



Healthcare

# ALERTBULLETIN®

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## Medical Malpractice: A Brief Guide to the Litigation Process

Medical malpractice occurs when an organization or healthcare provider – such as a physician, nurse practitioner, physician assistant, nurse, physical therapist, counselor or other licensed or unlicensed caregiver – is perceived as having failed to either deliver the appropriate level of care or to take necessary action, resulting in allegations of harm to a patient, client or aging services resident. Subsequent litigation may ensue, in which the professional skills and judgment of providers are challenged in a court of law, potentially resulting in monetary loss, reputational damage and psychological distress. Fortunately, defendant organizations and providers who find themselves named in a malpractice lawsuit have an ally in their professional liability insurer, which can guide them through the process and help to protect their personal assets.

This edition of *AlertBulletin*® describes the lifespan of a legal proceeding, from complaint through deposition to trial. After summarizing the basic elements of medical malpractice, the article outlines the mutual expectations of insurance companies and insureds, reviews critical first steps during litigation, examines the factors that determine the requisite standard of care, and offers tips on giving depositions and testifying at trial.



### Medical Malpractice Criteria

In order to prove medical negligence, injured patients/residents/clients, referred to as plaintiffs, must establish through a preponderance of evidence the following four legal criteria:

- 1. Duty of Care:** The healthcare provider or organization owed a duty of care to the plaintiff, i.e., there was a preexisting relationship.
- 2. Breach of Duty:** The provider's or organization's actions or omissions failed to meet the standard of care expected in the respective area of practice, i.e., the level of care that a reasonably skilled healthcare provider with the same background and training would provide in a similar situation.
- 3. Causation:** The breach of duty is responsible for the plaintiff's injury or harm, and the harm was a foreseeable consequence of the breach – a legal finding known as "proximate causation."
- 4. Damages:** The plaintiff suffered damages, which can be physical, psychological and/or financial in nature.

### Quick Links to CNA Resources

- *AlertBulletin*® 2024-Issue 1, "[Social Inflation: Understanding and Addressing Rising Claim Costs.](#)"
- *Vantage Point*® 2024-Issue 1, "[Medical Error Prevention: Reinvigorating Patient Safety Measures.](#)"



### Insurance Considerations

The relationship between the insurance company and the insured healthcare organization/provider is reciprocal in nature. Insurance company responsibilities include responding to legal claims, thoroughly investigating allegations and assigning legal counsel to represent the insured, among other actions.

In turn, following an adverse event or receipt of a summons and complaint notifying the recipient that a legal action has been filed, insureds must contact their designated insurance representative by telephone and forward a copy of the summons. Failure to promptly inform the insurance company of a potential claim, claim letter or lawsuit violates the insurance contract and may alter mutual obligations. Insureds also are expected to cooperate with the insurance company in defending against the claim. (The box below lists five guidelines designed to help defendants strengthen their legal position.)



### Record Retention

Prospective claims should be reported promptly not only to the insurer, but also to the healthcare organization's or practice's risk manager or equivalent administrator. This measure helps ensure that potential evidence is preserved and relevant documents are gathered and protected.

## Working with Legal Counsel: Five Basic Expectations

1. **Do not discuss the facts of the case or any judicial or administrative proceeding with anyone except the assigned legal counsel** and representatives of the insurance company, in order to maintain the protected and confidential status of all communications.
2. **Do not admit to liability**, consent to any arbitration or judgment, or agree to any settlement proposal without first consulting with legal counsel.
3. **Promptly alert the insurance company upon personal receipt of any correspondence or demands** in relation to the claim.
4. **Report any communication from the plaintiff**, opposing counsel, or any administrative, licensing or regulatory authority to the insurance company.
5. **Do not speak with the plaintiff or plaintiff counsel** without defense counsel present.

Once a claim has been initiated, it is essential to swiftly secure the healthcare information record in order to prevent alteration or deletion. The duty to preserve evidence also extends to medical equipment or devices involved in the occurrence, as well as informed consent forms, institutional policies and procedures, incident report forms, medical billing records and any personal notations made by the provider, among other germane materials. All such items should be promptly forwarded to defense counsel.



### Responding to the Complaint

Once a legal complaint has been filed in the court system, defense counsel will review the allegations in the context of the surrounding facts, and typically will file a motion to dismiss or an answer responding to the plaintiff's allegations. This provides an opportunity to assert legal defenses against the claim, which may involve, but is not limited to, one or more of the following rebuttals:

- **No breach of the standard of care**, i.e., the defendant's actions or omissions were consistent with the accepted standard of care, as supported by expert testimony.
- **Lack of proof of causation**, i.e., the plaintiff's injury or harm was not directly caused by the defendant's actions or omissions, but rather was due to other factors, such as the effects of chronic disease or plaintiff noncompliance.
- **Comparative or contributory negligence**, i.e., the plaintiff's own actions contributed to the alleged harm, potentially reducing or eliminating the defendant's liability.
- **Third party negligence**, i.e., another person or entity – such as a healthcare provider or a manufacturer or distributor of healthcare products/devices – caused or contributed to the adverse event, also potentially reducing or eliminating the defendant's liability.
- **Expiration of the statute of limitations**, i.e., the plaintiff's lawsuit was not filed within the state's specified time frame for medical malpractice claims.
- **Absence of adequate expert testimony**, i.e., the plaintiff failed to file an affidavit from a qualified medical expert attesting to defendant negligence as a proximate cause of the plaintiff's injuries, if required by state law.

If no answer is filed within the allotted time, usually 30 days from the date of service, the plaintiff may seek a default judgment and initiate proceedings to recover the judgment amount against the defendant without the opportunity to present a defense on the merits.



### Expert Witnesses

In medical malpractice cases, expert witnesses play a pivotal role in determining the standard of care and whether there was a breach of duty. Defense counsel is permitted to challenge the qualifications and opinions of the plaintiff's experts and to rebut assertions of negligence and proximate causation. In addition, the defense team typically retains its own experts to bolster its case. In determining whether expert witnesses are qualified to testify to the requisite standard of care, the court will ascertain whether the expert practiced in the respective field of medicine or healthcare at the time the incident occurred. The court will also verify whether the expert is board certified or otherwise has relevant training and experience.

When assessing the standard of care in a malpractice case, which is subject to change as research, clinical protocols and technology evolve, the jury is expected to take into account a number of factors, as indicated in the diagram below:



### Discovery

Once a lawsuit has been filed, the critical phase of discovery begins, which provides each party an opportunity to obtain relevant information and documents from the opposing side. Defendants are often expected to devote significant time and effort to gathering requested records and answering queries in an accurate and thoughtful manner. Discovery takes the following principal forms:

- **Initial disclosures** are statutorily imposed requirements for each side to produce certain information automatically and without objection, usually before formal discovery requests are made. Typical disclosures include the names of potential witnesses and experts, damage demands and the identities of ancillary healthcare workers involved in the incident.
- **Interrogatories** are written questions served by one party on the other.
- **Requests for production** are formal demands for written documentation, including, but not limited to, healthcare information records and policies and procedures in effect at the time of the incident.
- **Requests for admission** require the party served to either admit or deny certain facts and contentions.
- **Exchange of expert witness reports**, which include each expert's opinion and the basis for the conclusions reached.
- **Depositions**, in which witnesses provide sworn testimony in a question-and-answer session. For recommendations in regard to testifying at a deposition, see "Deposition Reminders" on [page 4](#).



### Pretrial Disposition

The majority of lawsuits are resolved before trial in one of the following ways:

- **Motion to dismiss**, usually filed early in proceedings and granted if the judge concludes that the suit is invalid for reasons which no amount of factual discovery can otherwise validate. Often such motions are premised upon a lack of jurisdiction, expiration of the statute of limitations, improper service of the summons and complaint, and failure of the plaintiff to state a legal claim and/or produce a qualified expert witness, among other grounds.
- **Motion for summary judgment**, typically filed after discovery is complete and granted if the judge concludes that the evidence is so incontrovertible that one party must win as a matter of law. Motions of this type often involve matters of causation, expert witness qualifications, standard of care questions and affirmative defenses.
- **Voluntary nonsuit**, reflecting the plaintiff's decision not to pursue the claim, resulting in dismissal.
- **Settlement**, meaning that the parties have agreed upon economic and/or non-economic damages, either through mediation or direct negotiations between the opposing attorneys.

Claims also may be resolved outside of a courtroom via the alternative dispute resolution methods known as mediation or arbitration. In mediation, a neutral third party uses a structured approach to help disputants communicate more effectively with each another and, if possible, reach a mutually satisfactory agreement. In arbitration, the neutral third party makes a binding decision regarding claim resolution.



### Trial Testimony

While most lawsuits culminate in a settlement or dismissal, some do reach the trial stage. Trial can be a prolonged experience, as lawsuits may take years to resolve. Defendant providers/administrators must therefore remain attentive and responsive throughout the process in order to maintain a strong defense. The following suggestions, which should be discussed with legal counsel, may help increase the likelihood of a favorable outcome:

- **Stay apprised of relevant judicial and administrative proceedings** through regular meetings with legal counsel and insurance company representatives.
- **Extensively review the healthcare information record with defense counsel before the trial begins** in order to show familiarity with and concern for the plaintiff, as well as to be confident and consistent when giving testimony and responding to cross-examination.
- **Revisit deposition transcripts with defense counsel.** A defendant's trial testimony is expected to be consistent with statements made during deposition. For this reason, defendants should devote sufficient time to thoroughly review their deposition transcript, as well as transcripts of testimony by medical experts and the plaintiff, prior to testifying in court.
- **Meet with legal counsel to prepare for giving direct testimony** and responding to cross-examination.
- **Be present at the defense counsel table** during the trial, if requested.

Healthcare delivery has its risks, which is why it is important to be aware of what the litigation process involves. By working closely with their professional liability insurer and assigned counsel, defendant administrators and providers can better understand their situation, minimize undue stress and help ensure that their interests are represented within the legal system.

## Deposition Reminders

1. **Listen carefully to questions** and think before you speak.
2. **Answer only the question asked** and do not elaborate.
3. **Speak slowly and clearly**, and do not allow yourself to be pressured into rushing a reply.
4. **Always answer truthfully and courteously**, and do not spar with opposing counsel.
5. **Ask for clarification or rephrasing** if you do not understand a question.
6. **Stay within your competence and knowledge when testifying**, declining to answer questions outside of your area of expertise.
7. **Avoid absolute statements**, such as "I never ..." or "I always ...."
8. **If you do not remember something, say so**; refrain from speculation.
9. **Ask to consult the healthcare information record** to refresh your memory, if necessary.
10. **Stop speaking** if your attorney lodges an objection.

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