

What to Do When a Patient Files Suit

On a busy Friday morning, after hospital rounds and a medical staff committee meeting, you pass your office manager's desk on your way to see the patients who are already waiting in the patient care rooms. The office manager hands you a thick envelope bearing the words "certified mail." Your first thought--this cannot be good news--is confirmed when you open the envelope and find a "summons" and "petition." You see the name of a patient listed as "plaintiff," followed by your name and the word "defendant." You stop, take a deep breath, put the envelope in your pocket and wonder what happens next. Just as knowing what steps to take to resolve a medical problem allows you to treat patients with assurance, knowing what steps to take when you receive a petition and summons can help you to actively confront the challenge of litigation.

First, take a few minutes to sit down and actually look through the petition and summons. In particular, note the date you were served with the petition. The litigation "clock" begins ticking on the date of service. Usually, your attorney will have only 20 days from the date you were served with the petition to file an answer on your behalf with the court, or default judgment can be entered against you. If someone signed the return receipt on your behalf, the date they signed is the date of service. As you read the petition, it is important to remember there may be little information describing the basis for the claim. While this is often frustrating, the development of a lawsuit is a dynamic process and detailed information is revealed over time.

Second, you will need to immediately notify your malpractice insurer so your insurer can hire an attorney to defend the lawsuit. Some insurers are becoming more stringent in enforcing their policy provisions, and may refuse coverage if this notice is not made quickly. Usually, your insurer will ask for a copy of the petition and summons by fax or e-mail. Most insurers will then select an attorney to hire to represent you; however, if you prefer a certain firm or defense attorney you should tell your insurer of your preference right away. You have the right to expect your attorney to listen to your concerns, work with you and keep you informed. The successful defense of a malpractice suit is a cooperative effort which is made easier if you are able to relate to and communicate effectively with your attorney.

In addition, notice should be promptly given to the risk manager, in practices where one is available. Litigation may trigger an obligation to report the filing to hospitals where the physician has privileges or to managed care companies, and the risk manager can often assist you in identifying these requirements.

Next, make a mental note of the fact you should never make any changes to the patient/plaintiff's medical records. This rule applies whether the medical records are in paper or electronic format. Often, the patient or his or her attorney has already obtained a copy of the medical records from your office or from another provider before filing suit. It is worth bearing in mind that plaintiff's counsel may request an electronic audit trail showing any alteration of an electronic medical record and the identity of the person making the change. When a physician makes an addition or change to the medical record, even if the change bears an initial and date, it creates the perception that the addition is self-serving. Often, even a well-meaning change backfires, resulting in an erosion of the physician's credibility and the perception of a guilty mind. If you have an independent recollection of events that occurred during your treatment of the patient, consult with your attorney before preparing an independent written account.

Next, vow to resist the temptation to set the record straight. The facts of the pending case should not be discussed with colleagues, staff or friends. While conversations with some individuals are protected from discovery by the plaintiff, others are not. Under such circumstances, who can the physician talk to, other than the attorney or risk manager? Generally, confidences you share with your physician or your spouse are privileged, and the plaintiff will not be allowed to inquire about those conversations.

Save any communications you have relating to the patient/plaintiff and notify your counsel of any such materials. In addition to any written records, be sure to preserve any electronically stored information or communications such as e-mails, telephone messages, texts, etc. Under the new federal and state rules, the parties to a lawsuit have the right to inspect and copy any electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data stored in any medium.

Although physicians frequently deal with stress and the unknown while treating patients, being named a defendant can produce a whole new level of anxiety. Most physicians work hard to provide their patients with the best available care and treatment, so disbelief and anxiety is the most common reaction to being served with a summons and petition. The qualities that lead an individual to follow the arduous route to licensure and work the long hours required by the practice may, at times, be associated with a certain degree of compulsiveness and perfectionism. The filing of a malpractice claim may cause doubts in one's abilities and can lead to depression. If seriously depressed, do what you would advise your patients to do and seek help, rather than attempting to manage it yourself.

Finally, make it a practice to stay involved in the litigation process. Carefully review the factual materials, letters, descriptions of the claims and opinions of the experts as the case progresses. You are an important part of the defense team. The physician's knowledge of the subject is the best resource for the attorney, and should be freely shared. The successful defense of a malpractice claim requires the cooperative efforts of the physician and the attorney.

This article is limited and merely provides a brief overview. A Physician's Guide to Medical Malpractice Litigation is available from Goodell, Stratton, Edmonds & Palmer, LLP that provides more in-depth information. If you would like to receive a copy, you may request it by e-mailing the authors.

This article was originally published in Vol. 1 No. 3 of Greater Kansas MD News published by Sunshine Media, Inc.