

PRF NEWS

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Covering Practice and Risk Management Issues for Physicians

The Cycle of a Medical Malpractice Claim

BY JUNE RILEY, MBA

THE BEGINNING: THE 90-DAY NOTICE

It may be a physician's worst nightmare: to be served with a Summons and Complaint. Often the first indication of a potential suit is the receipt of a 90-day notice which may arrive as an informal letter from the patient or formal letter from an attorney. In fact, look for the words "notice of intent to file suit" and/or "Code of Civil Procedure §364." **If you receive (or think you have received) a 90-day notice you should immediately call the PRF office and ask to speak to the Claims Administrator.**

Next, take a deep breath because more than half of the 90-day notices received by PRF Insureds do not result in a claim being filed. There are several reasons why.

First, if notified promptly, the PRF Claims Administrator may be able to informally resolve the matter and avert litigation. Second, serving a 90-day notice extends the statute of limitations allowing claimants extra time to decide if they really want to proceed.

Third, a plaintiff's attorney may initially want to preserve the claimant's right to file suit, but later decide that the case does not have merit or decline to represent the claimant. Fourth, if the would-be plaintiff decides not to pursue the matter, the case is dropped by default.

However, a patient's failure to serve a 90-day notice does not bar a patient from filing a claim. A Summons and Complaint or a formal Demand for Arbitration could be the first indication that a malpractice suit was brewing.

NEXT: SERVICE OF A SUMMONS AND COMPLAINT

Many things may run through your mind if you are served with a Summons and Complaint for medical malpractice—and none of them are good. Fears about colleagues' reactions, hospital privileges, and insurance premiums may suddenly appear and your self-confidence may be shaken. What-

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ever your initial reaction is, try to take yourself out of the eye of the storm. In a strictly pragmatic sense, the reason you purchased malpractice insurance is because there was always some probability that one day you might get sued. If that day should ever come for you, know that PRF is here to represent you and to indemnify you against loss. PRF is not here to judge you—it is here to help you.

Chances are that at least half of your physician colleagues have already been sued for malpractice (maybe more than once), and those that have not will likely face a suit at some future time. To varying degrees, every encounter a physician has with a patient has the potential for liability. So the probability of facing a malpractice claim during the course of your medical career is very real. One suit will rarely affect your admitting privileges with the hospital nor is your insurance premium likely to be increased. If the suit causes self-doubt, PRF is here to provide emotional

support. You can call the PRF Claims Administrator or your attorney at any time to confidentially discuss your feelings. If you would like to speak to one of the senior members of the Board of Directors, they are also available to meet with you and would welcome the opportunity to support a fellow physician. ■

June Riley is executive director of PRF.

Inside PRF News

The Cycle of a Medical Malpractice Claim

Physicians tend to take getting sued very personally, and who can blame them? It is personal. The patient is alleging that the physician was negligent in his or her practice of medicine. Whether or not the claim has merit or is defensible, the entire experience is stressful and unsettling. In this issue of *PRF News*, Executive Director June Riley aims to demystify, and hopefully, depersonalize this experience.

I've Been Sued: Questions and Answers

WHAT HAPPENS NOW?

If you receive a **Summons and Complaint** call the PRF office immediately and ask to speak to the **Claims Administrator**. It is important that you contact PRF, because you only have 30 days from receipt of service to file a response to the Complaint. Failure to timely respond to a Complaint, in the form of an Answer or a Demurrer, can have serious consequences to the defendant physician. Depending on the circumstances, an Answer to a Complaint may raise an affirmative defense against the allegations, or the Answer may simply deny the allegations. If the legitimacy of the claim can be challenged, the response may be a Demurrer. Although a Demurrer is the exception, it may be the appropriate response in instances where the statute of limitations has expired, or the plaintiff has no legal standing to assert the claim. For example, a person does not have legal standing to file a wrongful death claim on behalf of his or her fiancé.

If you have not already notified PRF of the incident, you will be asked to complete a typed Management Report. You will also be asked to provide PRF with whatever available records you have regarding the patient's medical care and a copy of the signed Arbitration Agreement. Whether or not you have a signed

Arbitration Agreement with the patient needs to be determined as quickly as possible. If it can be established that you have a valid Arbitration Agreement with the patient, your attorney will bring this to the attention of the plaintiff's counsel who may agree to arbitrate the matter. Barring the plaintiff attorney's cooperation, your attorney will file a motion with the Court to compel arbitration, and the matter will be tried before a panel of arbitrators—not before a jury.

Once PRF is in receipt of the Summons and Complaint, medical records and Arbitration Agreement, the PRF Claims Administrator will work with you to assign the legal counsel that is best suited to your case. The defense attorney will contact you to schedule a meeting. The Claims Administrator will be present at your first meeting with legal counsel to ensure that you and your attorney will work well together. Thereafter, the actual defense of the claim is tendered to your attorney. You may still have contact with the Claims Administrator from time to time, but your defense counsel will handle the logistics of the ongoing defense. You should have complete trust and confidence in your attorney to accurately assess the claim, to engage excellent medical experts, and to always represent your best interests.

The first thing your attorney will do is work with you to prepare a response to the Complaint, which usually comes in the form of an Answer. Once the Answer has been filed, your attorney will begin to build the defense of your claim through the discovery process.

WHAT IS DISCOVERY?

The first discovery steps typically involve form interrogatories. Interrogatories are a formal list of questions that are propounded by both sides of the dispute. The plaintiff's counsel will send form interrogatories to the defense counsel, which you must answer. Your counsel will send form interrogatories to the plaintiff's counsel, which the plaintiff must answer. There may be more than one set of interrogatories. Your attorney will guide you through this process.

Your attorney will engage at least one expert witness to review the complete records of the case to determine if standard of care was met. The number of expert witnesses needed

depends on the complexity of the case. Sometimes one or two expert witnesses are all that is needed. PRF is prepared to engage as many expert witnesses as is needed to build the best defense possible. Expert witnesses are crucial to your defense. The plaintiff's expert will opine that the physician failed to meet the standard of care—the defendant's expert will opine that the physician did meet the standard of care. Ultimately, it is a combination of deposition testimony, adequately documented records, and expert witnesses that make up the defense of a claim. If for some reason the defense expert believes that standard of care was not met and that the matter is not defensible, your attorney and PRF will consult with you to discuss possibly negotiating the most favorable settlement possible.

THE EXPERT WITNESSES SUPPORT MY CASE—WHAT'S NEXT?

After the initial discovery, interrogatories and expert opinion, the next step will be depositions of the parties to the action and of the parties peripherally related to the action. Persons to be deposed may be the plaintiff, the defendant, the plaintiff's family, the plaintiff's subsequent treating physicians and other care givers, experts from both sides, nurses, other defendants (if there is more than one defendant), and anyone who may have knowledge relevant to the case. Depositions are the lengthiest part of discovery and may continue for several months or even for a few years. There is no need to feel anxious or to want to rush the process—it just takes as long as it takes.

Sometimes, time is on your side. Plaintiff's counsel may get busy with other cases. Discovery may prove to the plaintiff's counsel that the case is not worth pursuing. Even if you, your attorney and PRF are poised to vigorously defend a case, it is not unusual for the case to be dismissed for waiver of costs. Dismissal (with prejudice) for waiver of costs is the best possible outcome for the defendant. It means that you never have to go to trial or arbitration, and that the plaintiff cannot assert a new claim against you at a later date. But dismissals don't happen overnight. It takes time.



JUNE 7 MEETING

Plan to attend PRF's Annual General Membership meeting on Tuesday, June 7, 2011, at the Hotel Kabuki in Japantown. Registration and reception begin at 5:30 p.m., and the meeting will start at 6:00 p.m. Thomas J. Garite, MD, an expert in maternal-fetal medicine, will address best practices for patient safety that apply to physicians of any specialty. Please return your completed Proxy to the PRF office, even if you plan to attend the meeting. Each PRF member who attends the meeting will receive \$100 cash. ■

WHAT IS IT LIKE TO BE DEPOSED?

Truthfully, no one looks forward to being deposed. The process is certainly stress inducing, and often adversarial. It is very important that defendants be thoroughly prepared for a deposition. Deponents are sworn to tell the truth, and everything said at a deposition is transcribed verbatim by a court reporter. Deposition testimony is admissible as evidence in a jury trial or in arbitration. Your attorney will carefully coach you on what to expect and how to respond truthfully, without displaying undue emotion, and without revealing more than you were asked. Sometimes your attorney will videotape a mock deposition with role-playing. As you observe your attorney playing the adversarial role of the plaintiff's attorney, it will help prepare you for the real deposition. You may be surprised that you become defensive or angry—two emotions that will not work in your favor. Playing back the videotape will allow you to see yourself as others see you—most importantly how the arbitrators or jury will see you.

Occasionally PRF and your attorney will engage a jury consultant to critique your mock deposition behavior and testimony, or simply to consult with you regarding your upcoming deposition and testimony. Your attorney will decide if another consultation is needed before you go to arbitration. Do not be afraid of being critiqued, because in the end you will have a more favorable deposition, which will help—not hurt—the defense of your claim. Be open to the coaching you receive from your attorney and the jury consultant. They will show you how to be caring, without being emotional. The coaching will help you stay calm during the deposition and arbitration. You will learn how to be consistent and factual and how to respond to questions in a manner that presents your case in the most favorable light.

MEDIATION—IS IT RIGHT FOR ME?

Following sufficient discovery, the parties may decide to mediate the matter. Mediation is not binding, nor is it as time consuming as arbitration. For the most part, mediations are completed in one day. The parties gather on neutral ground, usually the mediator's office. Before the mediation process starts, all the parties gather in one room and the mediator briefly explains the process. Thereafter, the parties go to separate rooms. Mediation is not about either side proving its perspective of the

case. Mediation is about both parties coming to a mutual agreement on what financial amount it would take for the plaintiff to agree to settle the matter.

Agreeing to mediate is not an admission of liability. Depending on the circumstances of the individual case, a reasonable settlement may be the best option. Whether or not to mediate is considered on a case-by-case basis. You are not required to partake in mediation if you intend to defend the case all the way through arbitration or trial. This should be discussed with your attorney. He or she will advise you on which course is in your best interest. However, you are still entitled to make that choice yourself.

Although mediations do not always result in a case being settled, there is little if any risk to mediating a claim. The parties simply return to their respective roles of asserting or defending the claim if mediation is not successful. Sometimes the defendant physician is present at the mediation, but sometimes this is not the case. Again, your attorney will advise you about what is in your best interest. If the parties come to an agreement and the case is settled, a settlement agreement often will be drafted and signed by the parties and attorneys present at the mediation. Once PRF has paid the settlement on behalf of the Insured, the matter will be dismissed with prejudice. ■

WORKING WITH YOUR ATTORNEY

If you are ever sued for medical malpractice, working closely with your assigned legal counsel is an important part of your defense. You need to be completely candid with your attorney, as a relationship built on trust will be in your best interest.

During your first meeting with your attorney it has become customary for the PRF Claims Administrator to be present. PRF realizes the importance of the attorney/client relationship, and we want to ensure that you and your attorney are well suited to each other. It is not only important for a defendant physician to have excellent legal counsel, it is just as important that the physician have complete trust and confidence that the attorney can provide the best defense possible, or alternatively work effectively and efficiently to settle a claim if settlement is in your best interest.

Remember, PRF does not rush to settle a claim. Options are very carefully assessed, and the wishes of the insured (to settle or to defend) help guide the process. Each case has its own unique set of facts and people. There is no formula that PRF follows. PRF treats each case with the care and thoughtfulness that each insured deserves.

If you are in the midst of a medical malpractice lawsuit, your attorney is your new best friend. He or she will be acting solely on your behalf. Here are some ways that you can help your attorney help you:

- Return your attorney's calls promptly.
- Be accessible to your attorney. Giving him your cell phone number is helpful, since it can be so difficult to get connected to the physician in a clinical setting.
- Be candid and forthcoming about the facts of the case even when they are not favorable to you. Your attorney will not be able to fully defend you if he or she does not have the facts.
- Don't be afraid to ask questions. This is your career and your defense. You have the right to understand the legal processes, and the attorney has a duty to explain things to you.
- PRF works with the top defense attorneys in the state of California, but if your attorney is not living up to your expectations, call the PRF office right away and ask to speak to the Claims Administrator. The sooner you inform PRF, the better; so that together we can work to resolve the issue.
- Readily provide all requested documents and records.
- Don't be surprised if nothing happens in your case for long periods of time. This is normal. Don't hesitate to call your attorney if you have any questions or just need some reassurance that you are in good hands.
- Finally, remember that the legal process takes time. You can rely on your attorney to fully understand and respond to the demands of the legal system. Your attorney will guide you through this journey. He or she is on your side. ■

Demystifying the Arbitration Process

If mediation was not successful (or if you chose not to mediate) the Arbitration process begins. Each of the parties will select an arbitrator of their choice, and the two parties must agree upon a third, neutral arbitrator. Once the arbitrators have been selected, a date can be set for the actual arbitration to commence. Coordinating the schedules of busy physicians and busy attorneys and arbitrators can be very challenging. Finding dates agreeable to all concerned may delay the arbitration, but **you must be present during the arbitration days.** Depending on the complexity of the case, an arbitration may take anywhere from two days to two weeks. During the anticipated block of time, you will not be available to see patients and you must arrange for a colleague to cover your practice for you.

Most cases are dismissed or settled before arbitration begins. If you, your attorney, and PRF have agreed to arbitration and decided against negotiating a settlement, it usually means that the case is defensible. Still, it is very important for the physician to understand that there are no guarantees of a favorable outcome. You may have a defensible case, but you can still lose at arbitration. If this is a chance you choose not to take, you should advise your PRF appointed defense attorney sooner, rather than later. Some physicians strenuously refuse a settlement and want their “day in court.” Other physician defendants feel just as strongly about not going to arbitration or trial. They want to settle the case and “make it go away.” This is a very personal decision and one you will not have to make alone.

Before every strategic point in the life of a

claim, whether it be mediation, trial, arbitration, or discussions about settlement, the PRF Insured will meet with some members of the PRF Board of Directors, the PRF appointed defense counsel, the Chair and/or Vice Chair of the Patient Care and Management Committee, PRF’s general counsel, the Claims Administrator and the Executive Director. The purpose of these strategic meetings is to thoroughly review the claim and its defensibility so you can fully appreciate all of your options.

sel will be there with you every step of the way. Arbitration will not be a pleasant experience, but at least it means that the entire process will soon be over. The plaintiff will be present during the arbitration, and he or she will testify during the arbitration.

If you prevail at arbitration you may feel tremendous relief or vindication. Even if you prevail, you will still need to decompress emotionally, and it may take time to recover from the experience.

If you, your attorney, and PRF have agreed to arbitration and decided against negotiating a settlement, it usually means that the case is defensible. Still, it is very important for the physician to understand that there are no guarantees of a favorable outcome.

This meeting is not adversarial. Everyone in the room will be on your side, so there is no need to feel intimidated or anxious about the meeting. The intent of the meeting is to help you make some difficult choices, and to let you know that PRF is there to support, defend, and indemnify you against personal loss. The point is for you to participate in the decision-making process involved in the defense or settlement of your claim.

All this said, if you decide to go forward with arbitration or trial, be prepared to not like at least 50 percent of what you hear. PRF’s Claims Administrator and your defense coun-

If you do not prevail (and there is always that possibility) you may feel disbelief and anger. As difficult as it may be, remember: Being sued for medical malpractice does not mean that you are not a good doctor. Losing at arbitration does not necessarily mean that the arbitrators’ decision was correct. If you believe that you contributed to the patient’s harm, be kind to yourself. Even doctors are human and can make errors in judgment.

Whatever the final outcome, try to learn what you can from the experience and work on putting it behind you. The rest of your rewarding medical career is still in front of you.

Everyone at PRF, the Board of Directors, the Committee members and the staff, strive to support our Insureds—especially during this difficult time. If you get sued for malpractice, remember that these are allegations—not facts. Whether the cycle of your claim is relatively brief or painstakingly lengthy, you will survive it and PRF will be there to help you through the process. ■



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