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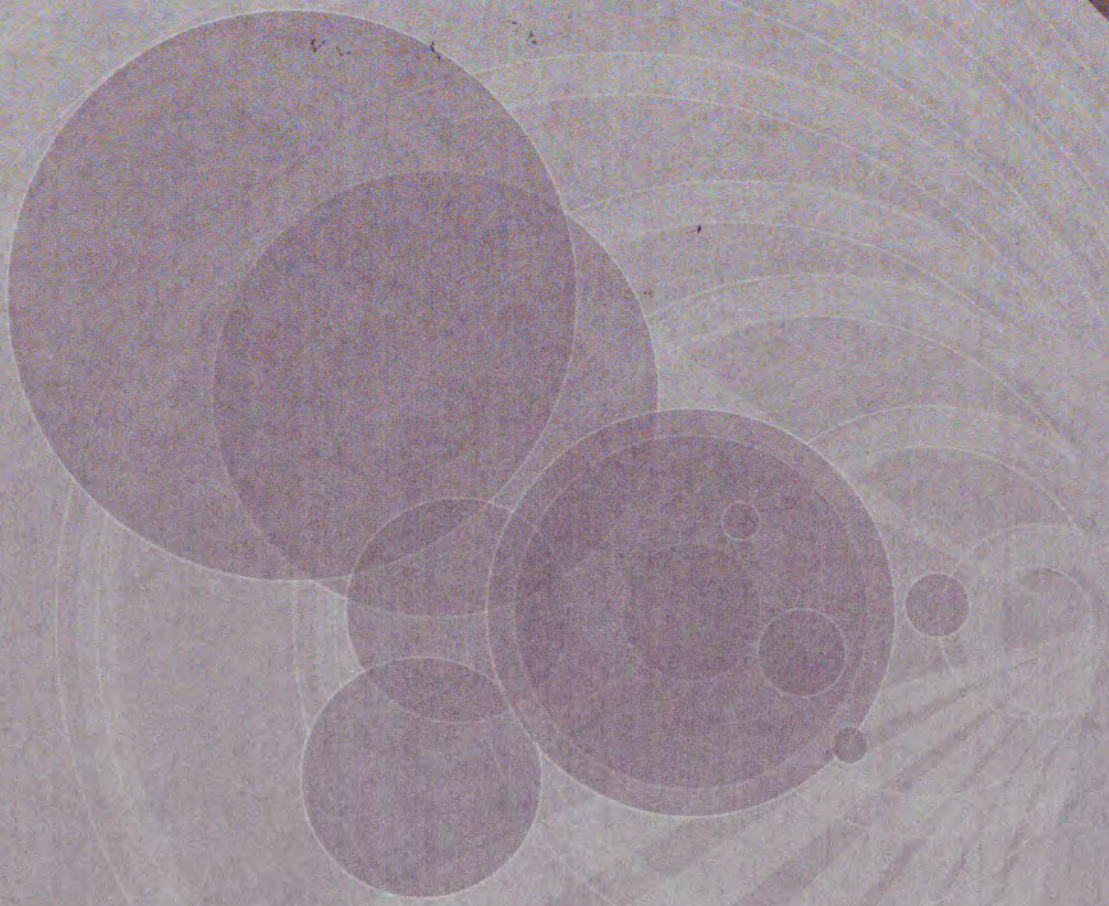

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Anatomy of a Malpractice Lawsuit

Haley A. Prevatt, BBA, T. Cornelius Sturgill Jr, JD,
J. Brent Austin, JD, Elizabeth R. Seif, JD,
Richard W. Schwartz, MD, MBA

Given the prevalence of medical malpractice lawsuits, physicians are often thrust into the legal world without the education of a juris doctor. The risk of facing suit varies among specialties, but there is no guarantee any physician will proceed through his or her career without being a defendant in a lawsuit. Every physician stands a significant chance of being sued. Although a lawsuit is an exhausting and intimidating situation in and of itself, the ramifications of a plaintiff's verdict could have chilling effects on the physician's life, both professionally and personally. Therefore, it is imperative that every physician have an understanding of the legal process of which he or she may become involved. This article provides a practical guide for the physician, including the fundamental procedures of a medical malpractice lawsuit, the behavior that will be expected or required of the defendant physician, and the effect of disobeying the required procedures.

Keywords: medical malpractice; litigation; physician defendant; elements/process of medical malpractice lawsuit

Anatomy of a Malpractice Lawsuit

In the current medicolegal climate, medical malpractice lawsuits are unfortunately commonplace. Although the risk of being sued varies depending on specialty, every physician practicing in the clinical arena stands a significant chance of being sued at some point in his or her career. The following describes the process of a lawsuit and provides a primer for the physician who might be named a defendant in a medical malpractice case.

Involvement in a lawsuit as a defendant begins with the service of a summons and a copy of the complaint.[1] It is possible that some other type of initiating document might be used, but the overwhelming majority of lawsuits are initiated with a complaint. This action is known as personal service.

A summons is a legal document, typically just one page, that identifies the plaintiff who has filed the lawsuit and the defendant being served. It usually contains the case number, the county in which the suit is filed (if it is a state court case), the court with which the suit is filed, and the date it is issued.[2] The summons also usually contains a "proof of service," which is filled out by the individual serving the summons that provides information on when, to whom, and by whom it is served.[3]

Personal service can be accomplished by an individual (often a constable or deputy sheriff) presenting the named defendant, or his or her agent, with the summons and complaint. The summons might also be mailed to the named defendant[4] via certified mail. When the named defendant has been given notice of the lawsuit and has been properly served, he or she is officially a party to the suit.

A complaint is a legal document that provides information about the lawsuit. The required degree of detail of the information provided in the complaint varies among different jurisdictions (eg, county, state, or federal court). A complaint must at least contain the names of the parties (plaintiffs and defendants) and some description of the allegations being made by the plaintiff. Generally, it is not necessary to provide proof of the allegations. For example, in Kentucky the complaint must contain a brief statement of the claim showing the relief (what the

From the University of Kentucky College of Law (HAP), Seif and Austin, PLLC (CS, BA, ERS), and the University of Kentucky Department of Surgery, Lexington, Kentucky (RWS).

Address correspondence to: Richard W. Schwartz, MD, MBA, Department of Surgery, University of Kentucky, 800 Rose Street, Lexington, KY 40536; e-mail: rschw01@email.uky.edu.

plaintiff wants from the physician) to which the plaintiff claims entitlement and a corresponding demand for judgment. Additionally, the names of all parties must be included.[5] Typical complaints in medical malpractice lawsuits include the names and locations of the parties, a very brief description of the events that have given rise to the lawsuit, and allegations of injury/damage caused to the plaintiff.

After a physician has been served and is a party to a lawsuit, the first step is to contact an attorney, a risk management professional, or counsel for the hospital or physicians' group. The physician's particular circumstances will obviously dictate whom to contact in this situation. A physician should never contact the plaintiff or the plaintiff's attorney. It is also very important not to discuss the matter with anyone other than his or her attorney or surrogate. Anyone, including colleagues or friends, could potentially end up as a witness in the lawsuit, so it is important to remember that anything said to them might become evidence.

The physician's next step will usually be to meet with his or her attorney. Upon reviewing the pertinent medical chart beforehand, it is imperative that nothing be changed or removed from it. The plaintiff's attorney will almost certainly have obtained a copy of the chart before filing the lawsuit and will therefore be capable of detecting any changes. Any such changes will be used against the defendant in the lawsuit. The physician should not try to assess or investigate the lawsuit by talking to others involved, and he or she should follow legal advice explicitly.

The initial meeting with the attorney will normally involve a review of the medical chart and a discussion of the events that gave rise to the lawsuit. It is important to tell the attorney anything pertinent about the patient's care and treatment independent of the medical chart. The attorney needs to know everything the physician recalls about the case and all of his or her thoughts and opinions in regard to it, whether favorable to the case or not.

After the lawsuit is filed and the defendants are served, the suit enters the discovery phase, in which information relating to the litigation is exchanged by plaintiff and defendant. This is basically the period leading up to the trial and it will almost certainly take one year, if not several years. It is the time during which both sides gather information about the case from each other or nonparties. Most medical malpractice lawsuits take a considerable amount of time; therefore, extended periods might lapse between physician and attorney contact. Usually, the attorney will contact the physician only when it is necessary to provide updates and obtain information. A physician should never hesitate to contact his or her attorney.

It is particularly important to remember that anything, whether or not admissible as evidence at trial, might be discovered.[6] In other words, discovery is very broad. Simply put, one major goal is that there are no surprises at trial. The plaintiff can ask for an abundance of information. Such information might include employment contracts, employment records, educational background, credentialing, disciplinary actions against the physician, criminal or substance abuse history, and previous lawsuits or other legal actions against the physician.

The physician should be aware that expert witnesses are subject to broad discovery requests, and plaintiffs' attorneys can take advantage of this in an effort to discredit his or her testimony. The expert witness might be required to disclose the percentage of his or her income or total income gained from providing litigation-related services; in extreme circumstances, he or she might be required to provide tax returns.[7] The opposing attorney might also inquire into his or her history as an expert and admit into evidence information such as how many evaluations have been performed on behalf of insurance companies, how many patients have been treated, and how much is charged for these examinations and their subsequent depositions.[8]

A physician's involvement as a defendant in the discovery process will normally consist of 2 primary components: (1) he or she will likely be asked to assist in responding to written discovery posed by the plaintiff, and (2) he or she will probably be asked to give a discovery deposition. Written discovery consists of interrogatories, requests for production of documents, and requests for admissions.[9] Interrogatories are simply questions to which answers are given under oath in writing.[10] Those answers are typically prepared by the physician and his or her lawyer. Requests for production of documents are what the name suggests. The plaintiff might request all documents be produced that have some relevance to the lawsuit. Requests for admissions (a party's acknowledgments of truth) are legally binding and require the physician to admit or deny specified facts. Objections can be made to interrogatories and requests for production of documents.[11] The physician's attorney will advise the defendant as to which discovery requests warrant a response and which ones warrant an objection. This attorney then will prepare the formal responses for the physician's review and signature.

The discovery deposition will likely be the physician's most important involvement in the case. Because

most lawsuits do not make it to trial, the physician probably will not have to testify in court.[12] Trials in state courts for civil matters have decreased from 36.1% in 1976 to 15.8% in 2002. In fact, most cases are settled out of court. Alternative dispute resolution is on the rise, removing lawsuits from the courtrooms. Therefore, the deposition given by the physician will be significant. The discovery deposition is conducted by the plaintiff's attorney, and the physician's attorney will be by his or her side. The plaintiff's attorney evaluates the defendant physician as a witness, learning as much as possible about what he or she knows about the case, and elicits testimony that will help the plaintiff's case. A court reporter is present to document the deposition, and if the plaintiff chooses, he or she may attend. Most depositions are documented only as a written transcription; however, sometimes a plaintiff's attorney will choose to have it videotaped as well.[13] Although discovery depositions seem informal, the defendant will be placed under oath and his or her responses might be placed in evidence at trial.[14]

Regardless of the informal nature of a discovery deposition, it is important to be well prepared. The physician should follow the attorney's instructions and advice concerning how to prepare. The plaintiff's attorney might request some items be brought to the deposition such as records or radiology films. The physician should be prepared to produce the requested items unless advised otherwise. The plaintiff's attorney can ask just about anything because of the broad scope of discovery.[15] It is extremely important to take great care in answering questions; in addition, responses should be made in a pleasant and cooperative manner, particularly if the deposition is videotaped. The defendant must remember that portions of discovery depositions can be presented at trial, and appearance to the jury is very important.

If the lawsuit makes it to trial, it is likely the physician will be testifying in open court. Because impressions made on the jury are so important to the outcome, the physician and his or her attorney must thoroughly prepare. The US Department of Justice reports that, in 2001, plaintiffs won only 27% of medical malpractice cases decided by trial, as opposed to the overall plaintiffs' success rate of 52% for all noncriminal trials.[16] Professional presentation as someone the jury can trust will increase the chances of being included in the preferred 73%.

Although admittedly onerous, it is very important that the physician attend the trial in its entirety. Physicians have busy schedules and often do not want to take the time to sit in a courtroom during a trial. However, not doing so will make a very bad impression on a jury. In summary, the importance of the physician's appearance to the jury cannot be underestimated. Juries are predisposed to favor doctors, and everything possible should be done by the physician to ensure he or she makes a favorable impression. The outcome of the trial could depend on the perception of that handful of people in the jury box.

In conclusion, even the most skilled physicians could have cases in which complications and poor outcomes occur. Although treatment may not fall below the standard of care, a lawsuit might follow. Upon being served, immediate contact of an attorney or a risk management professional is of utmost importance. Discussion of the matter with anyone other than the doctor's attorney or risk management could result in harm to the case. Tampering with the chart is absolutely forbidden because opposing council will surely already have obtained a copy, not to mention the legal implications falsification of records might bring. The physician's preparation for testimony, whether in open court or in discovery depositions, can directly affect both the case and the jury's perception. If a physician finds himself or herself named as a defendant in a medical malpractice claim, a thorough understanding of the process and what to expect will make the unpleasant situation more bearable and productive for the health care professional.

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