

Doctor, You've Been Sued!

It's important to understand the process and react properly when it occurs.

By Howard S. Rosenbaum, DPM

Malpractice suits are terrifying events for most podiatric physicians. Among the broad range of emotions experienced are feelings of denial, embarrassment, self-doubt, anger, anxiety, and depression. Reports of large jury awards in the media evoke agonizing thoughts of a tarnished reputation and financial loss.

Fortunately, many podiatric physicians have not been subjected to this psychological trauma. Nevertheless, odds favor a claim appearing at some time during your professional career. Becoming familiar with the claims process after being served with a summons & complaint will help ease the fears of this alien legal arena.

First, please understand that this presentation of medical malpractice defense is my generalized personal summary and in no way represents any particular insurance carrier or state. It is written from the perspective of a podiatrist who is currently employed as a licensed medical professional liability insurance agent.

Just as the same surgical procedure on two different patients is never exactly identical, malpractice litigation is unique to the individual lawsuit. Although strategies of defense may vary, basic protocols, rules, and procedures exist to guide the process.

Podiatric medical malpractice is a negligent act or omission by a podiatrist that results in harm or injury to the patient. It is not defined by a poor result, but rather the deviation of practice or care from the accepted standard of podiatric medical care in the community. The standard refers to the performance level of an average qualified podiatrist.

Professional Liability Insurance

Professional liability insurance is a significant overhead expense that medical providers are almost always required to obtain to satisfy state licensure requirements. Despite the substantial cost, the actual details of the policy coverage are poorly understood by most professionals until suddenly called upon for protection. A malpractice lawsuit consumes many hours of precious time and generates much stress. Educating yourself

will help alleviate the stress and better prepare you to participate proactively in your defense.

Summons and Complaint

Receipt of a summons and complaint demands your immediate attention and requires a timely response. Your insurance carrier needs to be called immediately and sent a copy of the summons and complaint, followed soon after with a copy of the complete chart. Your insurance carrier confirms your coverage and refers the lawsuit to their claims department where it is managed by a claims handler clerk or in-house attorney, depending upon the corporate structure of the insurance company.

An outside attorney with expertise in your type of case, as well as familiarity with the local courts and judges, is selected from the carrier's existing panel of defense firms. Typically, these firms specialize in medical malpractice claims defense work only and often maintain contractual relationships with more than one insurance company. On infrequent occasions, an off-panel attorney requested by the insured is hired, but only if approved by the insurance carrier.

Within the first few days, defense counsel should consult with you and review the summons and complaint, as well as your medical records.

Several points quickly emerge:

- * Are you the sole single defendant, or the primary or secondary defendant among multiple defendants?
- * Are the medical records accessible, complete, and legible?
- * Do issues exist, such as statute of limitations or non-involvement, to justify motions to dismiss?
- * What is the estimated cost of the claim?

The complaint is answered by your attorney in a timely manner, loss reserves are set by your insurance company, and meetings with your attorney are arranged. A certificate or affidavit of merit by the plaintiff's expert in the same specialty as the defendant is reviewed. Essentially, this is a report expressing an opinion that supports the claim of medical malpractice. It is required by some states in order to proceed with the lawsuit. Investigating the plaintiff's expert might reveal personal information that discredits his/her character and aids the defense in undermining the impact of his/her opinion.

Discovery

As discovery continues, written in-depth questions, known as interrogatories, are responded to in writing, and copies of

all prior and subsequent treatment records are obtained. Economic damages are reviewed. Defense experts in the same field are retained to review and render a clinical opinion on the validity of the claim. Background searches on the plaintiff, including all relevant personal and business history, are performed. A physical exam of the plaintiff is arranged by the defense counsel. In addition, private investigators are sometimes engaged to uncover and document the prevailing medical/physical condition of the plaintiff.

Details revealed by the interrogatories, as well as other documents provided, direct the course of questions by the attorney at the oral testimony known as a deposition of the deponent (the individual questioned). Adequate notice of time and place should be given.

The plaintiff is deposed under oath first, followed by the spouse or partner, co-defendants, and insured. In addition, the experts from the opposing parties and the witnesses to the facts of the lawsuit are also deposed. Typically, a court stenographer records all depositions and produces a printed transcript. The deponent and reporter must attest to the accuracy of the text by signature. Video and tape recorders may also be utilized at a deposition to enhance the value of the testimony. Following the examining attorney's questions, other counsel to the adverse party or co-defendants are permitted to ask questions of the deponent. As a result of discovery findings, motions for summary judgment may be filed to terminate a portion of or the entire lawsuit.

As a defendant, you should be intimately involved with your attorney and your insurer in the strategic management of your lawsuit. There are three basic outcomes to a malpractice lawsuit:

1. Dismissal without indemnity payment (with or without prejudice)
2. Settlement with indemnity payment
3. Trial with jury verdict

Attempts at dismissal by your counsel should be aggressively sought whenever appropriate, and especially when you are a secondary defendant among multiple defendants. Under all circumstances, defense needs to be vigorous from receipt of the summons and complaint until the claim is closed.

Dismissal with prejudice is a final court judgment that prevents a re-filing of the same claim in the future, whereas dismissal without prejudice allows for re-filing the same claim in the future under certain conditions. Settlements are primarily suggested when there are substantial reasons to

believe that dismissal without indemnity payment is not likely and trial by jury will not succeed.

To the surprise of many physicians, the physician's right to make the ultimate decision regarding settlement or trial by jury is not always provided within your professional liability insurance policy. The absolute Consent to Settle endorsement obligates the insurance carrier to abide by the decision of the insured defendant and requires the podiatrist's written approval to settle a claim.

However, the worth of consent to settle is clearly diminished when a "hammer clause" is added to the professional liability policy. A "hammer clause" obliges the insured physician to pay any judgment in excess of the recommended settlement by the carrier plus the cost of defense after refusal to consent.

As the suit continues, the estimated loss is re-evaluated. At all times, the insurance company must act in good faith to protect the insured. The fiduciary responsibility of the carrier obligates the carrier to advise the insured when it believes any adverse verdict will likely exceed the policy limits, and recommend that the insured obtain independent legal advice. Further, the carrier has the fiduciary responsibility to follow the general rule that requires the carrier to act as though they were responsible for the entire risk and to assist the independent counsel to protect the insured from excess liability.

Since the carrier maintains control of litigation, in order to avoid an accusation of bad faith, the carrier must consider settling the case within policy limits, taking into consideration the interest of the insured in addition to its own. The effort to maintain good faith by settlement is sometimes in conflict with the insurer's desire to avoid exposing itself as a possible target for future frivolous claims, which would result in higher defense costs.

Unfortunately, even a dismissed claim without indemnity payment is recorded forever in your applications for healthcare facility privileges and health insurance provider network participation. In addition, many state license websites and the National Practitioner Data Bank (NPDB) record all indemnity payments. In fact, medical malpractice payers are required by law to report all payments within 30 days to the NPDB.

Effect on Premium Rates

Even without indemnity payment, all claims are costly. It has been estimated that a medical malpractice claim now costs \$50,000 - \$100,000 to defend. Premium rates are affected differently by the malpractice insurance carriers:

* A dismissed claim with no indemnity payment (closed within six months) does not affect rates.

* A closed claim - dismissed or trial jury verdict with no indemnity payment (open for more than six months) - may increase rates at some carriers, but not others.

* A closed claim by settlement or trial jury verdict with indemnity payment is likely to increase rates at most carriers, but not all.

The frequency of claims, amount of indemnity payments, and details of the claims all contribute to an underwriter's assessment of risk for determination of the premium rate. Some insurers base their rates more on charts, while others recognize individual differences. Loss ratios are determined by underwriters as they establish individual premiums. The most recent ten-year time period is most important. However, earlier history of large indemnity payments or higher than expected claims frequency are often taken into consideration.

For most podiatrists, the likelihood of being non-renewed by your current malpractice insurance carrier is small. My advice to all podiatrists is to pay their professional liability premiums on time, complete renewal paperwork promptly, and keep their carrier informed of any changes within their medical practice. There is no simple answer for those podiatrists concerned about their history of frequent claims or large indemnity payments. A podiatrist with a single indemnity payment (unless extremely large), or a podiatrist with two dismissed claims with no indemnity payment, are usually insurable in the standard market. However, the occurrence of a lawsuit places your office policy, procedures, and records under serious scrutiny. It is vitally important not to alter any medical records or demonstrate any behavior that can be perceived as immoral or unethical.

An active effort by the insured to identify and correct practice habits that may have contributed to claims is advisable. Many malpractice insurance carriers have risk management departments to assist the insured with offers of tools and guidance to lessen the likelihood of a claim. Electronic medical records and e-scripts are just two examples of practice activities that are believed to reduce risk.

Now that you better understand the management of a malpractice claim, you will be able to view it more like a business matter of inconvenience than a personal attack. Under guidance of counsel, become an active contributor to the defense and maintain diligent oversight of the process. Remember, you are not alone.



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