



## malpractice guide

**Under Fire** If you are among the 12 to 16 percent of all doctors who will be sued for malpractice this year, you will no doubt face a difficult ordeal. What can you expect and what can you learn from the experience?

BY RICHARD VENTO



I'm being sued? This can't this be happening to me! I provided the best care I could

under the circumstances!

Should you be unfortunate enough to be accused of providing less-than-the-expected level of care, the resulting process will be one of the most stressful, exhausting, and prolonged experiences of your life. What are the chances of that occurring? Regrettably, the odds are

higher than you might think.

A rule of thumb, believed to have come out of **St. Paul Insurance Company's** statis-

tics, has been that 12 to 16 percent of physicians are sued every year. An article in the December 12, 2002 edition of the *Philadelphia Inquirer* cited some shocking statistics from a survey of physicians and members of the public. "Thirty-five percent of doctors and 42 percent of the public said they had experienced a medical mistake in their care or in the care of a family member. Errors that resulted in death and other serious medical consequences were experienced by 18 percent of the

doctors surveyed and 24 percent of the general public."

And no physician is immune. One of my former clients is a world-renowned specialty surgeon whose work defines the standard of care. His technique and reputation should have been beyond reproach. However, he was sued rather frequently, not because he committed errors but because he treated severely morbid patients, many of whom had unrealistic expectations due to the surgeon's reputation and abilities.

Let's assume you become one of the 12 to 16 percent of physicians who are sued this year. Here are some questions you will have and issues you will face in the ensuing ordeal.

### On what bases can I be sued?

Sadly, almost anyone can sue almost anyone else for almost anything. Allegations may come from lack of informed consent, battery, breach of express warranty, unfair business practices, fraud and defective medical devices. However, medical malpractice litigation usually results from allegations of negligence.

Medical negligence requires that the plaintiff prove

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four main issues. If the court holds that the plaintiff fails to prove any one of these, the defendant will prevail. These four elements are:

- 1) Duty to provide care in accordance with a standard of care. This is not difficult to prove. It simply means that if the doctor has agreed to treat this patient, then she has the duty to provide a professional service that meets a standard of care;
- 2) There was a medically negligent act, error, or omission and the physician failed to comply with the standard of care, as established by expert witnesses. Reasonable and prudent action under similar circumstances by a reputable, skilled physician is the common test of whether the standard of care is met. A specialized physician will typically be held to a higher standard than a physician without the specialized training and expertise;
- 3) The negligent act or omission was a direct legal or proximate cause of the alleged injury. There can be multiple and conflicting legal causes. Among these is conduct by the plaintiff or other health-care providers; and
- 4) Damages must have occurred as a result of neglect of the defendant. Damages can include economic damages, pain and suffering, death, disability, disfigurement, or loss of consortium.

Even if you were not directly involved in the patient's care, you can still become legally obligated to defend yourself. Two legal issues create this seemingly unfair reality: vicarious liability and ostensible agency.

Vicarious liability in medical malpractice actions maintains that a provider is responsible for the actions of her agents or other persons under

her direction and control (e.g., If a nurse practitioner employed by you is sued for failure to diagnose, or the NP misdiagnoses and failed to consult with you, you can be sued as well.

Ostensible agency says that if the plaintiff believes that a provider was the agent or an employee of another provider, then that other provider can be held legally liable for the actions of the direct caregiver.

The classic example of this theory is when the hospital is also held legally liable for the actions of a non-employed emergency medicine physician who treats a patient in that hospital's emergency department. This was the court's legal finding in one case in spite of prominent signs in the emergency department clearly stating that physicians providing services in the emergency department were not agents or employees of the hospital and were independent contractors. Further, the admission form signed by the patient also stated, in clear language, that the treating physician was not an employee. The plaintiffs prevailed, though, because they claimed the stress of the trauma requiring treatment rendered them unable to understand those disclaimers at the time of the alleged malpractice. It was their perception that the ED physician was an employee of the hospital, therefore he was an employee, and the hospital paid the majority of the damages.

#### The litigation process

The initiation of the legal action may take many forms and will vary by legal jurisdiction. Each jurisdiction has its own set of rules, terminology, and theories of law. Some variation or combination of the following actions will occur. You will receive one of the

following:

- Communication (written or verbal) from the patient, a family member, or an attorney demanding payment for damages;
- Written request for medical records, accompanied by a release from the patient;
- Legal form letter providing notice of the patient's intent to sue;
- Suit papers referred to as a "summons and complaint" served on you and filed with the "court of competent jurisdiction."

You should report any of these occurrences to your insurance carrier as soon as possible, especially if you or your office receive legal documents.

#### What's next?

Your reaction to the initiation of legal action will most likely be shock, disbelief, denial, anger, fear, and even depression—similar to the grieving process. It may be very difficult to hold these emotions in check and to not let them immobilize you. However, it is very important that you focus on how to deal with the legal action, not the personal affront on your professional abilities and reputation.

It will help to remember that you are not alone in dealing with this crisis. You purchased a medical malpractice insurance policy, a promise to defend you from allegations of a medical act, error, or omission, to pay associated legal expenses, and to pay damages if you are legally liable for the actions and damages claimed. The insurance company is not your adversary, but a strong ally with vast experience in dealing with and minimizing the effects of the assault on you and your medical practice.

The first actions by the insurance company in the event of a claim or lawsuit are (1), to appoint a defense attorney to represent you and to file any le-

gal response or other papers as a result of suit being brought against you, and (2), to begin the investigation and defense of the claim, even if the allegations are found to be groundless, false, or fraudulent.

The legal counsel assigned to your case will be very experienced, with extensive litigation experience in medical malpractice defense. This individual or team will be well versed in the medicine and nuances of your particular specialty and may specialize in cases involving the alleged injury (neurological deficits in infants, for example). You may not have a choice of the attorney assigned to work with you. However, since mutual communication and trust are the foundation for a successful defense of your case, do not hesitate to bring to the insurance company's attention any material issues you have with the attorney.

You should be forthright and brutally honest with your attorney—it's the only way the two of you can provide an effective defense. From your attorney, you can expect strict confidentiality, prompt response to your questions, and frank discussion of the issues affecting your case, your rights and duties, the status of the case and an ongoing evaluation of the potential financial and administrative exposures, such as state medical board sanctions.

Your malpractice insurance policy lists your obligations to the insurance company. These obligations are mostly a matter of common sense. You must not do or say anything that would prejudice your defense or exacerbate the damages. You must cooperate fully in the investigation of the claim allegations and development of your defense. This means that you must provide whatever medical records or

evidence in your possession. You should share with your attorney your opinions, medical knowledge, and any recollections you have about the treatment of this patient. You should attend all depositions and attend every day of trial, should the case not be settled or dismissed.

Your attorney will explain the steps in the legal process in detail and tell you what is expected of you in each step. First, the attorney will respond to the complaint. Next, the "discovery" process begins. In this phase, interrogatories (written questions which must be answered under oath by the opposing side) are answered, records are requested, and documents are subpoenaed. Legal motions are filed requiring response from the opposing sides and from court.

Depositions—oral testimony given under oath—are held for the benefit of both parties. According to the *Litigation Handbook for the Ophthalmologist* published in 1995 by [Ophthalmic Mutual Insurance Company](#), "It is an important part of the discovery and provides [the] best opportunity to develop the factual framework underlying the case and the contentions and legal issues to be confronted. Since the testimony is under oath, it has the same significance as if it was given in court and can be used for any number of purposes, including: (a) 'impeachment of a witness' (b) proof of facts that are in issue; and (c) use by expert witnesses in forming their opinions of the case."

Expert witnesses in various specialties are retained by both sides to evaluate the medical aspects of the case and to testify concerning the issues, causation, and damages. Pre-trial motions are filed to request the court to take

some action regarding a particular part of the discovery process.

To try or to settle:  
That is the question.

The most difficult decision to make in a medical malpractice lawsuit is whether to settle the case before trial or try the case in court. It is emotionally charged for the physician who sees dire consequences in settling the case, thereby admitting guilt, or losing at trial and perhaps risking financial devastation for verdicts above the limits of his malpractice coverage. The reporting of paid claims to the [National Practitioner Data Bank](#) is another impediment to the physician agreeing to settlement.

The decision to settle your case should be done on an objective basis, assessing the facts and issues of the case. The decision should be a joint one with your attorney and the insurance company. Most insurance companies do not settle cases these days based solely on a desire to save litigation costs.

Many medical malpractice policies actually provide that a claim cannot be settled without your consent. Most of these consent-to-settlement provisions state that consent cannot be unreasonably withheld. Much more noteworthy is a provision commonly called a "hammer clause." The hammer clause says that if the plaintiff offers to settle a case for a given dollar amount, and you, the physician, refuse to settle the case for that amount, then the insurance company is not responsible for any judgment amount greater than the settlement offer, and all subsequent legal expenses incurred beyond the settlement offer date are borne by you. The hammer clause makes withholding consent highly impractical.

A trial is just that—trying for all concerned. You must be prepared to participate fully. A trial may last for days or weeks and your presence throughout the process is usually mandatory. Your carrier will pay for reasonable expenses and some loss of earnings. If the case is tried to conclusion, the verdict may or may not be the ultimate result. Either side may appeal the verdict. The appeal process itself can be very long and stressful, and may even result in a re-trying of the case by another trial court.

**“Physician, heal thyself”**

Once the trial or settlement has concluded, allow for the grieving process to take its natural course. You have suffered a loss—a loss of time, perhaps personal money or at least income, as well as pride and self-confidence.

On a less personal note, it will also be helpful to evaluate the entire process from the initial treating of the patient to the conclusion of the legal process. The *Litigation Handbook* says that “one thing is clear after the exhausting process of litigating a case to its completion: You really don’t want to waste valuable years doing this again. Consider what you can do to prevent future malpractice collisions.” Your malpractice insurer can provide valuable assistance in the form of risk management programs, seminars, and office/practice assessments. These are typically provided without additional cost to you and will certainly be worthwhile compared with the potential alternative—another lawsuit. ■

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