

# ACEP



## Getting Sued: A Resident's Perspective

How to prepare for and deal with the pressures of a malpractice lawsuit

A malpractice lawsuit is a devastating experience for any physician, and can be especially so for a resident.

"One of the difficulties as a resident is, of course, is that you're still in the learning process medically and a lawsuit is a blow to your confidence," says R. Jason Thurman, MD, a resident in Emergency Medicine at the University of Cincinnati. During his second year of residency, Thurman was named in a medical malpractice and wrongful death lawsuit for a case he'd been involved in as an intern.

"Most physicians would probably say that they expect to be sued at some point, but when it happens, it still comes as a shock. It can hurt your confidence because you wonder whether you could have done something differently. It's important to accept the fact that no matter how good you are and how hard you try, there will be bad outcomes under your care," he says. "Physicians understand that bad outcomes do not necessarily equal bad care. However, bad outcomes are the bread and butter of malpractice and wrongful death litigation. So if there is a bad outcome, you might be sued, whether or not you did anything wrong."

Thurman was eventually dismissed from the case and medical malpractice was not found.

"Overall, it was a pretty difficult experience," he says. "What made it much worse was not knowing anything about what to expect as far as the procedural aspects of a lawsuit are concerned and as far as what to do personally, who to speak to and who not to speak to, what to say and what not to say."

A lawsuit can be a long, drawn-out process and it's important to have a plan for dealing with the pressures, says Thurman, who offers residents the following advice.

Examine your legal advice, but trust it. Relinquish control. This is a problem you cannot fix.

When you receive a summons, the first thing to do is to go directly to your risk management department. Seek advice from them first and don't talk to anyone else, says Thurman.

Hospital risk management departments have experienced lawyers to deal with these cases.

"As physicians we're geared toward identifying a problem and finding a solution. One of the first tendencies associated with the shock of being sued is that you want to fix it. You want to get this case and try it yourself because you just want to make it go away. It does help to become educated about your case and the process, but you need to leave the legal proceedings to the lawyers and let them do their jobs," he says.

"The sooner you accept the situation and the quicker you can depersonalize it, the better witness you'll be. You can't be a good witness if you're angry. Understand that the case is not necessarily about you or how hard you tried or how hard you worked or how much you cared. It's not a personal attack, although it feels like one," he says.

Lean on your support groups, but be mindful and protect them.

Any conversation you have with your lawyer is protected by attorney-client privilege and is inadmissible in court. Communication with your spouse is also privileged, notes Thurman.

The rules of discovery in a legal case, however, do not protect conversations you have with friends and colleagues. Anything you say to them about the facts of the case may be

"discoverable," which means the person you speak to may be called upon to repeat the conversation in court.

"Don't talk to other people about your case or ask their opinions of the case. What you can do

is tell them how difficult it is for you and how much you need their support," says Thurman. "In my case, I was named in the lawsuit with another physician in the emergency room who saw the same patient and we were advised not to talk to each other about it. Certainly we talked to each other about how upsetting it was and how difficult it was, but we did not discuss the particulars of the case."

Also keep this in mind when someone close to you is sued, says Thurman. "While it's natural to want to find out the details, understand that doing so could put you and your colleague in a bad situation. So be very supportive and understanding, but avoid asking about the specifics of the case."

Be prepared for the process to take a long time.

It can take years for a malpractice lawsuit to be resolved. Understanding how the process works can help ease the anxiety that goes along with it, says Thurman.

It begins with a written summons, followed by a discovery (investigation) process, during which depositions are taken with all parties represented. The plaintiffs usually go first, followed by the defendants. The parties are cross-examined by opposing counsel. "You must answer all questions in the deposition, but some are answered under objection. A judge later decides what will be admitted as testimony," explains Thurman.

Depositions are reviewed by legal counsel and by experts. The merits of the case are reviewed and the two sides jockey for position. The trial is essentially a re-enactment of the depositions taken in chambers, except that it's done before a jury.

"The plaintiff's attorney must prove that you breached the standard of care, which is to say that you have either done something wrong or not done something that any other reasonable physician would have done in the same circumstance. The plaintiff's attorneys will find an expert who will say you did the wrong thing," notes Thurman. "What you have to understand is that, unless you've done something egregious, in a great majority of medical malpractice cases the points of the case can be argued on both sides. And that's what happens. The defendant has an expert witness who says one thing and the plaintiff has an expert witness who says another."

In addition to proving that you breached the standard of care, the plaintiff's attorney must also prove causation - namely that the breach resulted in injury to the plaintiff. And finally, they must convince the jury that the injury you caused resulted in damage to the plaintiff and attach a dollar amount to that damage.

Be prepared for the fact that the case may be settled out of court and remember that a settlement is not an admission of negligence, but an attempt to cut losses, says Thurman. The amount of a settlement isn't necessarily proportional to any degree of culpability, but rather to the expense of trying the case to a conclusion.

Be well-informed and well-prepared.

Good documentation is vital to the defense in a malpractice lawsuit.

"The plaintiff's attorney will exploit any shortcomings in the medical documentation, but it's also true that strengths in the documentation help the defense, as they did in my case," says Thurman. "Keep this in mind and always document well - especially conversations and thought processes. When you choose a particular course of treatment, document why you chose to go that route. It's very difficult for an expert witness to find fault with a good, solid thought process."

It's also important to "be mindful of nurses' notes and EMS run sheets because they are all part of the medical record, and you should be able to demonstrate that you addressed any complaints or issues indicated there," he says.

It's natural to get upset, but do your best not to internalize the process.

"When you incur a medical malpractice or wrongful death suit, it can be personally devastating because being a physician is more than a job, it's a part of you. And when someone is accusing you of medical malpractice, they are saying that what you do with your heart and your soul you have done in a way that has harmed someone, and that is very difficult to deal with," says Thurman.

"The reality is that not every patient is going to have a good outcome. While doctors understand that that's a part of medicine, they also have to realize that sometimes they are going to be blamed for it - right or wrong. Being sued could happen to anyone involved in emergency medicine. Expect it and be prepared for it. If and when it happens, depersonalize it as quickly and as much as possible. A lawsuit doesn't mean you're a bad doctor or a bad person."

