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How to Handle a Malpractice Suit

Oh, the horror of being served with a malpractice complaint! No dermatology practice wants to experience it, but the reality is that it may happen - even to your practice. Therefore, it's important that you know what to do 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), there are several things that you should do to ensure that all of the proper parties are also notified of the claim.

Step one: Make yourself a copy of the complaint and open an internal office file on the matter to maintain copies of the documents you send and receive.

Step two: Determine if you are obligated to provide notice of the claim to your state board of medicine? You can easily ascertain that by asking your attorney.

Step three: Immediately forward the complaint to your professional liability carrier. Generally, you are contractually obligated to send the complaint to your carrier and failure to do so may jeopardize your continued coverage. In addition, your carrier will supply an attorney to defend you. That attorney has a limited time frame (usually 20 days) to respond to the complaint. So, getting the complaint to your carrier quickly is critical.

The Initial Meeting

After giving notice to your carrier, you will be contacted by an attorney retained by the carrier to represent you. The attorney will likely want to meet with you to review the facts of the case and explain the litigation process. In addition, the attorney will need copies of all of your medical records in the alleged matter.

This defense attorney typically determines the initial plan for defense of the case. At the initial meeting, you should ask enough questions so that you fully understand how the attorney intends to proceed.

Office Conduct

Pull the appropriate patient chart and store it someplace secure. Resist the temptation to make any changes to the chart. In most cases, the patient has obtained a copy of their chart before filing a claim. Later in the game, the patient's attorney will formally request a copy of the patient's chart from your office. If you have any changes to the chart, the patient's attorney will use those changes - no matter how well intended - to discredit your case.

Remind your staff to *only* discuss the case with the insurance carrier and attorney. All other conversations are not protected and could be used against you during the discovery and deposition phases discussed below. The patient's attorney will most likely ask you who you have spoken with about the case and what was said. If you have had an unprotected conversation about the case, you would be compelled to answer the question. Any information you give could harm the case.

Experts

You will most likely need to hire an "expert" for the defense of the case. It is important to retain an expert early on so that he or she can review the chart and determine which (if any) of the patient's issues have merit. Later in the process, this expert will be crucial to refuting the statements and opinions

of the patient's expert(s). Your expert is also the third party who will confirm that the medical care given to the patient was appropriate. Your attorney will provide you with curricula vitae and background information on any proposed experts.

The Answer

Typically, the defending party responds to the complaint with an "answer." Although the attorney will prepare the answer, you must carefully review it because the facts and allegations in the complaint will either be admitted or denied.

Your attorney may also file objections or a counterclaim. In this case, the opposing party must respond to your objections and/or counterclaim. Depending on the response, your attorney may need to prepare a new answer. While this process of going back and forth in writing can be tedious, everything must nonetheless be read for accuracy. Remember that once a statement is made in writing, it is difficult to change it later.

Discovery

Once the paper chase begins, the discovery phase of the case is underway. Discovery is a pre-trial phase of litigation when both parties are obligated to produce pertinent documents and exchange information with the other side. Certain discovery requests will be in the form of "interrogatories" which are written questions for you to answer. Other discovery requests will seek production of documents, where you will be asked for all papers in your possession such as medical records, billing records, curricula vitae, etc. Written responses to the interrogatories and exchanged documents will form the basis for the questions that will be posed to you during the deposition.

Any legal documents that are sent to or received from your lawyer should be kept in the internal office file you opened when you first received the complaint. Do not file any items about a legal case in your medical chart. Similarly, do not file extraneous or non-related items in the chart because you will probably be asked to produce your chart to the opposing party.

All conversations with your attorney are privileged and confidential. So, keep these conversations private to maintain that privilege and confidentiality. This will help protect them from being discovered by the opposing party.

Depositions

One of the critical junctures in the defense is the deposition. During the deposition either the complaining or defending parties may question individuals who possess any knowledge of the incident the complaint is based on. The questioning is done under oath with a court reporter present. Before questioning, you must be adequately prepared. You should have your own file copy of all the documents provided to the attorney, including all the documents that his attorney provided to other side that did not originate from your office. You should be familiar with the type of questions that will be asked and the opposing attorney's style in asking them. If you have adequate preparation, you can be proactive and go on the offensive. You can even go on-line and search for other cases in which the attorney appeared to see the verdicts or other pertinent details.

Settlement

Understanding the litigation 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 consent. If you object to settlement, you will need your own personal attorney (whom you pay personally) in order to truly understand your rights and obligations.

Trial Phase Begins

If there is no settlement, then the trial begins. Remember, the vast majority of cases do not go to trial -- they are settled. The trial is essentially a show, and you should recognize it for what it is. Each side tries to "show" why their position is correct and why their claim should prevail. All of the information gathered during the pre-trial phase will be used to assert the claim and destroy the credibility of the opposing party. No matter how it feels, it is likely not "personal." The patient likely does not want to hurt you; typically the patient only wants the money.

In today's litigious society, it's very likely your practice will experience at least one malpractice lawsuit. Understanding a professional liability claim and getting involved early is critical to the overall result. Remember to maintain a sense of perspective about the litigation process. By being prepared, you'll alleviate anxiety and better survive the process. Be proactive!

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