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What To Do When a Malpractice Lawsuit is Filed

No medical practice wants to be served with a malpractice complaint. However, the reality is that it may happen - even to your practice. Therefore, it's important that you know what needs to be done in order to support and facilitate a successful handling and defense of the case.

The first thing we advise is to be proactive. Once your office receives a notice of a claim (typically in a complaint or summons), you need to know if you have an obligation to provide notice to your state board of medicine. You can easily ascertain that by asking your attorney. You also need to quickly (immediately) forward the information of the complaint to your professional liability carrier, after making yourself a copy and opening an internal office file on the matter to maintain a copy of what you receive and send. Sending the complaint to your carrier quickly is critical to fulfilling your contractual responsibilities to your insurance carrier, which will appoint an attorney to advise you. Notify your carrier promptly so you do not jeopardize your professional liability coverage.

Once you have notified your carrier, you will be contacted by an attorney retained by your carrier to represent the insured physician's interest. The physician may have some say in who is selected to defend the case. If so, check around and interview the available attorney candidates before making a selection. The lawyer chosen will likely want to meet with you to review the facts of the case, to obtain all of your medical records in the alleged matter and to explain the process. That defense attorney typically determines the initial plan for defense of the case. You should understand the timeline involved (much slower than you would think) and how the attorney intends to proceed.

The next thing your office needs to do is pull the patient chart, and put it in a safe place. Resist the temptation to make any changes to the chart, as it is imperative that you do not make any alterations that would affect the overall creditability of your case. Make sure that no one in your office talks about any aspect or fact of the suit, except with the carrier or defense attorney, because such indiscretions are typically not protected from discovery. For example, a deposition question by a plaintiff's attorney might typically include something like: "tell me with whom you have spoken about this case? What did you/he say?" Having unprotected conversations could be harmful to your defense.

The defense attorney's response to the complaint is referred to as an "answer," and you will need to review it carefully. While this process of going back and forth in writing (Complaint - Answer - Response - and any variety of amendments thereto) can be tedious, everything must nonetheless be read for accuracy.

Once the paper chase begins, the process of "discovering" the plaintiff's case (and plaintiff's discovery of your defense) is underway. Certain discovery requests will be in the form of a written set of questions referred to as "interrogatories". Other discovery requests will be for the production of documents in which you will be asked for all papers in your possession such as medical records, billing records, curricula vitae, etc. Those written responses and documents will likely form the basis for the questions that will be posed to your physician(s) during deposition(s).

Make sure you have and maintain a complete (separate) file for all of the legal documents that are sent to or received from your lawyer, broken down by case if there is more than one. Do not file any of items about a legal case in your medical chart. Similarly, do not file extraneous or non-related items in your medical chart as you may be asked about "your file." All conversations with your attorney should be privileged and confidential and you will need to act as if they are private – so keep them private to maintain that privilege and confidentiality.

The attorney will talk with your physician about the hiring of an "expert" for the defense of the case. That expert should be someone who is retained early so he or she can review the chart and determine which (if any) of the plaintiff's issues may or may not have merit. This expert is crucial to refuting the statements and opinions of the plaintiff's expert(s). The expert is someone who is sought to "corroborate" the appropriateness of the medical care given the plaintiff. Your attorney will provide you with curricula vitae and background information on a proposed expert.

It's possible your case will have more than one expert, as most malpractice cases are generally divided into at least three issues.

- Was there a breach in the standard of care?
- Is there a relationship or substantial link between the alleged breach of the standard of care and the damages?
- What is the reasonable liability (money damages) for such a breach?

One of the critical junctures in the defense is the deposition. The physician must be adequately prepared. He should have his own file copy of all the documents provided to his attorney, including all the documents that his attorney provided to other side that did not originate from your office. He should know the type of questions that will be asked and the opposing attorney's style in asking them. Knowing the underlying nature and demeanor of the opposing attorney is helpful. This is where you can be proactive and go on the offensive if you have adequate preparation. If you are so inclined, you can probably go on-line to your county court house and search the other cases (trials) in which the attorney appeared to see the verdicts or other pertinent details.

Understanding the process also makes the issue of settlement more understandable when or if it comes up. Settlement is always a crucial stage, as professional liability insurers are becoming increasingly critical in their underwriting standards, and having several claims (even if they are all "settled") could render a physician virtually uninsurable. The carrier's attorney may recommend a settlement without your physician's consent. If your physician objects he will need his own personal attorney (whom he pays personally) so he can truly understand his rights and obligations. It is also important for the physician to have his own personal attorney if there is any possibility of a judgment in excess of your malpractice liability coverage. (Check your policy limits early on.)

If there is no settlement, then the trial begins. Remember though, the vast majority of cases do not go to trial -- they are settled. The trial is a show and you should recognize it for being one. Each side tries to "show" why their position is correct and why their claim should prevail. No matter how it feels, it is likely not "personal" in that the plaintiff likely does not want to hurt you. Typically the plaintiff only wants the money.

Understanding a professional liability claim is critical both to alleviating the anxiety of the claim in the first instance and in surviving the process. Getting involved early and understanding the process is critical to the overall result.

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