



ANATOMY OF A MEDICAL MALPRACTICE CASE

Facing a lawsuit can be an upsetting and often intimidating process. Coming from the medical environment, you may not have exposure to the complexities of the legal system, and you may have questions about how it works. Added to that, you may also be dealing with emotions ranging from confusion to anger. To help you prepare for what's to come, NORCAL Group offers this Anatomy of a Medical Malpractice Case to provide an overview of the general litigation process as well as recommendations to help you through it. This special report is not a substitute for competent legal counsel. Instead, its goal is to help you gain an understanding of the general process so that you can participate more effectively in your defense.

A medical malpractice lawsuit is a complicated and lengthy process, and every case is unique. It may take several years to resolve and varies by jurisdiction and the complexity of the case. Many of the steps in the process require specific actions under legally imposed time constraints. It's critical, therefore, to have an understanding of the process and follow the instructions of your defense team.*



1. PRE-LITIGATION

How does it generally start?

- › You receive a communication that mentions the possibility of a lawsuit or makes a demand of settlement.
- or -
- › You experience an adverse outcome.

What should you do?

- › Immediately notify your professional liability insurer for guidance.
- › Preserve a complete, unaltered, and locked copy of your medical record for the patient.
- › Maintain all claim-related communication in a separate, locked legal file, not in the medical record, to maintain its confidentiality.
- › Consult with your defense team to determine medical board reporting compliance.
- › If advised to do so by your defense team:
 - Review your medical record to remind yourself of the details of the case.
 - Create a narrative for your legal file with as many details of the case as you can remember while they're fresh in your mind.

Any alteration or destruction of your medical record could greatly harm your defense.

Do not share your legal file with anyone.

What happens next?

- › Maybe nothing, but you should take the above steps to prepare for the possibility of a lawsuit.



2. INITIATION OF THE LAWSUIT

How does it start?

- › The plaintiff files a complaint with the court detailing their case and their allegations.

The deadline for responding is defined by law and often fairly short.

What should you do?

- › Immediately notify your professional liability insurer upon being served with any legal papers.

You may meet separately with your defense counsel and your claims specialist.

What happens next?

- › Your defense counsel files an answer to the complaint with the court.
- › You have an initial meeting with your defense team to discuss the case.
- › You and your defense team identify potential expert witnesses.

*The defense team assigned by your medical professional liability insurer will include your claims specialist and (at the appropriate time) your defense counsel.



3. DISCOVERY

How does it start?

- › Plaintiff and defense counsel request information and documents about the case from the other party.

What should you do?

- › Respond thoroughly and promptly to all requests from your defense counsel.

Prepare to devote as much time and attention as needed to respond to discovery requests.

What happens next?

- › Written questions (interrogatories) that require written responses.
- › Requests for documents, depositions, and independent medical examinations.
- › Your defense counsel may request your input on the interrogatories and seek your input for certain answers.

Your answers are sworn testimony and may be used at trial. It is critical that you devote sufficient time to be as truthful and accurate as possible.

FIRST, DO NO HARM

Don't take any actions or make any statements about the case to anyone outside your defense team. Communication outside your defense team—including responding to online comments and criticisms—is not confidential and can be used against you.



4. MEDIATION & TRIAL

What happens in mediation?

If mediation is mandated by the court or agreed to by the parties, an independent third party attempts to assist the parties in settlement of the case, as appropriate.

If the two parties fail to reach a settlement, the case proceeds to trial.

How will my case be decided?

As a civil action (not a criminal one), the burden of proof is by a preponderance of the evidence (i.e., “more likely than not”). The plaintiff must show, to this standard, that the following four elements exist:

1. **Duty** — A physician-patient relationship existed.
2. **Negligence** — The physician deviated from the standard of care.
3. **Legal Cause** — The physician's negligent act or omission is a factual cause of the patient's injury or damage.
4. **Damages** — A negligent act or omission caused demonstrable injury or damages to the patient.

With few exceptions, the plaintiff must prove both duty and negligence by medical expert testimony. If neither duty nor negligence are proven, the law requires that the jury must find in favor of the defendant.

The jury may also find in favor of a defendant even if there was a breach of the standard of care, if it also finds either that the negligence was not causally related to any injury or that there was, in fact, no injury.

Very few cases make it to this stage or go to trial. Many are dismissed (voluntarily or by defense motion) or settled prior to trial.

NORCAL Group policyholders involved in a medical malpractice claim have access to a range of additional resources, including the *Litigation Support for Healthcare Professionals* educational series and additional litigation support tools. Contact your claims specialist or defense counsel, or call Customer Service at 844.4NORCAL.

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