



# MEDICAL MALPRACTICE

**Anatomy of an Alabama Lawsuit  
*and*  
How to Cope  
When your Physician Spouse is Sued**

*The Alliance of the Medical  
Association of the State of Alabama*

*And  
The Alabama Physician Health  
Program*

**2004**

*“Yes, it is personal”...at least when it is happening to you!*

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## FOREWARD

This booklet has been produced by the Alliance to the Medical Association of the State of Alabama (AMASA) in partnership with the Alabama Physician Health Program. These organizations understand the immense importance of the family to physician well-being. The life of a physician is filled with many opportunities, meaningful experiences, hard work, service, adventure, and plenty of stress. Increasingly, stress is reaping a devastating effect on many physicians and their families. The physician's family is drastically affected by the physician's work and lifestyle – “for better or worse.” Obtaining and keeping affordable medical malpractice insurance and dealing with malpractice suits has become a significant source of stress for physicians and subsequently for their families.

Statistics show that most physicians can expect to be sued during their career. Furthermore, a malpractice lawsuit can generate one of the highest-ranking stresses in the life of the physician. Both the physician and the family are affected. It would probably be correct to assume that the occurrence of a medical malpractice suit would scare you. That would be normal and natural. Having some knowledge of what is happening can be helpful and ease some of the stress, apprehension and confusion that affect you and your family.

When your spouse is sued, you must realize that the suit will have a tremendous emotional impact. Physicians are trained to use their personal knowledge and skills to care for and heal their patients. Most physicians deeply care about their patients, put the patient's needs first, and are committed to quality care. Physicians, more than most other professions, have their identity dominated by their professional role. When a malpractice claim is filed, physicians usually feel they are being attacked personally. A lawsuit may drastically affect the way they feel about their patients, their competence, and their confidence in making decisions. It will more than likely spill over into their home life. The emotional aspects can be very similar to the grieving process after the death of a loved one.

The goal of this booklet is to help you understand the legal logistics involved in a malpractice suit. If a lawsuit is filed the subsequent malpractice claim may be a part of your life for several years although the intensity of the process may wax and wane.

**This booklet is NOT designed to give legal advice.** Giving legal advice is for the physician's attorney to do. The goal of this booklet is to help familiarize you, the spouse or family member, with what a medical malpractice claim may entail and to suggest actions that will help you cope when a spouse is being sued. We hope that you will take this booklet and use it as a guide to better understand a medical malpractice claim.

*Always remember, this is not the worst thing that could happen in your life –  
It just may feel that way today.*

## Malpractice Stress Syndrome

Gregory E. Skipper, MD, FASAM,

Medical Director, Alabama Physician Health Program

The American Medical Association Board of Trustees has stated, “The biggest cost of suits brought under the malpractice system is the emotional injury that a physician experiences... .”<sup>1</sup> The *American Medical News*<sup>2</sup> reported, “... medical malpractice litigation is one of the most, if not the most, emotionally devastating experiences a physician can have.”

“Malpractice stress syndrome” can occur as a result of being sued.<sup>3</sup> This impacts not only the physician but family members as well, in what can seem to be an interminable process for which none of them are prepared. Symptoms are similar to the stages of grief: denial, anger, bargaining, isolation, depression, and guilt. These can affect both the family and the practice.

Although denial can be a useful defense mechanism to help a physician and their families cope with stress, it has risks. Physicians may delay reporting the claim to the insurance company, pretend that the litigation is not ongoing, and avoid preparing for depositions and trial. The family may also deny that they are worried about the lawsuit and avoid preparing for the prolonged stress.

Physicians may become angry when a suit is filed. “The feeling of impotence and desire to strike back are directly related to the anger phase and require creative and responsible outlets.” Anger may be directed toward oneself, other physicians, medicine, the suing patient (or even patients in general), and the family.<sup>4</sup>

Charles and Kennedy (1985) have provided one of the most definitive studies of the emotional repercussions of malpractice. Many of the physicians surveyed reported isolation (yet very few sought support from peers), negative self-image (in particular feeling misunderstood, defeated or ashamed), development or exacerbation of physical illness, and subsequent depression. Depression may be fostered by the prolonged nature of the litigation, a sense of not being in control, and the associated helplessness that both entail.

The emotional process of undergoing a malpractice suit is associated with guilt. When the physician is served with a malpractice suit, it can signify a type of death – death of the physician’s naïve belief that because he practices good medicine he is immune to this type of legal redress. It signifies the death of the illusion that because he is a physician and is a kind and gentle and moral person, the patients all love him and wouldn’t dare sue

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<sup>1</sup> Midwest Medical Insurance Risk Management Committee (1997), Malpractice: the hidden emotional costs. *South Dakota Journal of Medicine* 50(4):121-123.

<sup>2</sup> Skelly FJ (1994), Scope of stress. *American Medical News* Nov. 7:21-25

<sup>3</sup> Reading EG (1986), The malpractice stress syndrome. *N J Med* 83(5):289-290

<sup>4</sup> Gunter 1990

him.<sup>5</sup> Guilt contributes to shame and a sense of isolation. If staff or family do not know what is happening, they often withdraw, resulting in a perception of lack of support.<sup>6</sup>

Most physicians who go through litigation feel their families suffer as well. Most spouses respond to the suit with a deep sense of loss, financial vulnerability and social awkwardness. Often, physicians do not discuss their feelings with their spouse and family, attempting to shelter them from the stress.<sup>7</sup>

The physician's medical practice can be affected too. The physician may begin to view patients as potential litigants. Some physicians react by ordering extra tests, working longer hours, referring out difficult cases or losing focus. Some may develop burnout. (Burnout is a true syndrome characterized by emotional exhaustion, cynicism and depersonalization (treating people as objects).) They may also have an inability to process grief or losses because of emotional isolation. The sense of trust in the physician-patient relationship may be affected. In addition, rather than guaranteeing more time with patients, a suit may encourage a physician to spend more time with the patient's chart<sup>8</sup>. Physicians may become workaholics to compensate for perceived lack of competence or to prevail over fear of imminent dissolution of their practice.

The impact of malpractice litigation on the physician and the medical family is often overwhelming and difficult to process. In addition to publishing this booklet, AMASA and the Alabama Physician Health Program have teamed up to develop a support program for medical families that are suffering from the stresses of malpractice proceedings. Contact the Alabama Physician Health Program at (334) 954-2596 or e-mail [alabamaphp@usa.net](mailto:alabamaphp@usa.net), or contact AMASA, to learn more about this program, contribute ideas, or to become more involved. If you have experienced a malpractice suit and are willing to be available to assist others please let us know.

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<sup>5</sup> Gunter 1990

<sup>6</sup> Charles, 1986

<sup>7</sup> Midwest Medical Insurance Risk Management Committee, 1997

<sup>8</sup> Patrick, 1988

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# Anatomy of a Lawsuit

*(This section is addressed primarily to the physician for ease of writing; however, many of the points will be important for the spouse to understand the process.)*

## WHAT HAPPENS WHEN A SUIT IS FILED

All legal actions involve many procedural steps. However, the steps in any malpractice claim vary from state to state, jurisdiction to jurisdiction, as well as by the physician's insurance carrier. Many legal terms used in a case may differ from medical terms physicians are familiar with. One term may mean something in the medical context and yet mean something entirely different in the legal context.

Certainly, some medical malpractice cases involve a patient who was not given adequate care. However, in many cases, a medical malpractice claim is brought when the care given was acceptable. Patients or their families may bring claims when there has been an unexpected outcome or complication of treatment. Patients often need a target for their frustration and the physician can become the focus of this frustration or other emotions. In many cases there has been inadequate or poor communication and lack of rapport. Physicians' attempts to collect medical fees have also triggered malpractice claims.

A malpractice lawsuit begins when a disgruntled patient believes that a physician has caused him an injury. (The patient may be a minor and the suit brought by a parent or guardian. The plaintiff may also be the estate in the event the patient is deceased.) The patient then consults an attorney to review the case to see if the attorney thinks the patient has a worthwhile or "legitimate" claim. Because most malpractice plaintiff attorneys work on a contingency basis, their fee is a percentage of what the plaintiff (patient) wins. An attorney will usually only take a case if he feels there is a good chance of receiving a favorable verdict (because the attorney makes no money if the plaintiff loses). The attorney's assessment of the probable outcome may not have anything to do with the medical care given; it may simply be a belief that a bad medical outcome could generate a "sympathy verdict" from a jury. Nor does this mean the attorney believes the case will go to trial. Some cases are settled and never go to trial.

In almost all instances, the patient's attorney will seek a copy of the medical records with a medical release signed by the patient. The plaintiff's lawyer will likely be sending the records to a physician for him to review and issue an opinion as to whether medical malpractice occurred.



## WHAT DOES A PATIENT HAVE TO PROVE IN A MEDICAL MALPRACTICE CASE?

A plaintiff (patient) must prove four things in order to show that a physician committed medical malpractice. These are the legal elements and the terminology is largely legalistic, not medical. A physician does not consciously think about his treatment in these terms.

### 1. **A physician-patient relationship existed and the physician had the duty to provide treatment that met the Standard of Care.**

- A physician-patient relationship existed.

Generally, the physician-patient relationship is a result of a mutual, voluntary agreement. In some cases an agreement may arise when a person is taken to a hospital for emergency treatment. If there are any doubts about a relationship, this question is usually answered by a jury. *This is not where the bulk of litigation is generally concentrated.*

- The physician owed the patient a duty.

Even if a physician is not paid for the services, a duty is owed to a patient once the physician-patient relationship is established. This duty is to provide care to the patient which is consistent with the "Standard of Care." In Alabama, the Standard of Care is defined as that degree of care which a medical professional would generally give under like conditions and similar surrounding circumstances. Some factors which could be considered in this area are:

1. Learning and skill
2. Reasonable care and diligence
3. Keeping abreast of recent medical developments

In other words, did the physician's treatment equal what any other good and competent physician in his field would have done? *This is heavily litigated*, as the patient's attorneys, using experts, will usually try to show that the care given was not what a good competent physician would have done and not the standard of care that should have been given. This point is usually a more significantly contested issue in a case in which clear liability is lacking.

### 2. **There was a "breach of the Standard of Care" and this breach "caused" the injury.**

*Breach of the Standard of Care* is a legal term. Before liability is established, proof must exist that the physician did not give care consistent with the Standard of Care and that injury occurred to the patient as a result.

The Standard of Care (what the physician should have done) is argued using expert witnesses. If a case goes to trial, a witness (generally a physician) will argue that the

physician should have done something differently to adhere to the appropriate Standard of Care.

### 3. Causation

The physician's actions or lack of actions (breach of the Standard of Care) caused the damage to the patient.

**The cause of injury is also heavily litigated. When a case goes to trial there will be an expert witness who is willing to testify that this breach of the Standard of Care caused the patient's injury.** This negligence, or breach, does not have to be the only reason that the injury occurred. It only has to be a substantial factor in producing the injury. The patient's attorney only has to prove "within a reasonable degree of medical certainty" the defendant physician caused the injury. The exact cause of an injury can be difficult to identify. Often an injury will be the result of several contributing factors.

### 4. The patient was damaged or injured.

## PROCEDURAL STEPS IN LITIGATION OF A MEDICAL MALPRACTICE CASE

### Initiation of the Lawsuit:

Once an attorney has decided to take a case, he drafts the complaint against the physician and files it with the clerk of the court. The patient/plaintiff may name more than one defendant in the suit. The physician is then served with a copy of the complaint and a summons to appear before the court to answer the plaintiff's allegations or otherwise answer within a certain time period. This is called *Service of Process* and may be done by a sheriff. It may be the first notice that a physician receives that a patient is bringing a claim.

**The physician must contact his insurer immediately.** At this point, the physician's attorney assigned by his malpractice carrier will become actively involved. The attorney will answer the complaint or file a motion to dismiss. Courts rarely dismiss a complaint based solely on the defendant's Motion to Dismiss. The physician's attorney may also file a motion requesting the patient file a new complaint with a better description of the alleged claim. A failure to respond to the complaint will result in a default judgment against the physician. Therefore, it is imperative that the physician and his attorney strictly adhere to the specified deadlines.

## **Discovery:**

The process of allowing each party to the case to obtain records and information about the case from the other side is called discovery. Once the complaint is answered, both parties begin the process of discovery. This is achieved through the use of interrogatories, requests for production of documents, depositions, and requests for admissions. These tools are used prior to a case going to trial.

The physician's attorney will review the case to see how substantial it is and how defensible it is. The physician needs to be aware that the attorneys are not physicians and will need assistance in reviewing the medical information and in formulating questions for experts. In all cases, the physician should be prepared to teach the attorney what he needs to know in order to be able to defend the case. Once the physician and attorney agree on a defense strategy, the physician should search the literature for any pertinent material and be ready to supply all he can to his attorneys. This is a very important time in developing the strategy that will be used for defense and the physician needs to be involved.

Most importantly, the physician needs to think about the case so that he or she can honestly and candidly answer his attorney's questions.

### **Tools of Discovery:**

1. Interrogatories:  
Interrogatories are written questions that must be answered by the party to whom they are directed. They are usually used to obtain basic information about the case. The answers are binding in a court of law.
2. Document Requests:  
The patient's or physician's attorney asks for documents that are relative to the case. Examples include: patient's medical records, and physician's credentials, hospital privileges and practice history. Not all documents that are requested are necessarily produced.
3. Depositions:  
A deposition is a procedure that is conducted under oath and involves a question-and-answer session of any party or witness. The questions and answers are usually recorded by a court reporter and typed into a booklet form. Each party to the case has a right to be present during depositions of other persons. The physician can be a valuable resource for the attorney in formulating questions and ensuring that enough information is asked and answered by the person being deposed, especially when the witness is another physician or in the medical field. Because the deposition may be used in court, the attorneys will try to commit the party/witness/expert to as many facts and opinions as possible. Involvement in the deposition process will help the physician feel he has some control over getting the information needed to mount his defense.
4. Motions:  
Many types of motions may be made prior to trial. A motion is a request by a party to the trial judge. *Motions in Limine* may be filed to prevent certain

evidence from being introduced at the trial. Motions may be filed to establish procedures that will affect how the trial is conducted, such as a motion to have all the witnesses sequestered so that they do not hear each other's testimony. More often, motions are used to narrow the issues at trial and prevent unrelated or prejudicial information from being admitted into evidence.

### **Pre-trial Conferences and the Pre-trial Order:**

Prior to a trial, most judges will hold a pretrial conference with opposing attorneys. The purpose of this is to help organize the case by determining what motions need to be ruled on, what agreements can be made to narrow the issues for trial, and what procedures can be agreed upon to provide a smoother trial. It is also used to facilitate any settlement discussions. A pretrial order is often prepared by the attorneys for each side to aid the court in narrowing the issues to be tried.

A decision will have to be made whether to try the case or settle, and can be made at any point in the process. Individual insurance policies usually dictate whether the physician has a right to refuse settlement and insist upon a trial. If a decision is made to go to trial the physician must be prepared to testify. Physicians may find this to be the hardest time to stay calm, yet it is the most crucial time of all.

### **Trial:**

- Seating:  
The plaintiff is always seated closest to the jury.
- Jury Selection:  
During a procedure called *voir dire* questions are asked of the potential jury members to determine if there are any reasons the person should not serve, such as preconceived ideas against physicians or people who sue, friendship or business ties to a party or attorney or whether the plaintiff's present condition would cause the juror to automatically want to find for the plaintiff.
- Opening Statements:  
At this point, the attorneys present what they believe the evidence will be during trial. The plaintiff's attorney goes first. The defendant's attorney usually gives his opening statement immediately after the plaintiff's. Opening statements are not a time for the attorneys to argue the case but rather to make a statement of what they intend to prove during the trial.
- Plaintiff's Case:  
The plaintiff always presents his case first. The plaintiff's attorney calls his witnesses and experts to try to prove that the physician was negligent and that the negligence was the cause of the plaintiff's injury. The plaintiff's attorney may call the physician defendant and attempt to show that the physician did not follow the standard of care. The defendant's attorney has the right to cross-examine any of the

witnesses the plaintiff's attorney calls to give evidence during the plaintiff's case. After cross examination, the plaintiff's attorney may again ask questions to rebut or rehabilitate the witness's answers.

- Defendant's Case:

The physician's attorney will present the physician's case after the plaintiff has "rested" his case. At this point the physician's attorney has the opportunity to allow the physician to tell his story. The physician's experts will be called at this time as well as any other witnesses for the defense. The defendant physician will in essence teach the jury about the medical issues involved in the case. At this point in the case, the defense attorneys will present evidence explaining why the physician did not breach the Standard of Care, or the physician's actions did not cause the injury.

- Rebuttal:

After both sides have given their evidence, the plaintiff's attorney may offer additional evidence to contradict specific portions of the defendant's evidence.

- Closing Arguments:

Generally, the plaintiff has the right to give his closing argument first and then after the defendant's closing argument, may give rebuttal. The closing argument is the final statement or "summing up" of the case by each attorney to the jury. Each attorney will use persuasive arguments to show how he has established and proven the evidence of his case.

- Jury Instructions:

Before the jury is sent to reach its verdict, the judge will instruct the jury as to the law which they are to apply to the case. This is called the reading of the charges. The jury will decide what happened or what the facts are, then apply the law to those facts, and determine the outcome of the case.

## **THE ROLE OF THE PHYSICIAN**

- Be A Teacher:

The physician, of course, is the primary player in the defense of a medical malpractice suit. The physician must take an active role as a teacher. The attorney must learn enough of the medical background and process in order to provide the best defense possible.

Most attorneys will need information on why the physician acted as he did. Once the physician and attorney agree on a defense strategy, the physician may need to research, review and provide as much documentation as possible from the existing medical periodicals, specialty journal articles, textbooks and studies in the particular field of medicine concerned. This is where the physician's attorney can help to guide the physician in formulating answers

for questions that cannot be given in black and white terms. The physician also needs to be able to defend why he may have chosen one course of treatment rather than another available under the circumstances. By providing this information, the attorney will be able to formulate not only the arguments he needs, but also identify the areas of expertise in the form of expert witnesses needed to rebut opposing arguments.

- Be Prepared to be Deposed:

The physician will be deposed. It is important that his attorney prepare him for this. There are many ways to help prepare the physician for this action.

Following are some guidelines for physicians giving depositions.

***Guidelines for Depositions:***

1. Thou shalt not bear false witness. A physician who tells the truth can always be defended.
2. Understand the question. Attorneys are well known for asking confusing, compound questions. Sometimes they do not understand their own question, but hope the physician will. Ask them to repeat or rephrase a question that does not make sense.
3. Answer the question that is asked but do not volunteer information that is not asked; you will open up new lines of questioning. It is important not only to give a truthful answer, but a complete one. Therefore, don't hesitate to explain an answer if completeness requires it. Sometimes "yes" or "no" is just not enough. Be truthful; be complete... and then be quiet.
4. Take your time. This will help you to concentrate on listening to the question that is asked and to answer in a coherent, controlled fashion.
5. Stop talking when you have answered the question. After you have answered the question, the plaintiff's attorney may stare at you, waiting for more. Do not fill the uncomfortable silence with volunteered, unnecessary information.
6. Prepare for your testimony. Your deposition will be taken down by the court reporter and prepared into a booklet. You will be cross-examined from that booklet at trial. The more you know about the case and particulars of the treatment, the better off you will appear in court. Above all else, follow your attorney's advice in both preparation and the deposition. You are the medical expert, but the attorney is the legal expert.
7. Thou shalt not argue. If you feel an attorney is arguing with you, your attorney should object.
8. Control your temper. Don't be arrogant.
9. Minimize the use of medical jargon when you can and whenever possible, keep it simple.
10. You are ultimately in control of your own deposition. If you feel that you are losing your temper or cannot concentrate, ask to take a break and excuse yourself.

- Be Your Own Advocate:

In addition to being concerned with your own deposition, you may want to be present at some or all of other depositions taken in preparation for your trial. Your attorney will report to you on the substance of all depositions that are taken.

Even though the purpose of the physician's attorney is to be the physician's advocate in the proceedings, the truth is that the physician shouldn't rely solely on his attorneys; he needs to be his own active advocate. It is important that the physician look out for his own interests. The physician should get to know his insurance appointed attorney well and if he is not totally comfortable with this attorney should insist on having another attorney appointed to his case.

The physician should be actively involved in the trial as well. The physician should pay close attention to all prospective jurors and be involved in the jury selection process. The attorney J. B. Spencer (sometimes referred to as the "father of Florida medical malpractice litigation") is quoted as saying, "When you pick a good jury, the case is 90 percent won." This indicates how important this process is to the outcome of the case. The physician should be totally attentive during the trial and keep the attorney properly informed when witnesses for the plaintiff either stray from the facts or from accepted medical practices.

- Consider Hiring Your Own Attorney:

No one enjoys paying legal fees. However, the physician should consider engaging (at his own expense) the services of his own personal attorney for support, observation of court preparation and/or consultation during the trial, especially if there is a chance that the jury will return a verdict in excess of his policy limits. The attorney hired by your insurer usually will inform you if this is a possibility. The law recognizes that the interests of the physician and his own insurance carrier are not always the same and the physician may want to hire his own attorney to advise him of these issues. This can be particularly important in protecting the personal assets of the physician and his family.

- Be Sympathetic to the Jury in Court:

The physician needs to make eye contact with the jury. He is in essence telling his story, or teaching them about the case. The jury needs to feel that the physician cares. His demeanor is very important. He needs to stay calm.

The proper professional appearance is important from the time you or your spouse arrives in the parking lot to the time you leave. Discuss issues of dress, transportation and the like with your attorney.

Typically, six or 12 jurors will hear a medical malpractice case. At all times, no matter what may be going on in the courtroom, one of them is looking at the physician and forming opinions about that physician. Act accordingly.

# COPING AT HOME

## PHYSICIAN'S STRESS SYMPTOMS

If your spouse is sued, you must realize that the suit will have a tremendous emotional impact. Physicians are trained to use their personal knowledge and skills to care for and heal their patients. When a malpractice claim is filed, physicians may feel they are being attacked personally. A lawsuit may affect the way they feel about their patients, their competence and their confidence in making decisions. Self doubt and “what ifs” inevitably accompany any tragic outcomes.

The stress that occurs when a physician is sued can cause emotional and behavioral changes, including:

- Denial;
- Anger at being sued;
- Frustration at the slow workings of the legal system and having to work within the framework of a system that is foreign to them. Physicians are used to being in charge and this is a situation out of their control;
- Fear about the loss of public and personal image, prestige in the medical community, financial security;
- Irritability and anxiety;
- Embarrassment and shame;
- Withdrawal from one's family and social activities;
- Emotional distancing from patients and colleagues;
- Difficulty practicing medicine – Because a claim of malpractice affects confidence, concentration and even ability to make decisions, physicians may find it difficult to care for patients in their usual manner; and
- Physical symptoms such as insomnia, fatigue, gastrointestinal symptoms, and headaches and/or sexual dysfunction.
- Excessive alcohol use or drug use.

This stress affects not just the physician but you and your family as well. Since the physician may feel shame and embarrassment because of the suit, it may be very difficult to discuss openly and may lead to family members denying feeling any effects from the situation. As a result, family members may feel very isolated. Your attorneys may advise you not to discuss the details of the case, leading to even greater feelings of isolation and depression.

**What can you as the physician's spouse do to alleviate this strain on your spouse and family?** Some of the following ideas may be helpful to you:

- Be knowledgeable. Educate yourself about malpractice claims, legal proceedings and your options. The more you know, the more you'll be able to help.



- Be supportive. Now, more than ever, your spouse needs the help of someone who believes in him. Be reassuring throughout the legal process.
- Communicate and encourage your spouse to communicate with you. It may not be easy for your spouse to talk about what's happening. You need to encourage communication so that you stay in touch with each other's concerns. At the appropriate time and place, ask questions about the case and initiate discussions about feelings and emotions.
- Talk to the family. Family members (including your children) may hear about the case from friends, especially if you live in a small town. Do not discuss the particulars of the case. Just tell them there is a legal matter in process and warn them if there may be publicity or negative reactions from others. When talking with other family members and/or friends, keep the discussion of the situation to a minimum. Your attorney will provide guidelines as to what may be said in public.
- Do not be afraid to tell your children that this is a serious matter and that Dad or Mom may not act as he or she normally would because of stress. Tell them that you expect a positive outcome, and that their own lives will be affected only minimally. Keep in mind that your spouse may not be the best person to talk with the children and family because of the emotional and self-esteem issues involved.
- Seek support for yourself. Just as your spouse feels anger, frustration, and depression, you may, too. The solution is the same for both of you. Talk to your peers – other physicians' spouses, either informally or in groups. Contact the physician health program or the medical alliance, either locally or at the state level. You can be referred to an existing support group or a support group can be specifically developed for you with two or more other spouses who have gone through a law suit and have volunteered to be helpful. If there is no such group available for you, or if you prefer, consider speaking with a professional to help you deal with your feelings.
- Use caution in talking with patients. Follow your spouse's attorney's advice in this area because what you say can be used in court. When patients ask about the case, be positive but say as little as possible.
- Encourage your spouse to work with his or her attorney on the defense. They will need help to successfully defend the case and being involved may help to make the physician feel more in control and help to relieve stress.
- Participate in your spouse's defense when possible. Your presence and support at the trial can be very helpful if your spouse and attorney agree you should attend. Keep in mind that your appearance and your demeanor can make an impression on the jury – how you look, what you wear, how you carry yourself. You want to be sure that you don't attract attention to matters that are unrelated to the case.
- Seek psychiatric help immediately if your spouse's symptoms of depression and anxiety are severe, especially if there is a risk of suicide.

Your emotional support and positive reassurance are vital to your spouse's wellbeing throughout this situation. The impact of malpractice litigation on the physician is real and long lasting. Sharing the experience can help to alleviate the stress for you, your spouse and your family.

## THE ROLE OF THE PHYSICIAN'S SPOUSE

- Be a Counselor and Personal Cheerleader:

Because a physician's statements concerning a case are potentially admissible against him in a trial, he does not have the outlet most other people have in discussing things that happen in his job. He cannot discuss specifics with his physician partners, peers, or even family (other than his spouse ) because these individuals can be called to testify against the physician and forced to reveal what the physician may have said to them. In the state of Alabama, communications between a husband and wife are confidential. That means that a spouse cannot be forced to disclose such information. He can talk to you!

It cannot be stressed enough that it will be helpful to your spouse for you to listen. If your spouse will take time to teach you about the suit and the medical position he used, you will both benefit. You can also help by asking questions that can aid your spouse in preparing how to speak to a jury. The more he practices, the more relaxed and less confrontational the exchange becomes. Practicing helps explain the sequence of events. The jury wants to understand, but unfortunately, the jury is not a physician's peer group in terms of medical knowledge. If you do not understand something, a jury won't either.

Not all physicians want to talk about the suit to their spouse. If you are fearful and overreact to discussions about the suit, your husband may not want to discuss the case with you. Some people involved in a situation like this, admittedly, become severely depressed or anxious. It is imperative that you seek help if this is overwhelming to you. There is nothing shameful in this. Stigmas have been attached not only to medical malpractice suits, but also to seeking the professional help that is a part of medicine. If depression and psychological illness were not facts of life, we would not need physicians.

Take some time to enjoy yourselves – a weekend away. If you have children, they may see the increased tension at home. Try to keep their schedule as normal as possible.

- Be an Asset in Court:

Just like your physician spouse, your demeanor in court is very important. You need to appear calm. You must strive to not appear arrogant or angry.

*Be Seen, Not Heard:*

Watch what you say, even in the restrooms. Jurors or potential jurors may be in there. Many things spoken may be misinterpreted or even cause for a mistrial.

You may want to bring a support person to sit with you, such as a parent, sibling or friend. Don't talk or whisper while court is in session. If you need to say something, write it down.

*Body Language:*

Facial expressions are hard to control. However, maintaining your composure is important at all times during trial.

Hearing someone “speak badly about” your spouse is very difficult. Remember, your spouse will get to explain his reasoning and logic. His experts will get to testify. There really isn’t any way to prepare yourself or your spouse for testimony presented by the other side. This is one time that eye contact with your spouse and a smile will help carry him through this trial. Just don’t go overboard. Be subtle.

If you have to leave during the trial, do so as unobtrusively as possible. You don’t want to call attention to yourself.

- Be an Asset Outside the Courtroom

Make time to have lunch with your spouse. He needs your support. He may want to go over something with you that helps clarify things in his own mind.

During the trial itself, you and your spouse will be very tired at the end of the day. Rather than have to go home and prepare dinner, if possible, go out to eat. If this is not possible, have easy meals already prepared. Perhaps a family member or support group can help out.

Taking away all your fears is impossible. However, some fear is a good and healthy phenomenon, as in the saying: “Fight or Flight.” During this time, you also want to keep your sense of humor. Laughter is not called ‘the best medicine’ for nothing. The case itself might provide some humor, if you look hard enough. It is okay to laugh outside the courtroom; it can ease the tension.

“Children need to be... encouraged to discuss their feelings about the suit. If these fears and worries are brought out into the light, they can usually be dispelled.” It is best that children not learn about the malpractice suit from the media or hearsay. Anticipating their emotional reactions and validating them as normal responses can mitigate their pain and alleviate isolation (Eisenberg, 1987). Believe it or not, all young children tend to blame themselves for every problem in the home, real or imagined.

## **COPING WITH CHILDREN'S FEAR**

This can be a very difficult time for children as well as for the parents. The following are some tips for helping them cope as well.

- Maintain family traditions like holidays and birthdays, even if you don't feel like celebrating. Try not to become too preoccupied with your own concerns and anxieties.
- It is important to take care of yourself, both emotionally and physically, so that you can be there for your children. Be aware of your own stress level, and if you are feeling overwhelmed, seek support from family, friends, spiritual counselors and, if necessary, a health professional.
- Remember that children are very perceptive of adults' behavior and emotional responses. Children see and perceive more than you may think and are very sensitive to your fears and anxieties. As previously mentioned children tend to blame themselves for every problem in the home, real or imagined. While it's okay to admit your concerns in front of the children, be sure to emphasize your ability to cope and that it's not their fault. Be mindful of what you say and do, and if possible, minimize children's exposure to conversation truly meant for adults.
- It's not always possible to accurately gauge when children are feeling scared or worried. Be alert to clues such as your child's expressions, play activities or angry outbursts, which may signal a child's unspoken need to talk. Watch for dramatic behavior changes. While it is normal for a child to express feelings of anger, fear or sadness after a crisis, if these feelings persist or get worse over time, there's no shame in contacting a mental health professional.
- Monitor your child's exposure to media coverage. If children see information about the case on television, watch it with them and talk to them afterwards to clarify any misunderstandings.
- Reassure your children. Remind them that they are precious to you and that you are taking every precaution to keep them safe.

# FREQUENTLY ASKED QUESTIONS

## *Is there a limit on the time in which a patient can sue a physician? Is it different for children?*

As a general rule there is a two-year statute of limitations for medical malpractice actions in Alabama. Usually the two-year time period begins to run from the date of the act or omission giving rise to the claim. However, case law has modified the statute to allow some patients to bring a claim outside the two-year statute of limitations, such as in cases in which foreign objects were left in the body.

Generally, the limitation of time in which a medical liability action can be brought on behalf of a child extends until the child reaches the age of eight.

Use these as rough guidelines. The statute of limitations is actually more complex than can be adequately discussed here.

## *How long is the case going to take from the filing of complaints to resolutions?*

Most cases take from one to four years to be resolved. The time involved varies substantially depending upon the county where the suit is brought, the diligence of the patient's attorney, and whether appellate proceedings are involved. Very few cases are resolved in less than one year after suit is filed. In some cases involving appeal, more than four years may pass before resolution of the case.

## *How are attorneys appointed? Who pays the attorneys? Do I have a choice of counsel?*

Attorneys are hired by the insurance company to defend the physician in fulfillment of the company's responsibility under the professional liability policy. The insurance company pays the attorney. Insurance companies choose attorneys based on their experience and competence in handling medical liability matters. A physician's preferences may be considered with regard to choice of law firm or attorney, however, the physician has no right to choose unilaterally which law firm is hired by the insurance company to defend him. In addition, once a case is assigned to a particular firm, the decision as to which attorney in that firm will handle the case is often made by the attorneys in that firm. As mentioned above, a physician is always entitled to retain an attorney independently to represent him on a case, at his own expense, even when the insurance company has appointed other counsel.

## *How are expert witnesses found?*

Expert witnesses are obtained by either side in a variety of ways. Normally, treating physicians involved in the care of the patient are consulted and may serve as experts in the case. Plaintiff's counsel will often seek to obtain expert witnesses through witness finding or referral services. These services are designed to put plaintiffs' counsel in touch with physicians who are willing to evaluate a case and to testify against a physician if they believe there is malpractice.

## *What about settling the case out of court? Who decides if it can be settled?*

Most cases are finally resolved short of trial. Settlement may occur at any time in the course of litigation, before suit is actually filed, or even while the case is on appeal. Many cases are resolved short of trial by court order, such as when a case is dismissed based on motions made by one side or the other.

The decision to settle is typically controlled by the insurance contract. Ideally, it would occur as the result of discussion and evaluation of the case by the defendant physician, his attorneys, and representatives from the insurance company. Many insurance contracts provide that the insurer can settle the case even over the defendant physician's wishes. Rules under state and federal law require the reporting of settlements. These should be carefully considered in deciding whether to settle a medical malpractice case.

***If my spouse is in a medical group, how does a case affect the group?***

Financially, the effect on a group depends to some extent upon the legal structure of the group. Sometimes both the group and individual physicians will be named as defendants.

***How and why should partners or colleagues be involved and informed about a suit?***

The defendant physician must decide whether to inform anyone other than members of his professional corporation or partnership about the suit. Because of the potential for liability against other partners or the professional corporation, they should be informed about a suit brought against a member of the group.

Because the statements of a physician concerning a case are potentially admissible against him in a trial, *his conversation with partners, colleagues, or family other than his spouse should be carefully considered*. He should seek specific advice from his attorney on this question.

***Does my spouse have liability if a physician covering him or her is negligent?***

The law recognizes that physicians cannot be on duty 24 hours a day, seven days a week. Generally, a physician is not liable for the treatment and care of another physician who is taking calls for him or covering his patients while he is attending to matters elsewhere, unless the covering physician is an employee of the sued physician (which is rare) or there is some other independent medical malpractice liability.

In addition, a physician generally must convey sufficient information to the covering physician so that the covering physician has an adequate basis to make decisions regarding the patient's care.

***Is the spouse liable for any judgment against the physician?***

If the marriage relationship is the only legal relationship between the physician and the spouse, then the spouse is not liable for a malpractice judgment against the physician. Only the physician is liable. However, if there is a judgment in excess of policy limits, and property or

funds are jointly owned by spouse and physician, that property may be used to satisfy the judgment. For additional information, talk with your attorney.

***What happens if there isn't enough insurance; can we lose our home?***

A physician is personally liable for his acts of negligence. If he is adjudged to be liable and the damages assessed are in excess of any liability insurance coverage, then he is responsible for the additional amounts. These personal assets could include the physician's home or other real property. However, in Alabama, legal provisions are in place to protect a physician's retirement fund.

***Should personal assets be put in the spouse's name to protect them from a lawsuit against the physician?***

If the physician obtains adequate amounts of professional liability insurance, there is no need to juggle the title to assets. Such a move can be looked upon adversely, and there may be state and federal tax consequences. In addition, if it can be proven that the transfer was made to avoid paying a judgment, the transfer may be voided. Any such decision should be made in careful consideration of the state and federal tax consequences. These issues are complex and specific legal advice should be sought.

***Is it advisable to change insurance companies in the middle of a lawsuit?***

If a physician is considering changing insurance companies and there is a claim or suit pending against him, he should consult his attorney to determine if the proposed change of insurers would have any effect on the defense of a claim or a suit. Generally, it will not affect the manner in which any claim is evaluated or defended.

If there are potential claims against him that have not yet been filed, then it is important for the physician to obtain legal advice before changing insurance companies, especially if he is considering changing from an occurrence to a claims-made policy or vice versa.

***What about filing of claims after a physician has died? Can an estate have a claim filed against it?***

The estate of a deceased physician can be sued after the physician's death if the claim has not expired under the statute of limitations.

## TAKING THE MYSTERY OUT OF LEGAL TERMS

- **Allegation** – The assertion, claim or statement of a party to an action, made in a pleading, setting out what he expects to prove.
- **Answer** – The written response to a complaint.
- **Causation** – The existence of a connection between an action or omission of the defendant and the injury suffered by the plaintiff. Causation is a critical element in establishing a negligence claim. The other elements are duty, breach and injury.
- **Complaint** – The formal allegation of charges; the statement by the plaintiff of what he undertakes to prove.
- **Contingency Fee** – A fee arrangement in which the plaintiff's attorney agrees to accept his fee on the contingency of a successful outcome.
- **Cross Examination** – The questioning of a witness in a trial, or in the taking of a deposition, by the party opposed to the one who called or produced the witness, concerning matters about which the witness has testified during direct examination.
- **Damages** – Injury of person or property giving rise to a person's right to be compensated for those injuries.
- **Defendant** – The person being sued.
- **Deposition** – A pretrial discovery procedure conducted under oath that involves a question and answer session of any party or possible witness. The person whose deposition is being taken is called the deponent.
- **Direct Examination** – The initial questioning of a witness by the party who called the witness.
- **Directed Verdict** – Ruling by the judge, without jury consideration, that as a matter of law and based on the facts, the verdict must be in favor of a particular party.
- **Discovery** – The pretrial activities in which participants try to learn evidence known to the opposing party. This includes interrogatories and depositions.
- **Duty** – Breach of duty is one of the elements required to establish negligence.
- **Expert Witness** – Person who has special training, knowledge, skill, or experience in an area relevant to resolution of the legal dispute, that is beyond the average person's knowledge, and who is allowed to offer an opinion as testimony in court.
- **Hearsay** – An out of court statement by another, outside a witness's personal knowledge, offered to prove the truth of the matter asserted. Hearsay is generally inadmissible because it relies on the truth and veracity of outside persons not present for cross-examination. Some exceptions apply.
- **High/Low Agreement** – An agreement by both parties to contain plaintiff's recovery to a minimum and maximum amount. Typically, the low dollar amount will be given to the plaintiff even if no monetary amount is awarded. The high dollar amount is the most that the plaintiff will be given by the defendant even if a larger amount is awarded.
- **Impeachment of a Witness** – An attack on the credibility of a witness.
- **Interrogatory** – A written question required to be answered under direction of a court.
- **Judgment** – A formal decision given by a court.
- **Malpractice** – Failure to meet a required professional standard of care, which results in harm to another.



- **National Practitioners Data Bank (NPDB)** – A national databank maintained by a Division of the U.S. Dept. of Health and Human Services under federal law. This law requires, among other things, reporting to the databank all physicians for whom claims payments by insurance companies, regardless of dollar amount, have been made. Some disciplinary acts by a credentialing group, such as hospitals, or Regulatory Licensing Boards must also be reported to the NPDB. The NPDB information is not available to the public or to plaintiffs’ attorneys. Its purpose is only for credentialing and most credentialing authorities are required to query the databank before privileges are granted. In Alabama reporting of professional liability claims payments to the Board of Medical Examiners is also required.
- **Negligence** – An allegation that the standard of care has been breached or that duty has been breached, causing injury to another. This is the most frequent allegation in a malpractice claim.
- **Objection** – The act of taking exception to some statement or procedure in trial. Used to call the court’s attention to improper evidence or procedure.
- **Perjury** – Willful giving of false testimony under oath.
- **Plaintiff** – One who commences a personal action or lawsuit to obtain remedy for any injury to his or her rights; the complaining party in litigation.
- **Settlement** – An agreement by the parties involved which terminates the litigation, based on circumstances they find mutually satisfactory. A settlement does not determine negligence; it only resolves the case.
- **Spousal Immunity** – In Alabama, private communications between the spouses occurring during the marriage are privileged and not admissible in trial.
- **Standard of Care** – Under this standard, a physician will be liable for failure to adhere to those standards of care exercised by reasonably prudent physicians with the same degree of skill and expertise in the same or similar circumstances.
- **Statute of Limitations** – A statute assigning a certain time within which a lawsuit must be filed.
- **Subpoena** – A court order requiring a person to appear to give testimony or produce documents.
- **Summons** – A formal court document that accompanies the complaint, saying that the defendant is required to answer and appear in court.
- **Tort Law** – The law of a state under which malpractice claims are decided.
- **Umbrella Policy** – Form of insurance protection against losses in excess of the amount covered by other liability policies.
- **Verdict** – The finding or decision of a jury/judge on the matter submitted to it in trial.
- **Vicarious Liability** – Indirect legal responsibility; for example, the liability of an employer for the acts of an employee.

## RESOURCES FOR MORE INFORMATION

American Medical Association and National Health Lawyers Association; Physician's Survival Guide: Legal Pitfalls and Solutions; American Medical Association and National Health Lawyers Association; Chicago, IL; 1991.

American Medical Association Auxiliary, Inc.; *What Every Physician's Spouse Should Know... Professional Liability*; American Medical Association Auxiliary, Inc.; Chicago, IL; 1990.

Charles SC (1986), Malpractice litigation and its impact on physicians. *Curr Psychiatr Ther* 23:173-180.

Charles SC, Kennedy E (1985), *Defendant: A Psychiatrist on Trial for Medical Malpractice: An Episode in America's Hidden Health Care Crisis*. New York: Free Press.

Danner, Douglas; When Bad Things Happen to Good Doctors: A Malpractice Primer; Clark Boardman Callaghan; 1996.

Eisenberg H (1987), Malpractice suits are a family affair. *Medical Economics* 64:1-6.

Gunter LM (1990), The five stages of dying in a malpractice suit. *Texas Medicine* 86(12):50-53.

Horowitz MJ, Siegel B, Holen A et al. (1997), Diagnostic criteria for complicated grief disorder. *Am J Psychiatry* 154(7):904-910.

Midwest Medical Insurance Risk Management Committee (1997), Malpractice: the hidden emotional costs. *South Dakota Journal of Medicine* 50(4):121-123.

Moore, Thomas A. and Kramer, Daniel; Medical Malpractice: Discovery and Trial; Practising Law Institute; New York, NY; 1990.

Patrick GB (1988), Small deaths. *ACMS Bulletin* 77(12):1303-1306 [editorial].

Patterson, Richard M.; Harney's Medical Malpractice; Lexis Law Publishing; Charlottesville, VA; 2001.

Reading EG (1986), The malpractice stress syndrome. *N J Med* 83(5):289-290.

Simos BG (1979), *A Time to Grieve: Loss as a Universal Human Experience*. New York: Family Service Association of America.

Skelly FJ (1994), Scope of stress. *American Medical News* Nov. 7:21-25.

It is our sincere hope that this booklet has been helpful to you. Please submit feedback suggestions or comments to: [alabamaphp@usa.net](mailto:alabamaphp@usa.net) or by writing or calling the Alabama Physician Health Program, 19 S. Jackson St., Montgomery, AL 36102, (334) 954-2596.

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