Section 1 **The long road to trial**

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Chapter 1 **You've been served! Now what?**

That dreaded day arrives. And no it is not just a bad dream. That police officer at your front door is not ringing the doorbell to warn you of a prowler in the neighborhood. He has come to serve you with papers notifying you of a complaint filed by a patient: a patient you may or may not remember seeing. Although anybody who serves you with papers is called a process server, in some jurisdictions, like mine, it is done by a sheriff's deputy.

The feeling is akin to being hit on the head with a bat, stabbed in the back, and disemboweled, all at the same time. Thoughts run through your mind like, "Will I lose my job?"; "Is my money protected?"; "Am I a bad doctor?"; and "Is my career over?"

You are justifiably depressed, confused, frustrated, and angry. When you have had a few minutes, hours, or days to assimilate this experience that unfortunately has begun a new chapter in your life, you undoubtedly ask, "Now what?"

When it happened to me, I called my father. Then again, not everyone has a medical malpractice defense trial attorney for a father. Most physicians do not have an attorney who is readily available to give appropriate and timely advice to initiate damage control. Through this book I am going to suggest what to do and, equally important, what not to do.

FIRST: Obtain a copy of your medical malpractice policy and make sure you can answer the following questions

Most of us think paying out an exorbitant sum of money every year is the extent of our necessary knowledge of the policy. But there are a few things you should know about your policy, and if you do not know, you should find out soon.

How to Survive a Medical Malpractice Lawsuit. By © Ilene R. Brenner. Published 2010 Blackwell Publishing.

Some key clauses to know:
1 Policy limits
2 Ability to choose an attorney
3 If you have the right to refuse settlement

Q1. What are my policy limits?

This is especially important in states that do not have caps on noneconomic damages such as pain and suffering. If the patient's economic damages are likely to relatively low, and you have caps limiting the noneconomic component, then your typical one million dollar policy limit will more than suffice. You can rest easy because you will not become destitute if you lose. (For more information about damages, see Chapters 2 and 9.)

Also, if this is a high economic damages case, for example, a patient with a long stay in the intensive care unit, loss of wages, disability, and loss of future income, you will know if you are adequately or inadequately covered in the event that you lose. If you are not adequately covered, you may want to consider settling the case to protect your personal assets. (For more information on settlements, see Chapter 8, *Should you settle?*)

I am told by a number of medical malpractice attorneys that it is rare for plaintiff attorneys to pursue a physician's personal assets when their limits are exceeded by a high verdict. However, it is still possible, and if you have not yet been sued, now is the time you should review your limits. Also, review your asset protection plan. But I am not sure if that actually works, because a ruthless plaintiff's attorney may find a loophole that allows them access to your money.

Q2. Do I get to choose an attorney or must I accept whoever is assigned? Is there a pool of attorneys from which I can choose?

This is important if you know of a good attorney that you want to request. Also, plaintiffs often sue multiple doctors, including your employer. Sometimes your employer will "assign" you the same attorney as they have. This can pose a conflict of interest if your attorney is representing both of you, often to your detriment. (See more about this topic in Chapter 3, *What is a conflict of interest and how do I resolve one?*)

If you feel that you do have a conflict of interest with your codefendants and can request a separate attorney, do so. (For more information on choosing an attorney, see Chapter 3, *How to choose your attorney*.)

In general, the process of picking a law firm to represent you should involve colleague recommendations, peer reputation, and insurance company suggestions.

The insurance company will have to retain an attorney for you to respond to the complaint quickly relatively soon, because, depending on the jurisdiction, you may have as few as 20 days from the day you were served with the papers to submit a response.

However, some policies give you the right to select an attorney. If you already have a relationship with an attorney on the insurance company's panel (of defense attorneys acceptable to the insurance company), you can request that law firm to represent you.

Often, you are not told that you have a choice even when your policy says you do, and the insurance company will assign you an attorney without asking your opinion of their selection. You need to ask questions and make it clear that you will be a proactive client. You need to know your rights.

If you do not have any ability to choose an attorney in your policy, then you can expect to be assigned an attorney. When you accept someone that the insurance company approves of, they will pay for the attorney's fees. You could insist on hiring your own attorney at your own expense to protect your interests if you do not approve of the choices offered to you (see Chapter 3 for more information). However, you do have an insurance policy that is actually a contract. You must accept the terms of the contract if you expect them to cover you for any judgments. Although you could hire private counsel to work with your assigned attorney, this is usually not necessary. They cannot try your case for you, but they can protect your interests by keeping abreast of developments in the case that you would otherwise be unaware of and give you advice to help optimize the precarious situations between codefendants.

Insurance companies' goal is to minimize losses. It is in their best interest to have excellent qualified counsel. Therefore, any law firm approved by the insurance company should be more than capable. If you do not like the attorney assigned to your case, you do have options beyond hiring private counsel. I detail these options in Chapter 3.

Too often, the shock of a lawsuit turns previously confident, curious physicians into passive-aggressive clients who wait for the insurance company to make decisions for them. This approach is potentially dangerous. You have to look out for your own interests.

Q3. Do I have the right to refuse settlement?

It may not seem like a big deal, but nowadays even a low settlement is considered a loss as it raises your risk status with the insurance company.

> If you have not been sued yet, do your best to get the *Consent to Settle* clause in your policy.

It increases your malpractice premiums. Too many settlements can even make it difficult for you to be employed in the future.

Technically, your insurance company is not working for you but for themselves, to limit the risk of a large verdict. If they think a low settlement will save them money in the long run, they will do so, sometimes irrespective of whether or not you have "a good case."

Therefore, if you do not have the right to refuse a settlement, you are at the whim of your insurance company (or possibly your employers if they purchased your policy for you).

If you do have this very important right, you may request to go to trial regardless of the insurance company wishes. After all, it is not their record that will be affected by a settlement. It is yours and yours alone. (For more on settlement, see Chapter 8, *Should you settle?*)

If you have not yet been sued and do not have this *Consent to Settle* clause in your policy at the present time, you should strive to get it in there if possible. Sometimes you do not have a choice, but it does not hurt to ask.

What are the options if your employer purchases your insurance policy and dictates the terms?

If you work for a company that has purchased a policy for you, or if you work for a company that is self-insured, then you likely have no say over what clauses go into your policy. If this is your situation, you have three options:

1. *Find out how aggressive they are in refusing to settle cases.* Many employers have realized that plaintiff's attorneys are less likely to take a case against physicians if they know that their employers have a reputation for taking every case to trial. If your company fights most of its lawsuits to the bitter end, you can feel a little better about not having that clause in your medical malpractice insurance policy.
2. *Purchase your own policy.* Some employers will adjust your salary upward if you refuse their malpractice coverage and instead purchase your own. However, most will not. You could purchase your own policy despite also being covered by your employer. Although most doctors may think this an insane financial decision—to turn down free medical malpractice coverage—some doctors do this knowing that the ability to make important decisions for themselves can outweigh the cut in income.

   The decision becomes all the more important if your employer and codefendant is a hospital. In Chapter 3, I explain at length the dangers of having a hospital as your codefendant. The problem is compounded if they also control your policy and your decision-making ability.

There are risks to purchasing your own policy, as you are a grouping of one and may have higher rates than if you had others pooled with you. Or, a lawsuit could get your individual coverage severely limited or dropped altogether. However, if you have your own policy, you can control what terms are in it, and your employer will not have any say in your lawsuit decisions.

3 *Do not work for that company.* It is a hard decision, but sometimes it is best to not work for an employer that purchases your policy for you. If you are looking for a job, conventional wisdom typically states that if you can get someone else to pay for your medical malpractice policy, do so. I offer an alternative view: If you can purchase your own policy with terms that are acceptable, but get group rating through your employer and a higher salary to compensate, that is the best scenario.

SECOND: Call your insurance company to report the claim

By reporting a claim, you initiate the process of having the insurance company cover your legal expenses and any verdict against you. Although it is possible that the insurance company already knows about your claim from your employer, you still need to make the call yourself.

> Reporting the claim to the insurance company is the critical first step in a very long process.

There may have been some circumstances that led you to report the potential lawsuit to them months ago, and a file has already been created on this case. For instance, the plaintiff attorney might have sent a letter to you or to the hospital to demand money for a bad outcome. You may have found out that other physicians you know have received letters requesting medical records regarding a patient. Or, the plaintiff's attorney may have requested a copy of your chart. In all of these circumstances, your first step would be to call the insurance company. However, if you are asked to provide records, do not send them anything, initially, until you have had a chance to seek advice from your insurance company. They may assign you an attorney or they may tell you to make an exact copy of each and every page of your chart. If applicable, do not exclude memos or billing. Do not include correspondence regarding insurance and legal issues. You might need to be assigned counsel to decide how to handle what will likely become a lawsuit, and that process begins with calling your insurance company.

Also, if you have a claims-made insurance policy, reporting a possible future lawsuit would be a very smart thing to do. A claims-made policy

means that you are covered only for claims that arise during the policy period, for example, while you are working for a specific employer. If a lawsuit should arise after the policy period, then you are not covered. Therefore, if a potential case is reported before an actual lawsuit, it will still count under your claims-made policy, even if you leave your job and the lawsuit is filed after your coverage ends.

The other type of policy, called an occurrence policy, means that the claim could be made years after the policy ends and still be covered because the occurrence was during the policy period. And therefore, for an occurrence policy the timing of reporting potential claims is less critical.

You can also call your employer out of courtesy, but resist the passive tactic of letting your employer take over the process for you. You should be dealing with the insurance company directly. As some physicians' policies are purchased on their behalf by their employer, there is the temptation for the employers to want to control everything.

However, it is still your policy, and you should not let your employer take over, even if they offer. Keep in mind, there may be a conflict of interest between you and your employer, especially if they are also a codefendant with you on the case. (For more about conflict of interest, see Chapter 3, *What is a conflict of interest and how do I resolve one?*)

This is your case and your career. Be proactive. If your employer is a codefendant, do not allow them to act as an intermediary with the insurance company.

The only one looking out for you is you.

An exception to the above-mentioned advice is that you may already have an attorney that you trust to represent you. In that case, it is acceptable to have your attorney contact the insurance company for you to initiate the claim.

When you speak to the agents of your insurance company, they will likely ask you some details about the patient encounter if you have any specific recollections. The agents will ask you whether you believe any of the allegations are true. They will also likely ask if there are any other parties that have been sued along with you. Therefore, you should have read through the complaint to familiarize yourself with it and get an idea of why you are being sued. However, it is possible, if not likely, that after reading the complaint, you still may not know why you have been sued. Do not worry about that; there is plenty of time to do research that will help your recall. It is okay that you do not have your defense planned yet.

A few things to avoid

Do not look anything up in a book, journal, or an online site

You cannot give into this understandable temptation to find information that will help you justify your actions relative to whatever complaint is made against you.

You may think finding data to support your case will help bolster your confidence, as it is likely at an all time low, but it can be damaging to your case.

Here is why: When you are deposed (when a witness has sworn testimony taken outside of a courtroom without a judge present), and also at trial, the plaintiff's attorney will try to pin you down to an *authoritative source* of information. In other words, they will ask you, "Do you consider e.g. *Tintanelli* on Emergency Medicine, or *Harrison's* on Internal Medicine, authoritative texts?" Plaintiff's counsel might ask you what texts of your field are in your office or in your home.

Once you have disclosed that you have an authoritative source, the plaintiff's attorney at trial will embarrass you on the stand with obscure and out of context quotes that hurt your case.

Prevent this occurrence by saying this mantra over and over, *Nothing is authoritative*.

Books are out of date when printed. Journals are not gospel, not even if it is the *New England Journal of Medicine*. Reputable journals in other fields are not always relevant. Articles in journals are often flawed studies. Information is changing all the time.

There is a time to look up information: after meeting with your attorney. After consulting with your legal counsel, any research you do is for them, not you, and not subject to discovery (this may vary by state, and therefore, you should ask your attorney to be sure).

The plaintiff's attorney will try, at your deposition, to pin you down to an authoritative source. When you have deflected that issue, they will then ask you if you researched anything about the case after receiving the complaint. You will say, "No. I only looked up information per the request of my attorney." Your attorney (if any good) will then object to any attempts to find out any more information on this topic. You will then have frustrated the plaintiff and helped your case a great deal, a two for one special.

Other advice: (1) do not talk to anyone other than your attorney or your spouse about the details of your case and (2) do not destroy or alter evidence.

Do not talk to anyone

You can talk to your attorney and your spouse about the specifics of the case. However, anyone else you speak to about this case can be called or deposed as witnesses.

Specifically, do not speak to your colleagues about this case unless it is in a peer-review setting. Anything you say to them outside of peer review is not protected and can certainly be used against you. (See Chapter 15 for more information on peer review.)

You might think about talking to that surgeon who found the appendicitis you missed. Don't. No matter what they may say to you that seems supportive of your care, you never really know if they will be helpful to you. It is best to keep that door closed, because once opened, it can hurt your case significantly.

Also, do not contact the plaintiff or their attorney. You may think you have "proof" that can convince them to drop your case. And you might. However, it is a risky tactic that could set up a situation where the case continues and your proof of innocence is now not admissible. If you have any evidence you think could get your case dropped, show it to your attorney and let them figure out the best method of using it.

An example: Doctor X always makes sure to tape-record all conversations with his patients involving informed consent (with full disclosure to the patient that the taping is occurring). At a later date, the physician is sued by a patient claiming that he did not explain the procedure he was going to do and that her negative outcome was completely unexpected. The physician's tape is the kind of proof that can get a case dismissed.

Also, your attorney is now your official representative in all matters regarding this case. You are not to talk with the plaintiff outside of an organized legal setting. The time for apologies has passed. (For more about apologies, see Chapter 11, *If something goes wrong, should I apologize?*)

Although you may think that a conversation between the two of you, without your attorneys, could change their mind and get them to drop the case, the true likelihood is infinitesimally small. The only thing it will accomplish is getting your actions and words twisted around to make you look very bad in your deposition and in court.

Do not destroy or alter evidence

You may think that cleverly adding some information to the chart may help you. However, in all likelihood, a copy of the original exists somewhere you do not even realize, and it will resurface during trial to annihilate you.

If you have additional documentation, such as a personal diary, that you think could hurt your case, now is not the time to destroy it. Although it is a bad idea to keep a diary (this is explained further in Chapter 13), once

you are sued, it is too late. You may think no one can discover that you destroyed evidence; however, clever attorneys will find out.

You never want to appear deceitful. If proof of your altering the chart or making other information disappear comes to light, your case is lost. Do not risk this. You would be surprised at how many physicians break this rule and lose big. Or settle big. For cases that were winnable.

Avoid the blame game

Do not blame yourself. I know it is not possible to go through the process of a lawsuit emotionally unscathed; however, you must try your best to realize that most physicians get sued at some point in their career. Often, more than once. Just because you have been sued, it does not mean you are a bad doctor.

Do not blame your patients. The worst possible sequela of a medical malpractice lawsuit is the destruction of the trust between doctor and patient.

> It is a natural reaction to want to assign blame: to yourself, your patients, or the "evil" plaintiff's attorneys.

It will be difficult to put this case aside, but do your best not to look at your patients as "the enemy."

Do not lose your compassion. It is easy to let the painful process of a lawsuit take over your emotions and make you bitter.

Try to remember why you went into medicine in the first place: to help people. Compassionate doctors, in my opinion, are the best doctors. Bitter doctors, who do not care about their patients, make bad doctors. (They also get poor patient satisfaction numbers and more angry patients that can lead to future lawsuits; see Chapter 11.)

Do your best to retain (or regain) your compassion despite all the obstacles thrown your way. It will keep you sane and make you a better doctor. Do not forget you are the same compassionate competent physician today as you were yesterday.

Do not change your quality practice of medicine. There are many courses out there for physicians that give recommendations to avoid lawsuits. Unfortunately, sometimes the "defensible" way to treat a patient is not necessarily the best medical practice.

Try to avoid following medicolegal advice that goes against the good medical treatment that you provide to your patients just because an "expert" in a course said so.

For instance, a colleague once told me that they would not take a signout from me because they do not do incision and drainage (I&D) on the face.

When a person has an abscess, it is the recommended practice to perform an I&D. If not performed, the abscess might not resolve despite antibiotic administration.

My colleague's refusal was based on a medicolegal course where the instructor said never to do I&Ds on the face because of the possibility of causing a scar on the face that would lead to a lawsuit. Never mind that an inappropriately treated abscess would eventually lead to a bigger scar! I found this appalling, both that the advice was given *and* that the advice was taken.

In matters of medicine, I understand that there are many instances where the most defensible means of treatment is not necessarily the best medical practice. But we took an oath, and I believe that following best practice *is* the best and most defensible in the long run. The best methodology is when good medical practice is also defensible medical practice.

If a patient insists on a test that you do not feel they need, in particular computed tomography (CT) scans, it may not be wise medicolegally to refuse. However, it is always prudent to explain the radiation risks involved in CT scanning: that a small but significant number of patients undergoing a CT scan will develop cancer from the CT scan. (Make sure to document that you explained the risks of a CT scan.)

Getting sued can damage your self-confidence. However, do not let fear consume you. Make every effort to continue practicing the good medicine you have been doing for years.

It is possible that the lawsuit is a result of your unintentional negligence. If that is the case, realize you are human. We all make mistakes. It may feel unfair that physicians can be sued for those errors when there are scores of people (e.g., politicians) who make errors in judgment daily, which cause irreversible harm to people, yet are exempt from such lawsuits. But, unfortunately, this is our reality.

Sometimes, you need to be introspective and decide if something about the way you practice medicine needs to be altered to give better treatment to patients. Sometimes, there is nothing that can be done.

Sometimes nothing *should* be done, as your "error" was really a statistical reality and you are already practicing the best medicine possible.

> Statistically every doctor will experience bad outcomes. And because physicians are human, they will make errors. You are not alone.

Therefore, what is the difference between a predictable bad outcome and a medical malpractice? See Chapter 2 for more information.