

# Litigation Stress

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## Synonyms, Key Words, and Related Terms

medical malpractice risk management, physician wellness, medical malpractice stress, malpractice stress syndrome, MSS, medical malpractice litigation stress, medical malpractice stress syndrome, MMS, physician vulnerability, NPDB, National Practitioner Data Bank, physician stress, litigation stress support group, medical risk management, litigation stress management, personal counsel in medical malpractice litigation, litigation coach or counselor

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## Introduction

All practicing physicians are vulnerable to medical malpractice claims. Although for a variety of reasons emergency physicians may feel uniquely vulnerable, they are actually somewhat less vulnerable than colleagues in very high-risk specialties such as obstetrics-gynecology, neurosurgery, or invasive cardiology. Despite the personal assault that is invariably perceived by a physician who is faced with a claim of malpractice, all physicians can, with the appropriate education and support, learn to withstand, to assimilate, and even to grow as a result of the litigation experience.

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## Personal And Professional Impact Of Medical Malpractice Claims

Medical malpractice claims have many adverse effects on physicians. The most widely published expert on the topic, Sara Charles, MD, has found that more than 95% of sued physicians acknowledge some physical and/or emotional reaction.

Physical responses typically include the onset or exacerbation of a physical illness, such as myocardial infarction or peptic ulcer disease. Emotional responses are more common and may range from anger to profound depression or even suicide.

In addition to the significant personal responses to malpractice litigation, a claim may substantially impact a physician's professional life. Sued physicians are more likely to stop seeing patients who seem to have a greater risk of experiencing a bad outcome or of propensity to initiate a suit. These physicians are more likely to consider early retirement and to discourage their own children from entering the medical profession.

After being sued, most physicians begin to keep more meticulous records, order more tests and consultations, and stop performing procedures that may result in complications even when they are appropriate and performed competently. A physician facing a medical malpractice suit may feel or actually be shunned by colleagues or hospital administrators.

Being named in a medical malpractice suit can have other professional consequences. Since 1986, any entity making payments in settlement of a malpractice claim (unless the payment is made by the physician on his own behalf) must report the provider and case details to the National Practitioner Data Bank (NPDB).

Credentialing bodies (eg, hospitals, group practices, licensing authorities) are required by law to query the National Practitioner Data Bank (NPDB) when considering the qualifications of a physician applicant. Although the law is very clear that a report in the data bank should not be taken as evidence of negligence, it is widely considered by plaintiff attorneys and even other physicians and some employers to be just that. Therefore, the existence of such a report can be prejudicial and could result in denial of employment credentials or state licensure.

The only way to avoid data bank reporting when payment is made in settlement of a claim on behalf of the physician is for the physician to pay it personally. Under certain circumstances, however, the group or hospital may settle with the plaintiff on its own behalf. If the physician is dismissed and the dismissal is not a condition of such settlement, he or she may be exempted from reporting to the NPDB.

Many insurers retain the right to settle claims on behalf of their physician insureds, whether or not the claim is meritorious and with or without the consent of the insured physician, because the nuisance value of litigating the case is greater to the insurance company than the settlement demand. This practice can result in monetary settlement for a nonmeritorious claim and mandatory NPDB reporting, which causes great distress to a physician who is not negligent and may even have provided exemplary care.

Some insurers will allow insured physicians the opportunity to influence which details of the malpractice claim are submitted to the data bank. It is important for

physicians to be aware of the details of their liability insurance contract regarding these significant issues.

Regardless of whether a case is settled, adjudicated, or dismissed, the intrusive and repetitive documentation that will be requested regarding all prior cases during every future application for employment, insurance coverage, or licensure can vicariously retraumatize the physician throughout practice life.

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## How To Prevent, Mitigate, And Learn From Malpractice Litigation

### Prevention

Prevention is by far the most effective strategy in mitigating the effects of malpractice claims, because significant stress is engendered the moment notice of a claim is received, and it continues for years, regardless of the outcome.

Most risk management experts agree that effective communication is the most crucial deterrent to malpractice litigation. Components include the following:

- Uninterrupted listening during the critical first 60 seconds of the physician-patient interaction
- Setting up realistic expectations for the interaction
- Sharing responsibility regarding the outcome with the patient, family, and other providers
- Providing time- and action-specific discharge instructions, including the expected time frame for follow-up or recovery
- Providing an opportunity for the patient to ask questions and, where questions cannot be answered or demands met, providing an alternative avenue to address the patient's concerns or to show an empathic understanding of them

These components are taught by the Bayer Institute for Health Care communication (800-800-5907) and can be remembered by the "4 E" mnemonic: we Engage, Empathize, Educate, and Enlist patients in management of their conditions.

Additional actions that may decrease the likelihood of a malpractice claim include complete, legible, and timely documentation of all interactions, maintenance of continuing education and board certification, reading current practice journals, and participating in quality assurance activities.

### Mitigation

Despite the best preventive measures, litigation may nonetheless occur. Physicians preparing to defend a medical malpractice claim must recognize that they will inevitably have emotional reactions. Individuals confronting the litigation process should expect to feel angry, hurt, disappointed, disillusioned, isolated, frustrated, vulnerable, and unjustly singled out.

Guilt is a common response, even if the physician rendered faultless care. Defendant physicians may question their competence or persistence in the profession. They may become ill, withdrawn, or depressed.

Initially, support systems may appear to be scarce. Colleagues or associates may not offer empathy or understanding, particularly if they have not personally experienced a medical malpractice action. The affected medical department or hospital administration may not offer support but, instead, may take an adversarial stance. Even practice partners, family, and friends initially may be incapable of providing support or understanding. All of these groups may harbor the mistaken belief that bad outcomes and malpractice suits only happen when physicians make mistakes.

Several options are available to assist physicians in sharing the burden of defending a medical malpractice suit. Sharing feelings and explaining the basics of such medical cases to family members can help ease the stress for the physician by gaining their support and empathy. Feelings may also be discussed with a counselor. Privileged communications (which cannot be "discovered" by lawyers for the plaintiff) are possible not only with attorneys and spouses but also with priests, ministers, rabbis, psychologists, psychiatrists, or therapists.

The insurance carrier should be notified promptly of any claim or threat of claim, of any contact by an attorney, or of any request for records. This notification is often a condition of insurability, as well as a mechanism of dating claims for coverage. Defendants should plan to participate actively in the case and provide the defense counsel with complete details as promptly as possible. No part of any medical record should ever be concealed or altered.

Defendants should inquire of their counsel about the opposition's deposition and trial tactics, insist on obtaining the best witnesses, assist in answering interrogatories, read the litigation documents, and carefully prepare for their testimony.

Some physicians seek individual coaching to better understand the malpractice process and prepare for depositions and trial. Some practice groups, some liability carriers, and some state medical societies make counseling available to sued physicians, or help to organize support groups of sued physicians.

Hiring personal co-counsel may also be prudent if the award or settlement amount may exceed policy limits or if the insurer's attorney does not appear to be skillful or to represent the best interests of the physician. It is prudent to remember that despite applicable laws, there is an inherent conflict of interest when any third party is paying for physicians' defense. A personal counsel can help the physician in any needed negotiations with the insurance carrier.

A number of useful references and resources are available for physicians undergoing litigation and for those who may be experiencing critical levels of litigation stress, some of which can be found in the bibliography.

After a trial, physician defendants should prepare for each possible outcome even before the verdict is given. They must understand and accept that settlement is not an admission of negligence. The amount of any settlement is not proportional to the degree of culpability (if any) in the case but rather to the relative expense of

litigating the case to its conclusion, the costs incurred by the medical outcome, and emotional factors weighed by the jury.

Unfortunately, even dismissal from a case can never completely remove the stigma or stress of litigation. Litigating a malpractice case typically takes years, and the process may be even more stressful than the outcome if the defendant is not prepared, educated, and supported throughout the case. However, litigation is nonetheless, a survivable learning experience if it is approached as an intellectual, physical, and emotional challenge, which is part and parcel of practice in a high-risk profession.

Prior to settlement of a claim, the physician defendant and his or her attorney should explore whether avoidance of NPDB reporting is possible under the circumstances of the case. Also, with the attorney's assistance, a brief summary of the claim should be created, which usually should include the terms of the judgment, settlement, or dismissal. This document can be submitted for future credentialing and licensing application purposes.

## **Learning**

Regardless of the outcome, successfully confronting a malpractice suit can be a growth experience. The medical or technical knowledge gained from researching and defending the case can often be used to help change the environment and circumstances that may have contributed to the suit (for example, upgrading diagnostic, treatment, or support services available at the hospital, or changing jobs to find a safer or more supportive environment in which to practice).

Successfully coping with significant stress requires physicians to stretch beyond their usual boundaries and capabilities and to learn more effective ways of relating to others. Analyzing and altering negative or abrasive behaviors may improve all facets of life. Neutral third parties, such as a defense attorney, a coach, or a counselor, or court clerks, may provide insight regarding demeanor or habits exhibited by physicians under stress (which may be similar to the behavior that prompted initiation of the suit). Better communication and coping skills can be learned from a coach or therapist who has been consulted because of the stress of the claim process. Physicians may initiate a lifelong program of better care for their physical, emotional, and relational selves when they learn to accept assistance from others under circumstances such as medical malpractice litigation, when it is unavoidable.

A sued physician should consider sharing the experience with others facing litigation or those facing similar serious stresses, such as disciplinary proceedings, divorce, serious illness, or practice dissolution. Physician defendants can and should also be motivated to educate the public regarding the limitations and constraints of emergency medicine and medicine in general.

The practice of medicine includes the constant threat of medical malpractice litigation. Confronted with a claim of medical malpractice, a physician should secure personal support systems as well as the best professional counsel available. Facing a medical malpractice suit is a tremendous challenge in the life of any physician, but successfully negotiating the process enhances physicians' coping skills and may, over the long haul, actually improve physician functioning in every aspect of life.

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## TEST QUESTIONS

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## Further Reading

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## MULTIMEDIA

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## Acknowledgments