ISSUES AT RISK

How to React to a Summons & Complaint

by John H. Danielson, ARM, CPHRM

Your office manager has just handed you the "Summons and Complaint" that the county sheriff has served on your practice. You look at the name on the summons, and see that one of your longstanding patients is the plaintiff. You are shocked; you've never been sued in fifteen years of practice. What do you do next?

Here are some general statements relating to medical malpractice claims. The literature and statistics show that, in a report of the Bureau of Justice Statistics, most medical malpractice claims were closed with no payment provided to those alleging a medical injury. The study also indicated that payments from insurance companies increased as the claim advanced through the legal process. The most common providers sued in the study were physicians, surgeons and hospitals. This study reported information on about 43,000 closed medical malpractice claims during the period of 2000 through 2004. Seven states reported information; they were Florida, Illinois, Maine, Massachusetts, Missouri, Nevada and Texas.

Now let's go back to our doctor who has just been served with a Summons and Complaint alleging professional medical negligence. Notification to the medical malpractice insurance company must be accomplished in a timely manner. That means, do it now! Your policy will tell you how the insurer wants you to report. There are insurers who will want direct notification of a suit by the insured. Others may let you report to your agent/broker. Following the appropriate process will avoid questions of late reporting and possible denials of coverage.

The medical record is a primary piece of evidence in a medical malpractice claim. The record should be secured as soon as possible. The provider must not fall prey to the temptation to alter or change the record after having received notice of suit being filed. To do so is to invite disaster. In most cases the plaintiff's attorney will have obtained a copy of the record prior to suit being filed. It is most embarrassing to appear at a deposition and find that there are two differing copies of the medical record.

The next step, and a time consuming activity, is written and oral discovery. Each side will propound to the other written Interrogatories. This is a process of gathering information about the plaintiff and the defendant. The information sought by each side can be very broad in scope. The plaintiff will want to know the names of all defendants, insurance information, experts for the plaintiff and other material plaintiff will use at trial. Generally at this time, the experts for both sides will not be disclosed. The defendants will want to know similar information about the plaintiff, including spouse/partner, minor children, involvement in other civil actions, etc. The person who prepares the Interrogatories must have his/her signature notarized.

Oral discovery is the deposition process. Depositions are formal questioning by an attorney with a court reporter recording the proceedings after the deponent has been sworn in by the court reporter. At a minimum, the defendant(s), plaintiff(s) and experts for both sides will be deposed. Depositions can be a harrowing experience. The physician defendant has to be well prepared by defense counsel prior to the deposition. Above all, questions must be answered truthfully. The signed deposition forms the basis of the deponent's testimony if the case goes to trial. If the testimony differs at trial, plaintiff's attorney will move to impeach the witness and have the entire testimony stricken from the record. Assuring that the physician defendant has been well prepared can sometimes be the critical difference in a medical malpractice case. A physician who rambles or otherwise seems inattentive during the deposition is not going be a good witness in front of a jury.

Now that written and oral discovery has been completed, a trial date will be set. Statistics show that 90 percent or more medical malpractice claims are settled prior to going to trial; only around 10 percent of medical malpractice cases are tried. Settlement is always a possibility until the verdict is read in court.

Another option is to have a pretrial conference in front of a judge. The judge will evaluate the claim and present a settlement figure to both sides. If the plaintiff and defendant agree, the case is settled. If not, the parties can opt to meet again or proceed to trial.

At trial the judge is in control of the proceedings. The first order of business is the selection of a jury. Each attorney will question the individual juror and can reject a certain number of jurors. After the jury has been seated and sworn, the attorneys will each have an opening statement. The plaintiff will then present his/her case before the jury, followed by the defendant. Closing arguments will follow if a directed verdict motion is denied. These are summaries to remind the jury of the salient points presented by plaintiff and defendant. The judge then instructs the jury on the law and the jury retires to deliberate a verdict.

When the verdict has been entered, either side may appeal based on possible errors during the court trial. If no appeal is forthcoming, the process is complete. In this article, I have tried to provide a brief overview of the process of a lawsuit from the time of service to the reading of the verdict. I write from my experience as a healthcare risk manager, having worked with attorneys in the preparation and conduct of malpractice trials.

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