



# how to

## **SURVIVE A MEDICAL MALPRACTICE LAWSUIT**

the physician's road map for success

Ilene R. Brenner MD

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# How to Survive a Medical Malpractice Lawsuit

# **How to survive a medical malpractice lawsuit**

**The physician's road map  
for success**

**Ilene R. Brenner, MD**

Board Certified Emergency Physician  
and Adjunct Professor  
Nell Hodgson School of Nursing at Emory University  
Atlanta, GA, USA

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# ***Foreword***

I will never forget that thanksgiving as long as I live. We had just offered our heartfelt thanks to God for a wonderful year when the doorbell rang. To my surprise, standing at the door in a blinding storm was a deputy sheriff. I thought, what would bring you out on a night like this? There must have been a burglary in the neighborhood. Then he handed me the letter, shook his head, and said, "I'm really sorry doctor to do this to you on Thanksgiving. It's just my job." I did not understand his apology until I saw the return address on the letter. It was a law firm. And I was being sued. I returned to the table and tried to act as if it was nothing. But I could not eat. My whole world, as well as my stomach, was turned upside down.

Every physician who has ever been sued, and that is most of us, knows that feeling of loss, frustration, and bewilderment. It is in that moment that you want someone to help you, to give you some practical advice, to hold your hand. Ilene Brenner has done just that in a professional way with a very personal approach.

There are quite a number of books on how to avoid getting sued. Some will help you to be a better clinician, improve your documentation, and communicate more effectively; all skills that will lower your chances of ever being sued. But as most of us know, litigation, like lightening, can never be predicted very accurately. You practice the best medicine you know how. You document your charts with compulsive detail. You treat your patients like they are your own family. But then something happens, and there is a bad outcome. And the patient looks around for someone to blame and you get sued. Then the question becomes, what do you do when lightening strikes?

As the editor-in-chief of *Emergency Physician's Monthly*, a publication read by over 40,000 emergency physicians across the nation, I work constantly, in various ways to help emergency physicians avoid litigation, prepare for litigation, and to recover from litigation. I have been on both sides of the fence. In addition to being a physician, I am also an attorney and the former medical legal editor of *Emergency Department Law*. I have been sued, and I have helped prepare fellow physicians to defend themselves. So when I read the first submission of Dr. Brenner on the topic of *How to Survive a Malpractice Suit*, it was clear that she knew what she was talking about. Her style was at once very intimate and personal. She gains your confidence with her honesty. Then she walks you through the practical steps that you needed to take to properly defend yourself, your practice, your property, and your sense of self. Her advice is not just personal, it is very practical.

The financial burden of medical malpractice lawsuits is well known to most Americans, especially those of us who are the targets of that litigation. Fear of being sued is the number one cause of over testing and over treating patients and may account for, in the estimate of some economists, up to a quarter of our nation's overall healthcare spending. Furthermore, although physicians win the overwhelming majority of cases brought against them, as the amounts of awards have skyrocketed, insurance premiums have risen as well, driving many physicians out of practice. The financial burden of litigation is felt throughout the system. But what about the impact on the physicians themselves?

Once named in a suit, even if you are only peripherally involved, it may take years to clear your name or resolve the suit. In the interim, they do not know how, let alone if, they will survive. Lawyers representing their physician clients do not have or do not take the time to hold their clients by the hand. Maybe it is the natural aversion of

doctors for lawyers and vice versa. Whatever, it just does not happen very often. The physicians feel left alone with no one who understands them, no one to answer the detail questions about how, when, where, and sometimes even why. That is when you really wish you had a malpractice defense lawyer in the family. Dr. Brenner did.

When Dr. Brenner was served with a suit for medical negligence, in addition to her legal counsel, she turned to a trusted friend, her father, who just happened to be a seasoned medical malpractice trial attorney. Between her paid counsel and her “family lawyer,” she was able to get answers for the little detail questions that get overlooked and only thought of after the appointment with your attorney. Moreover, she was able to ask about the nuance of the personal side of litigation. The combination made for an intimate yet useful guide.

When it is all said and done, no one can completely prevent a physician from exposure to malpractice litigation. Bad outcomes occur. We may even ask ourselves whether we would have taken a different course had we been able to see the future. Moreover, nothing can insulate a physician from the shock of being sued by the one you attempted to help. But when it does occur, it is really useful to have a guide who can walk you through the experience. Dr. Brenner offers practical advice in a way that allows you to trust her. The wise person will take the advice and be better prepared to weather the storm.

Mark Plaster, MD, JD

# ***Introduction***

Approximately 80 billion dollars are spent every year by physicians as a result of their practice of defensive medicine. They order extra tests, do additional procedures, and prescribe superfluous antibiotics. Why would well-trained physicians practice this way? They are hoping that their thoroughness will stave off any potential lawsuits.

For most physicians, medicine is more than a vocation; it is a calling. These highly intelligent people sacrifice the best years of their lives to work 100+ hour weeks at less than minimum wage. Most doctors would tell you that the reason they decided to go through all this time and trouble, at extreme sacrifice on both personal and financial levels, was out of an idealistic intent to help sick people become well.

Having a multiyear apprenticeship in residency training does create physicians who are both competent and confident in their practice of medicine. However, with board certification and yearly re-certifications, on top of the required continuing medical education (CME) courses, and reading scores of articles and journals, the training never really ends.

In fact, the core identity of most physicians is indelibly imprinted with the field of medicine. Unlike many other professions where people can leave their job at work, a doctor is always a doctor (any physician who has answered the call at a restaurant or on an airplane knows exactly what I mean). It is for this reason that physicians are uniquely vulnerable to a medical malpractice lawsuit; in both a literal and a psychological sense.

The long road to become a physician prevents most from getting expertise that would enable them to seek another vocation; few have the skill set to even work as a secretary.

And fewer have the ability to work in another career where they could earn a salary commensurate with their current income. Physicians have committed their lives, and their livelihood, to the practice of medicine. When something like a lawsuit threatens to derail their future in the only profession in which they have skills and passion, they panic; which is understandable since an unfavorable result can do irreparable harm to their career.

Every doctor seeks to avoid getting sued, but few doctors know what to do once it happens. Risk management courses abound, but they are not mandatory and relatively few doctors attend. Despite the information in these courses, there is still a surprising dearth of information when it comes to what happens AFTER you get sued.

Although doctors spend years in learning the language of medicine, few have any familiarity with the legal profession beyond what they see on television. A very small percentage of the education of physicians includes the legal aspects of medicine. Much of these hours are dedicated to government regulations such as EMTALA and HIPAA, and the defensive practice of medicine. Little if any attention is given to the legal process in a medical malpractice lawsuit. And this is why, when first served with papers declaring a complaint against them by one of their patients, physicians are completely unprepared for the crucial moments that follow.

Fortunately for me, I won my case in a jury trial, and I learned many lessons as a result. During my journey through the legal system, I had an excellent resource to draw from: my father, who is a defendant medical malpractice trial attorney. Shortly after winning, a number of my friends were sued as well. They asked me a myriad of similar questions. I shared with them the knowledge I obtained through my experience, my attorney, and information gleaned from years of assisting my father on his

cases. It occurred to me that if these intelligent physicians were all requiring the same advice, lots of other physicians likely needed it as well.

This inspired me to write an article entitled, *OK, so you've been sued. Now what?*, which was published by *Emergency Physician's Monthly Magazine* in 2007. That first article was the beginning of a series of articles about medical malpractice.

The extremely positive responses I received spurred me on to expand my readership beyond emergency physicians. Certainly, all medical professionals can benefit from advice about what is considered one of the most stressful events in a physician's life: being sued for medical malpractice.

I have consolidated and expanded upon my articles into a book that I hope will arm the physicians with knowledge that will help them best navigate their way through the arduous legal process.

The average physician heads into the legal arena totally unprepared for what is to follow. For the uninformed, the experience can not only be frightening but also be career ending. It is my belief that my book will help prepare physicians for battle. It is imperative that physicians be active participants in their case. Doctors cannot sit back and assume that their attorney will save them. They have to save themselves.

## **What is included in this book?**

This book is divided into several chapters covering the time period that begins with the moment you receive your summons. It walks the reader through every aspect of the lawsuit, including the posttrial appeal.

You will also find additional mock deposition testimony examples than that were present in my series of articles. In

addition, there are specific examples to help assist you in your cross-examination.

There is a chapter on the psychology of a medical malpractice lawsuit, which details the complex and emotional aspects of litigation. The final chapter of Section 1 is entitled, *What if you lose?* The possibility of an appeal means that there is still hope.

Section 2 of the book provides tips on lawsuit prevention. Of course, nobody can prevent a lawsuit, but there are some things that can be done that will minimize the risk, or at least help your case should you be sued. Important issues such as informed consent and risk management are discussed.

There is no specific legal advice given in this book. Although I have consulted with attorneys in writing this book, I am not an attorney, and I make no claims to be an authority on legal issues. For that, I recommend speaking with a medical malpractice attorney in your state.

Although I am a physician, I am not attempting to give any advice on the practice of medicine. I cannot guarantee that following the information in this book will lead to a positive result in your lawsuit. I do, however, believe that it will dramatically improve your chances.

I hope that no one needs to utilize any of this guidance. Unfortunately, statistically, most of us will. It is not a sign of weakness to be involved in a lawsuit. In fact, it is a badge of honor that you made it through the legal system with your sanity intact.

People sue for various reasons: unreasonably high expectations, desire for a monetary reward, revenge for feeling condescended to, and because other physicians convinced them that they were victims of medical malpractice. Being sued does not make you a bad doctor. Making mistakes does not make you a bad doctor either. It makes you human.

So if you have been sued, do not wallow in confusion and self-pity. Take charge. The following chapter tells you how.

# ***Section 1 The long road to trial***

# ***Chapter 1 You've been served! Now what?***

That dreaded day arrives. And no it is not just a bad dream. That police officer at your front door is not ringing the doorbell to warn you of a prowler in the neighborhood. He has come to serve you with papers notifying you of a complaint filed by a patient: a patient you may or may not remember seeing. Although anybody who serves you with papers is called a process server, in some jurisdictions, like mine, it is done by a sheriff's deputy.

The feeling is akin to being hit on the head with a bat, stabbed in the back, and disemboweled, all at the same time. Thoughts run through your mind like, "Will I lose my job?"; "Is my money protected?"; "Am I a bad doctor?"; and "Is my career over?"

You are justifiably depressed, confused, frustrated, and angry. When you have had a few minutes, hours, or days to assimilate this experience that unfortunately has begun a new chapter in your life, you undoubtedly ask, "Now what?"

When it happened to me, I called my father. Then again, not everyone has a medical malpractice defense trial attorney for a father. Most physicians do not have an attorney who is readily available to give appropriate and timely advice to initiate damage control. Through this book I am going to suggest what to do and, equally important, what not to do.

**FIRST: Obtain a copy of your medical malpractice policy and**

# make sure you can answer the following questions

Most of us think paying out an exorbitant sum of money every year is the extent of our necessary knowledge of the policy. But there are a few things you should know about your policy, and if you do not know, you should find out soon.

Some key clauses to know:

- 1 Policy limits
- 2 Ability to choose an attorney
- 3 If you have the right to refuse settlement

## Q1. What are my policy limits?

This is especially important in states that do not have caps on noneconomic damages such as pain and suffering. If the patient's economic damages are likely to be relatively low, and you have caps limiting the noneconomic component, then your typical one million dollar policy limit will more than suffice. You can rest easy because you will not become destitute if you lose. (For more information about damages, see Chapters 2 and 9.)

Also, if this is a high economic damages case, for example, a patient with a long stay in the intensive care unit, loss of wages, disability, and loss of future income, you will know if you are adequately or inadequately covered in the event that you lose. If you are not adequately covered, you may want to consider settling the case to protect your personal assets. (For more information on settlements, see Chapter 8, *Should you settle?*)

I am told by a number of medical malpractice attorneys that it is rare for plaintiff attorneys to pursue a physician's personal assets when their limits are exceeded by a high

verdict. However, it is still possible, and if you have not yet been sued, now is the time you should review your limits. Also, review your asset protection plan. But I am not sure if that actually works, because a ruthless plaintiff's attorney may find a loophole that allows them access to your money.

## **Q2. Do I get to choose an attorney or must I accept whoever is assigned? Is there a pool of attorneys from which I can choose?**

This is important if you know of a good attorney that you want to request. Also, plaintiffs often sue multiple doctors, including your employer. Sometimes your employer will "assign" you the same attorney as they have. This can pose a conflict of interest if your attorney is representing both of you, often to your detriment. (See more about this topic in Chapter 3, *What is a conflict of interest and how do I resolve one?*)

If you feel that you do have a conflict of interest with your codefendants and can request a separate attorney, do so. (For more information on choosing an attorney, see Chapter 3, *How to choose your attorney.*)

In general, the process of picking a law firm to represent you should involve colleague recommendations, peer reputation, and insurance company suggestions.

The insurance company will have to retain an attorney for you to respond to the complaint quickly relatively soon, because, depending on the jurisdiction, you may have as few as 20 days from the day you were served with the papers to submit a response.

However, some policies give you the right to select an attorney. If you already have a relationship with an attorney on the insurance company's panel (of defense attorneys