



When Bad Things Happen to Good Anesthesiologists

Help, I've Been Sued! A Practical Guide to Dealing with a Lawsuit

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Being involved in a medical malpractice claim is not an uncommon experience among the practicing physicians in the United States. The annual rate of paid malpractice claims across all specialties is 14.1 per 1,000 physician-years, while anesthesiologists have a lower rate of 11.7 per 1,000 physician-years in the U.S. (*JAMA Intern Med* 2017;177:710-8). A recent study found that 41.5% of anesthesiologists over the age of 55 had been sued in their career (*Policy Research Perspectives* 2023:13). To most physicians, a medical malpractice lawsuit is an unpleasant introduction to the legal system, and with little formal training in litigation, physicians are understandably apprehensive and anxious when

sued. In this article, we provide a brief, guided tour through the key steps of a lawsuit with the goal of demystifying the litigation process and empowering you to make sound decisions.

A medical malpractice lawsuit is a civil legal action and a petition for financial compensation for alleged damages caused by a perceived wrong (either an action or inaction by a medical provider or medical team) to which the defendant is obliged to respond. If you are served with a lawsuit, your first step is to inform your liability insurance company, which will then assign an attorney to your case. In an academic practice setting, you may be notified of a claim through your hospital's medical-legal department. At this stage, you may be confused, angry, and in disbelief, but you

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must stay grounded and disciplined: don't contact the patient directly, don't alter or addend medical records related to the case, and don't discuss the case with anyone other than your attorney. You may receive a subpoena that requires you to preserve and submit all documentation related to the claim; refer this to your hospital's medical record department. You may be

Do's and Don'ts of a Medical Malpractice Lawsuit

DO		DON'T	
Advocate for yourself	You are the most knowledgeable person about your case and its medical issues. Speak up on strategy!	Become jaded or distracted	Being sued elicits strong emotions. Acknowledge your emotions, but don't allow them to spill over into your home or work life. Seek professional services for you and your family.
Teach your lawyer	Your lawyer needs to understand all the relevant medical aspects of your case. Even lawyers with extensive experience in medical malpractice may be unfamiliar with the nuances of perioperative care.	Discuss the case with anyone	Discussions with your spouse are considered privileged, but it's best to confirm with your lawyer. Don't discuss your case with others.
Do your homework	Learn about the lawsuit process and become an informed participant. Certain aspects of a lawsuit, such as the deposition, can be actively influenced by your performance.	Expect the case to have a quick resolution	Prepare yourself for the long haul. The legal process can be very frustrating: everything moves slowly — until it doesn't!
Find ways to relieve stress	Many defendants feel isolation, shame, or self-loathing. Tap into resources like the ASA's SafeHaven, a counseling resource made by physicians for physicians dealing with stress, burnout, or mental health challenges (asahq.org/SafeHaven ; asahq.org/podcasts/central-line/episode-one-hundred-thirty-seven).	Use your lawyer as a sounding board	You want to vent, but you're not allowed to talk to anyone! Resist the urge to voice your frustrations to your attorney — it only distracts from the task at hand. Use other resources to talk it out.
Take a moment to re-evaluate	Is the lawsuit a signal to re-evaluate your work arrangement, pursue a different career path, or leave an unhealthy workplace?	Be so hard on yourself	Our work demands a high level of performance every day, and most of us hold ourselves to incredibly high standards. Allow yourself some grace. A lawsuit doesn't define you or your work performance.
Keep things in perspective	Take a step back and consider what's really at risk. Outside of rare cases, your personal assets are unlikely to be affected, and very few physicians lose their employment because of a single lawsuit.		

required to notify your group or your hospital about the lawsuit, so review your contracts to see if any notification clauses exist. If your case was discussed at an M&M conference, rest assured, these proceedings are typically protected from discovery. Finally, seek out mental health services or counseling as needed to deal with the inevitable stress that the lawsuit will cause.

Next, you'll meet with your attorney and discuss what you recall about the case. Not all attorneys are alike; you'll want a fully engaged, quick learner who is experienced in medical malpractice. A good working relationship is important because you will be spending a lot of time with your lawyer and their support staff. If you're not entirely satisfied, ask your insurer for other options, as they typically work with a roster of attorneys – but make this move early.

In some cases, your attorney may file a motion for summary judgment to dismiss the case based on the initial facts, but this is only granted if the lawsuit is deemed baseless with no facts in dispute. In other instances, your case may be sent to mandatory arbitration as required by the patient's health insurance contract.

Soon after a lawsuit is filed, discovery begins. Discovery is the process of gathering and exchanging information from and between parties. Medical records, testimony, and depositions will be obtained because these materials are reasonably thought to produce admissible evidence. This process can take months, if not years. After receiving the medical records, you and your lawyer will go over every page in painstaking detail, scrutinizing the meaning of every word, check mark, and comma.

In nearly all cases, each party will retain an expert witness. Your expert witness will review your case and provide an opinion as to whether the standard of care was met. Unsurprisingly, academic credentials and lengthy experience are sought-after qualities in an expert. Request to review your expert witness' CV and ask yourself, "Is this someone who is qualified to comment on my care?" By being proactive and involved, you can play a role in your defense. If you're not satisfied with the proposed witness, an alternative can usually be found. You will not be speaking with the expert witness; such communication is not protected by attorney-client privilege and is therefore discoverable. The expert witness will produce a written report in which they conclude whether your actions met (or did not meet) the standard of care. Additionally, a separate medical expert may be retained for the purpose of physically examining the plaintiff and offering an additional nonbiased opinion about the plaintiff's physical condition. Other retained experts may calculate the estimated financial damages and the patient's needs for short-term and long-term care due to the claimed injury.

Depositions are another critical element of a lawsuit and should be taken seriously. A deposition is a recorded interview where a witness is questioned one-on-one, under oath, by the opposing attorney. The deposition occurs in-person or via video conference with you, your attorney, the plaintiff's attorney, and a court reporter. It is important to be truthful, professionally dressed, and prepared; however, don't bring any notes, because anything on the table in front of you could be subpoenaed by the opposing counsel. The plaintiff's attorney will ask questions for the ostensible purpose of gathering information, but some questions will be asked in a manner that is intended to provoke a reaction or cause you to "slip up." You may be asked about documents or other evidence, so be familiar with all the records relevant to your case. Your attorney should coach you extensively in the weeks leading up to the deposition; if they don't, you should ask that they do so. Be careful not to appear overly rehearsed, inflexible, or robotic – the key is to appear credible.

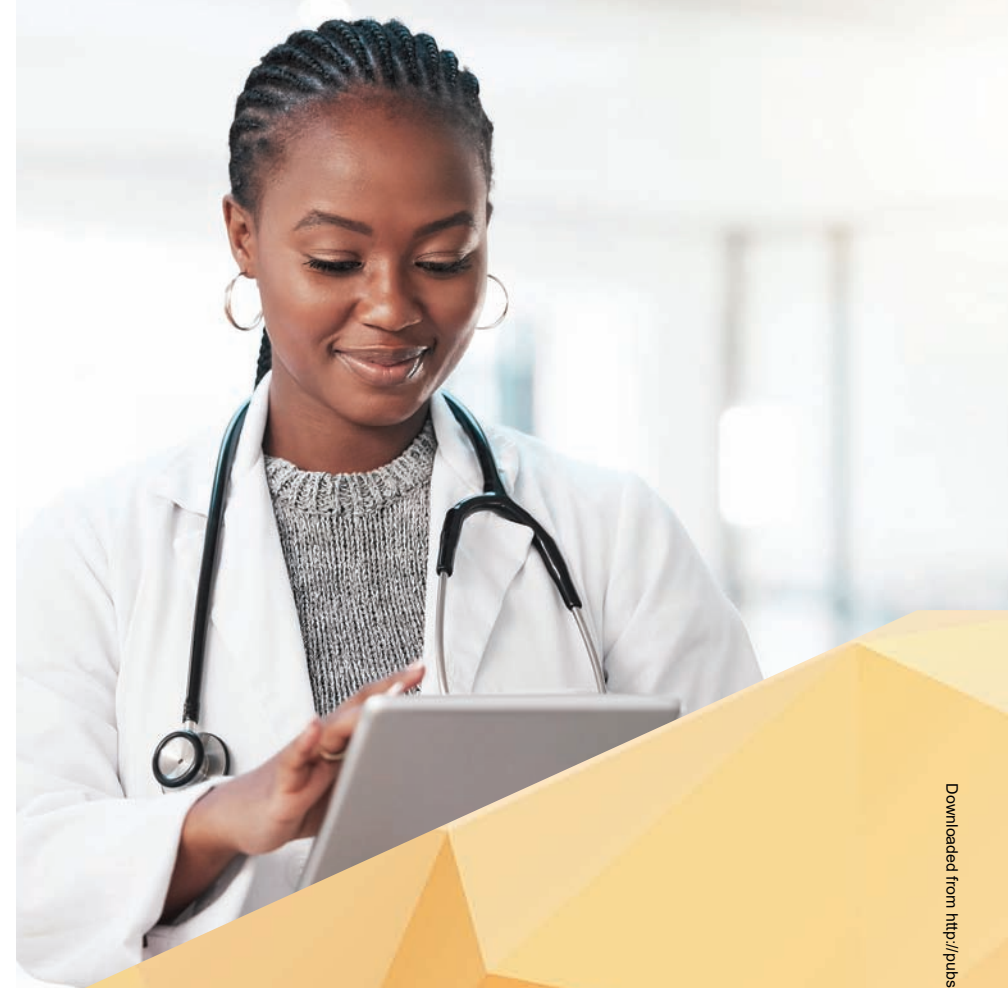
After discovery is complete, you and your attorney will review the entire case, assess its likelihood of prevailing, and discuss whether to settle or proceed to trial. Most cases are settled before trial because it avoids the cost, time, and unpredictability of taking a case in front of a jury. Many lawsuits are dropped (or defendants are dropped) before this stage, and among the cases that go to a jury trial, studies have found that the defendant (i.e., physician) prevails in most cases.

Cases that involve a monetary settlement or jury award, regardless of the amount, are automatically reported to the National Practitioner Data Bank (NPDB). The NPDB was established in 1986 and is administered by the U.S. Department of Health & Human Services; it stores the names of medical practitioners who have had medical malpractice settlements or judgments against them. The NPDB is primarily intended for use by hospitals and institutions but is accessible to the public with practitioner identities anonymized. Reporting to state medical boards varies by state. For example, in California, settlements or judgments greater than \$30,000 generally need to be reported to the state medical board; on the other hand, Illinois, home to the ASA headquarters office, has no minimum threshold, and all monetary settlements are reportable.

You may be sued in your career, and dealing with a lawsuit is aggravating and stressful. However, you can take practical steps to familiarize yourself with the litigation process and increase your engagement in it. By taking these steps, a lawsuit, like many other life challenges, can be managed and overcome. ■

Disclaimer:

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