

Litigation Preparation: After You've Been Sued...

Five steps you should take to protect yourself after you have been named in a lawsuit.

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Once you have been sued, your ability to increase your malpractice insurance, restructure your corporate arrangements, or even shelter personal assets is limited. In fact, once the alleged malpractice occurs, it is usually too late to take many effective pre-emptive steps toward minimizing your exposure. There are, however, several things you should be doing to ensure a successful outcome and reduce future malpractice premiums.

STEP 1: RETAIN YOUR OWN LAWYER

Yes, your malpractice carrier will appoint a lawyer to act on your behalf, and yes, that lawyer's fees will be paid by the carrier. So, why incur the additional expense of hiring your own lawyer when you already have one that doesn't cost you anything? Because you have more riding on the outcome of this case than either your insurance company or the lawyer they have hired.

Over the past decade, insurance companies have applied similar measures to both doctors and the defense attorneys hired to defend them. They have curtailed increases (or sometimes reduced) to the hourly rate paid to the attorneys, while scrupulously auditing legal bills to remove charges they deemed unnecessary such as "legal research" or "conference between attorneys." They have similarly decreed preset limits for many tasks, such as motions, pleadings, and review of records. If they deem the time for any task to be too high, they often unilaterally cut the fee, regardless of the amount of time the defense attorney spent on the task in question. The result has been that some insurance defense firms are filled with attorneys who are overworked, underpaid, and constrained by the insurance companies from providing a zealous and aggressive defense. The law firm's desire for more

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revenue in this environment has led to a dramatic increase in the amount of billable hours required of their associates and partners. As a result, the defense attorney's order of priorities may become skewed, with an emphasis on following the insurance companies' rules regarding billing codes and status reports (to ensure proper levels of reserves on each case), performing those tasks that provide the easiest billable hour return, with the result obtained in a particular case coming in a distant third. The average plaintiff's lawyer is not constrained by such considerations. They normally take 33% to 40% of any verdict, but do not get paid unless there is a recovery. Once they accept a case, their only goal is to maximize their recovery. Accordingly, the attorney on the other side of the table from you is usually more motivated to get a large verdict than your insurance defense attorney is to ensure that there is no verdict. If they see a potential for a large verdict, they will throw all possible resources at the case, while your defense attorney is left asking the insurance company for permission to conduct one day's worth of legal research on a salient part of the defense. Unless you get proactive, this is the system that will be defending your case.

By hiring a personal attorney (with a background in litigation), you will have an advocate, familiar with the litigation process, who is interested solely in obtaining the best result for you, without regard to the insurance company's budget

or interests. As soon as the suit has been filed, your personal attorney should insist on meeting with you and the attorney hired by the insurance company to plan the defense strategy, identify and interview key witnesses, and select the expert witnesses who should review your case and possibly testify on your behalf. You and your attorney should both insist on being copied on the periodic status reports prepared by your defense attorney for the insurance adjuster, which summarizes deposition testimony and provides the legal opinion regarding your potential liability and the amount of exposure. Some insurance companies will allow you to choose your defense attorney, letting you have the representation you want without having to pay extra. This is often negotiated in advance at the time you obtain your policy, but is worth exploring at any time in the litigation process.

From the standpoint of the insurance defense attorney, the knowledge that another attorney is looking over his or her shoulder will likely result in better representation for you. At best, lawyers with a sense of professional pride will want to demonstrate to any colleague that they are providing the best possible care. At worst, no lawyer wants to be the subject of a legal malpractice case, which an involved personal attorney would be uniquely able to establish.

Finally, your personal attorney will also be able to ensure that all of your rights under your insurance contract are honored, including obtaining the best expert to testify on your behalf, and exercising as much control as possible over the decision to try or settle your case.

STEP 2: STAY ON TOP OF DISCOVERY

The discovery phase of the litigation usually begins with the filing of the Answer to the Complaint, and lasts for a predetermined length of time set by the court. Although courts will frequently grant a motion to extend a discovery deadline, neither you nor your attorney should count on that. If you have complied with all discovery deadlines and the opposition has not, you may gain an advantage later (for instance, if the other side needs more time and you oppose their motion to extend the deadlines).

The primary tools used in discovery are written interrogatories, requests to produce documents, and depositions. You, or someone at your office, should keep an eye toward complying with these requests, and ensuring that your answers are accurate and complete. If you make a misstatement in your discovery answers, you can usually amend those answers, but you should expect the plaintiff's attorney to highlight any inaccurate (and uncorrected) information at time of trial in an effort to establish a cover-up.

STEP 3: ACTIVELY PARTICIPATE IN THE EXPERT REPORTS (YOURS AND THEIRS)

No single aspect of your case is as important as the expert

reports prepared by the two sides (or multiple sides in the frequent case of multiple defendants). Your liability will likely hinge on the experts' testimony and how credible each is to be perceived by the jury. You can greatly assist in this effort by providing your attorneys with names and contact information of experts who you believe possess the expertise to properly evaluate the standard of care that should have been exercised and your actions.

In addition, you should thoroughly review the expert reports of the plaintiff and any co-defendants and be familiar with their allegations of negligence against you and any other medical personnel. You are the expert and can provide your attorneys with invaluable insight that will assist them in their cross examination of the other experts who may be testifying against you. Anything that you can do to discredit these experts, such as providing text book quotes or published data that contradicts their assertions will assist your case tremendously.

STEP 4: PREPARE FOR YOUR DEPOSITION

Your deposition will be used by the plaintiff extensively in their preparation for trial. You should fully expect that they will go through every page to find any contradiction between your testimony and any written records, or the testimony of other witnesses. Therefore, you need to prepare for this deposition with the knowledge that it will be the major tool used to cross examine you at trial. The plaintiff's attorney will attempt to use any changes between your deposition testimony and your court room testimony to discredit you (ie, "Were you lying then or are you lying now?").

To prepare for your deposition, you should review all of the pre-, post-, and perioperative notes and records. These may jog your memory regarding some aspect of the case that you might otherwise have misstated.

You will also need to meet with your attorney prior to your deposition. He or she will provide you with the ground rules regarding your testimony.

STEP 5: ATTEND THE TRIAL

A jury will likely be evaluating whether you are liable or not for the plaintiff's damages. Occasionally, it may be a judge or an arbitration panel. The jurors are not medical specialists, and often they may make their decision based on whether they like you, feel sympathy for the plaintiff, or how well they like the attorneys representing the respective parties. Attending the entire trial will let the jurors get to observe you, and see how much this case means to you. ■

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