

THE PHYSICIAN'S GUIDE TO MALPRACTICE LITIGATION

Step-by-Step



INTRODUCTION

This guide is intended to help you understand the litigation process and appreciate how, if appropriate, ProAssurance will aggressively defend your case and help you preserve your reputation. During this process, it may sometimes seem like you have little control. This information will help lessen feelings of uncertainty.

You have sacrificed to get where you are. Despite your efforts and the care and concern you give your patients, a medical malpractice lawsuit is an unfortunate reality. It is impossible for a doctor to foresee all possible outcomes and consequences. Ultimately, regardless of precautions, many doctors find themselves unfortunate recipients of malpractice lawsuits. Statistics show even the best doctors, working diligently to provide excellent care and maintain great relationships, will probably become involved in a malpractice suit.

The stress from being sued is understandable and likely occurs because you are a well-meaning physician who was trying to help your patient. However, there is some good news—you are not alone.

You purchased the best insurance coverage available for a reason. ProAssurance is fully committed to providing you an unfettered defense and making the process easier for you. Here is our claims philosophy:

- We seek to expeditiously resolve for a reasonable sum those cases in which our insured breached the standard of care and caused injury or death to the patient.
- We will defend, where appropriate, those cases in which our insured either did not breach the standard of care or did not cause injury to or the death of the patient.

ProAssurance has excellent claims and legal experience. That experience tells us it is critical for you to get involved and stay active in your defense. Most successful results are linked in large part to the joint efforts of the physician, our Claims Department, and the defense attorneys. We recognize the importance of retaining the best defense attorneys on your behalf. The importance of the defense team will become apparent to you as the case progresses to depositions and possibly trial. By the end of litigation, most physicians have a new understanding of and appreciation for both the legal process and the importance of an excellent defense team.

DISCLOSURE

Statements in these materials should not be considered as professional medical or legal advice to individuals or organizations. Nothing in these materials is designed to alter your basic obligations to your patients.

I. THE LAWSUIT

Your patient or a patient's family member complained to an attorney, who converted those complaints into a lawsuit. You may have found the wording in the lawsuit bewildering and inconsistent with the medical facts as you know them. That is not uncommon.

Litigation alleging medical malpractice usually begins with an unhappy patient or family member and an injury with jury appeal—not necessarily medical negligence. The causes of lawsuits may include anything from dissatisfaction with the bill to indignation over a doctor's demeanor.

We typically have **20 or 30** days from the date you received the lawsuit to file a response on your behalf, depending on local court rules.

Contact our Claims Intake Line immediately upon receipt of the lawsuit so your attorney can easily respond in time. Keep the following in mind:

- DO maintain the patient's medical records in a safe and secure place.
- DO immediately inform your Claims Specialist and attorney as you receive additional legal documents concerning your case.
- DO NOT PERMIT ANYONE TO ALTER THE PATIENT'S MEDICAL RECORDS! Any attempted alterations, changes, additions, or deletions—no matter how innocent—can destroy your credibility and discredit the record as fraudulent. These actions also place your insurance coverage at risk.
- DO NOT discuss your case with anyone except your Claims Specialist, your attorney, or their associates. Instruct all office personnel to hold this matter in strict confidence.
- DO NOT contact the plaintiff or the plaintiff's attorney or respond to their attempts to contact you. Let us do that. Resist any urges or provocation to interact with the plaintiff's side; contact your ProAssurance Claims Specialist instead. We will help you through this often challenging part of the process.
- DO NOT include legal correspondence or information pertaining to the case in the patient's medical records. Create a separate legal file for all legal material concerning the case and designate one person on your office staff to receive it. Alert other members of your office staff to bring any legal communications in this matter to your attention immediately.
- DO NOT release copies of the medical records without first notifying your Claims Specialist or your attorney. Instruct your staff to bring all requests for copies of medical records to you.
- DO NOT destroy any electronically stored or accessible documents, emails, text messages, databases, or backup tapes that may have any possible bearing on your case. TAKE IMMEDIATE STEPS to preserve and prevent the destruction of this information.
- DO NOT answer any initial discovery requests (Interrogatories, Request for Production of Documents, or Request for Admissions) that you receive. Let your attorney assist in this process.

II. MEETING WITH YOUR DEFENSE ATTORNEY AND CLAIMS SPECIALIST

Your Claims Specialist and your attorney will meet with you as soon as possible to obtain your detailed account of exactly what happened. Prepare for this interview by reviewing the medical records and reflecting on the events surrounding this incident.

The questions may be direct and exhaustive, and it is absolutely essential you cooperate. We need to know the truth (the whole truth—especially when it is unfortunate or unpleasant) to prepare your defense. We can defend, and have repeatedly and successfully defended, credible physicians who have made honest mistakes in judgment. Our ability to provide a successful defense can be hindered by an uncooperative physician or any suggestion of deceit or untruthfulness.

We will choose and retain experienced defense counsel to represent you. We will provide you with counsel appropriate to your specific circumstances. Among other things, your Claims Specialist and attorney will want to review:

- Your schedule in detail during the time at issue.
- Hospital and nursing notes and diagnostic test results.
- Relevant test and treatment protocols.
- What experts in the same line of practice consider the exercise of reasonable care, skill, and diligence under similar circumstances.

While requirements may vary from state to state, the background, training, experience, and board certification of those colleagues will help determine their suitability as potential expert witnesses.

Your attorney will explain the important stages of litigation, which include written discovery, depositions, and then trial. Defending a lawsuit alleging medical malpractice involves many nuances that may not be readily apparent to you. Your attorney will guide you in preparing for your discovery responses, deposition, and trial so as to avoid any effort by anyone to mischaracterize your testimony. Physicians often fail to appreciate how their testimony can later be distorted. Careful preparation with your attorney is imperative to avoid this trap. This preparation also makes the process a bit easier, giving you the confidence to be a better witness.

III. WRITTEN DISCOVERY

Very early in the case, the plaintiff's attorney will send requests for written discovery to you or your attorney. These may include Interrogatories and Requests for Production of Documents, which are pretrial discovery tools used to establish important facts. Advise your Claims Specialist and your defense attorney if and when you receive such requests. Do not answer or respond to Interrogatories or Requests for Production of Documents without the assistance of your attorney.

Your attorney will obtain information from you to answer these requests. You will be asked to review the answers for accuracy and validate the documents with your signature. You may be asked to respond to more than one discovery request. Written discovery can go on for several months, sometimes for a year or longer.

IV. DEPOSITIONS

After several months—maybe several years—you will give your deposition. Typically this will take place in an attorney's office. You will be sworn in and asked to answer an attorney's questions before a court reporter and, likely, a video camera. Your deposition serves several functions:

- Discovering important facts about your case.
- “Freezing” your version of the facts and your medical opinions.
- Ascertaining the names of additional witnesses and/or potential codefendants.
- Allowing the attorneys to evaluate you, your credibility, and the merits of the case.

The plaintiff's attorney's goals are to obtain your agreement with their version of the facts and to obtain details that can be used against you. Because a plaintiff's attorney is trying to do what is best for their client, they only will advocate for the patient and most likely will not prove the points that are good for your case.

The plaintiff's attorney's version of the case may prevent a jury from understanding the truth of the physician's position. This distortion is often demonstrated by their reference to bits and pieces of a medical record rather than the complete picture. We have seen plaintiff's attorneys seek to minimize the many dilemmas and difficult clinical conditions that physicians face every day. These external factors inevitably shape the life and death decisions that must be made without the benefit of hindsight. These tactics, employed all too often by some attorneys today, serve to distort the truth in professional liability actions.

Plan to spend significant time preparing with your attorney. Your attorney is skilled in readying physicians for a deposition and will guide you through this complicated process.

Also plan to attend the depositions of the plaintiff's experts. It will be harder for the experts to exaggerate if you are present. These depositions will give you a better understanding of the plaintiff's contentions in the case.

V. THE LULL IN THE ACTION

After depositions are completed, several months or even years may pass before your trial date. The delays are aggravating but inevitable. Your Claims Specialist and defense attorney will keep you informed during this period, and you can call them at any time for the status of your case.

VI. SETTLE OR DEFEND?

In most states, your policy with ProAssurance contains a “Consent to Settle” clause that prohibits claim settlement unless consent is obtained, as per the terms of the policy. We include this clause whenever we can, because a strong defense is part of our commitment to you. We take pride in retaining the best legal talent and defense experts, conducting exhaustive searches to verify facts and details, and obtaining jury verdicts on behalf of our insureds with defensible claims.

Occasionally, cases of merit or mitigating circumstances do present themselves. We then will entertain reasonable settlement offers. In all cases, the physician is advised of settlement demands.

VII. THE TRIAL

When you walk into the courtroom with your attorneys, you enter the room to win. ProAssurance fiercely does what is legally necessary to help ensure victory—all in an ethical and professional manner. The drama and formality of a trial, however, can cause even the calmest person to experience anxiety. To decrease anxiety, prepare by familiarizing yourself with the courtroom setting and guidelines for testifying before a jury. Your attorney will work vigorously to prepare you for what to expect and to make sure you are well prepared for trial.

Your highest obligation as a physician in any judicial proceeding is to tell the truth. It is the highest moral, legal, and ethical obligation you have. Once the jury understands the truth, they frequently reach the right result. Your attorney will work with you to ensure their understanding.

VIII. THE VERDICT

If you win, the plaintiff has about a month to file post-trial motions challenging the outcome of the case. If the motions are denied, the plaintiff may file an appeal. If the plaintiff chooses not to appeal, the lawsuit is over as soon as the post-trial motion deadline expires. If the plaintiff does appeal, we will continue to defend you.

If the jury returns a verdict in favor of the plaintiff, we will discuss options with you. If the facts support it, we could file post-trial motions asking the judge to reduce the verdict, overturn the verdict and grant a new trial, or overturn the verdict and grant a verdict in your favor. If these motions are unsuccessful, we will consider an appeal to the higher court. If ProAssurance decides to pursue the case further, we will file the appeal shortly thereafter. The post-trial motions and appeals process can often last several years.

RESOURCES

We understand the toll a malpractice claim can take and are committed to assisting you in every way we can. You may want to take advantage of these additional resources:

- ***Successful Trial Preparation: What Physicians Need to Know***

This guide helps you get familiar with the trial process. It will help ease anxiety and assist you in working with your defense team. You can request a copy from your Claims Specialist.

- ***When Good Doctors Get Sued***

This book by Angela Dodge, PhD, with Steven Fitzer, JD, helps guide defendant physicians through each phase of a legal claim or lawsuit. You can request a copy from your Claims Specialist.

- ***Litigation Stress and Burnout***

ProAssurance offers a valuable Litigation Stress and Burnout resource center for physicians. View the bundle on the Risk Management website at [RiskManagement.ProAssurance.com](https://www.proassurance.com/riskmanagement).

CONCLUSION

ProAssurance is committed to you. Among other things, this commitment means we will provide:

- the best defense attorneys;
- the most professional Claims Specialists;
- cutting-edge courtroom technology;
- superior expert witnesses; and
- the most comprehensive and factual legal research.

All of our efforts are intended to meet the highest standards of ethics and integrity. Throughout the litigation process, never forget that ProAssurance is readily available to assist you and allay your concerns.

At the end of the litigation process, we are confident you will be thankful you had ProAssurance by your side.

CONTACT

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