

# The Summons

A copyrighted excerpt from  
*Adverse Events, Stress and Litigation: A Physician's Guide*  
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Indeed, some medical professionals earn their livelihoods through their frequent courtroom testimony. Their opinions are sometimes used as the foundation for frivolous lawsuits. Until the process of discovery reveals their identity and makes them subject to deposition or interrogatories that cast enough doubt on their opinions to lead to a dismissal, such experts invest plaintiff lawyers with a credibility that allows them to continue with even highly questionable cases without becoming vulnerable to court sanctions.

Physicians can inadvertently admit to a violation of the community standard or cause an injury so obviously due to their negligence that no expert is required. *Res ipsa loquitur*—“the thing speaks for itself”—is the legal term for such situations. Retained surgical sponges or instruments, for example, speak clearly for themselves of negligence in the operating room.

- *Causation*. This is the name given to link the physician’s treatment to the injury. Unless an attorney can establish that the physician’s alleged negligence was a substantial contributing cause of the injuries to his client, the client is not entitled to recover damages. The causation link must generally be proved by expert testimony. It may also be established by a physician who, in a deposition or at trial, mistakenly responds, “Yes,” to the question: “Isn’t it correct, doctor, that this injury occurs only when the clinician has been negligent?” By so answering, the physician is serving as an expert against himself.
- *Damages*. Damages fall into three broad categories: *economic*, *noneconomic*, and *punitive*. Economic damages include lost wages, the cost of present and future medical care, along with impaired earning capacity, and other related expenses of the patient. Noneconomic damages compensate the patient for the pain and suffering that they have experienced. Caps on pain and suffering have been used in such states as Indiana and California to rein in runaway damage awards. Punitive damages are awarded as a deterrent to future similar egregious conduct and to send a message to other clinicians that such behavior will not only not be tolerated but also severely punished. Because trial lawyers so often inflame juries to award these punitive damages in the multimillion dollar range, in recent decades, legislatures have limited the circumstances in which plaintiffs can recover punitive damages in medical malpractice cases.

### The Summons: The Lawsuit, a Reality

The summons is a legal document ordering the recipient to appear in court at or within a certain time to answer charges filed in the complaint.

Usually the summons and complaint are delivered by a sheriff, by a private process server, or via registered mail. Because in most cases we do not know with

certainty that a lawsuit against us is imminent, we are often shocked and appalled by the impersonal manner in which we are served a document accusing us of negligence. We are further embarrassed by the impact of the threatening impact of the process server's arrival at the office on our colleagues and staff and on our families, if the server delivers the document to our home. Few experiences humiliate or disturb us more, especially if we have small children, than the sight of a uniformed officer handing us a stack of obviously unsettling documents.

Despite the shock of such deliveries, we cannot allow ourselves to become so paralyzed that we deny what has happened or fail to respond, through our lawyer, to the summons by the statutory deadline, usually within thirty days. If the charges are brought in federal court, the time limit is twenty days. By failing to respond in a timely and appropriate manner, we may forfeit our right to a defense. Every year, default judgments are entered against the small number of physicians who fail to respond to a summons in a timely manner. Unless set aside by court process, such defaults mean that the trial lawyer's only task is to prove the damages. Worse still, our failure to cooperate in our defense may lead to denial of insurance coverage for the lawsuit.

## The Complaint

The complaint is a list of accusations rendered in the legalese of court papers whose character is unfamiliar to physicians.

The heading at the top of the first page indicates the court in which the papers are filed, such as "In the Circuit Court of the State of Oregon for the County of Multnomah" or, in a federal case, "In the United States District Court for the Southern District of New York."

Beneath the headings is the caption. On the right side, it lists the parties to the lawsuit, beginning with the plaintiff, usually the patient or, in the case of a death, the personal representative of the patient's estate. Listed below are the defendants. Here we find our name, alone or among many, including our colleagues, our hospital, and others. To the right in the caption are words such as: "Action for Damages, Medical Malpractice."

Below the caption are the numbered paragraphs of the complaint. To prosecute a successful lawsuit, the plaintiff is required to plead and to prove the court's jurisdiction, the required elements of the claim, and the patient's entitlement to relief.

In the complaint, plaintiff lawyers cast a wide net of charges, fine meshed to catch even the smallest of possibilities, and then empty it onto the court's dockets. While they can amend a complaint later, most prefer to dump the whole catch, whatever their size or condition, to demonstrate that they do not let anything, big or small, get away. They do this as much to intimidate us as to impress the court.

Our defense lawyers routinely tell us not to take these allegations seriously or literally. But their familiarity with the faux battle pose of lawyers does not reassure us and we often feel more isolated by their seeming lack of understanding for us. To lawyers, allegations are simply a means (the pleadings) to an end (recovery). To us, however, the accusation is personal and enraging in its charge that we “recklessly and with wanton disregard of the circumstances” injured our patient or that we “carelessly, negligently, and unlawfully breached our duty of care.”

Because news is predominantly negative, the local newspapers in some jurisdictions publish the complaint, word-for-word on the front page. Our children may come home from school in tears because some other children refer to their father or mother as a murderer. Because defense lawyers are not personally involved in the same way as we are and, by training, are not necessarily sensitized to the emotional turmoil caused by such allegations of fault, they may neither understand nor be able to relate to our outrage at the targeting of our professional performance.

Is the extent of damages always included in the documents? In recent tort reform battles, the trial bar has tried to blunt criticism of its tactics by agreeing to changes in the rules regarding the pleading of damages. In many states, plaintiffs are not required and, in some instances, are not allowed to specify the exact amount of the damages they are seeking to recover. In such states as Illinois, the complaint specifies a minimum demand, asking for “a judgment against the defendant in a sum in excess of \$50,000.” The media are less interested in running stories about lawsuits filed against a physician that have no speculated dollar value. The public is, therefore, not educated about the volume or cumulative demands of lawsuits filed. In late 2003 in Oregon, plaintiff lawyer demands in the 460 pending physician malpractice claims totaled more than \$1.5 billion.<sup>12</sup> To dispose of these claims at the stated award level, each Oregon physician would be forced to pay \$300,000.

A common first impulse, after reading the complaint, is to call the patient’s attorney in an effort to straighten out “this whole misunderstanding.” This is yet another temptation to be resisted wholeheartedly. We should never contact patients’ attorneys in an attempt to convince them to dismiss the lawsuit. We may rightly reason that the attorneys have heard only the patient’s version of what happened and, that because they lack medical training, they cannot possibly understand the complexities involved in caring for this patient. If they hear our side of the story, we feel, they will surely reconsider. This fantasy, for it is no less than that, highlights the primary difference between physicians and the lawyers who sue them: we are looking for answers and exploring solutions while plaintiff lawyers are advocates whose focus is not a broad and subtle exploration of the true causes of an incident but rather a broad and bold attempt to get as much money out of us as possible.

By talking directly to the plaintiff’s attorney, we give them an opportunity to put questions to us without our lawyers being present. We can be sure that any

admissions we may make against our self-interest will be used against us. This may seem a good-hearted and commonsense move to us, but it is naïve and dangerous when dealing with lawyers.

#### *Notifying the Insurer*

Physicians *must* call their liability insurer immediately after they are served with papers. Failing to do so may jeopardize the insurer's ability to make a proper response or, possibly, cause them to deny coverage to physicians because of their failure to act appropriately. One obstetrician opened the complaint, filed it in the patient's chart, and did not come across it again for almost a year. Another physician, repeatedly observing her attorney's return address on incoming mail, placed it all unopened, in a separate file. Because the physician did not open and respond to this correspondence and the attorney could not make direct contact with the physician, the latter scheduled an appointment with the physician in the guise of a patient. Once inside the office, she identified herself and the physician responded by retrieving the file of unopened mail. Physicians may fantasize that if they deny its filing and do not talk about it, the lawsuit will go away. Such magical thinking complicates their lives in ways as hard to enumerate as they are to imagine.

The company will quickly assign physicians a claims professional, unless they already did that when they reported the case as an incident. Most companies employ experienced professionals who understand the adverse impact of claims on physicians. They are usually courteous, well informed, and eager to be of assistance. Physicians should not hesitate to raise any questions and concerns they have, because they can be assured that these conversations will be held in confidence and are not subject to discovery.

Claims professionals ask physicians to forward as quickly as possible the summons, the complaint, and a copy of the chart. They will also set up an internal file and will assign a defense counsel.

In some cases, as discussed in Chapter 7, the physician's carrier also insures co-defendants who are not part of the physician's practice. Because each person is entitled to an independent defense, it is likely that different claims personnel will handle each separate defense. If this does not occur, physicians should raise their concerns and request different personnel. Because they will want to be able to challenge any assignment of the award to their account, should there be settlement, realistically physicians need their own claims professional to represent their interests.

#### *Preparing a Narrative*

Unless, as suggested in Chapter 1, the physician has anticipated their request, claims professionals will ask physicians to write a narrative describing the care of the patient and the events that lead to the claim or suit. This is the physician's opportunity to "tell what happened." As previously noted, this narrative is likely

to be submitted to the attorney with the law firm retained by the insurance company to represent the physician and, as such, is considered a confidential communication between physician and attorney. Nothing a physician writes to his attorney or claims professional should be placed in the patient's chart, because this would cause a privileged communication to lose its protection and so become available to the patient's lawyer.

If the insurers structure a narrative process, physicians will answer detailed questions or tell their story in a preset format. Should the claims professional simply ask the physician to tell them what happened, physicians can follow the journalist's five-question approach to an event of who, what, where, when, and why.

The following format lists the most frequently requested narrative information. In preparing the narrative, physicians should ask themselves what they would want to know if they were asked to review and provide an expert opinion in the case.

- Provide information on one's medical school, residency, additional training, length of time in practice, areas of expertise, and familiarity with the specific procedure or treatment that is the subject of this claim.
- Outline the patient's treatment chronologically, beginning with the date of the initial visit, presenting complaints, history, physical findings, and treatment.
- Provide the interpretation and significance of tests and treatment in lay terms, including the name and a description of what was done. Detail any procedure and surgery in lay terms as completely as possible, including the reasons why it was done. Include information on all supplies and equipment used in the course of treatment, including the brand name, model, and type of equipment. Provide similar information as appropriate for each visit thereafter.
- Identify other involved clinicians describing their role and responsibilities in the patient's care. Identify clearly the primary physician. Describe the role of any relevant team members who were involved in making a particular diagnosis and prescribing treatment. Note any disagreement among team members about the diagnosis and means or methods of treatment. List the names and responsibilities of all other personnel including nurses, medical assistants, technicians, and others involved in the patient's care.
- Include if known, relevant personal information about the patient and the patient's family such as the number of children, the spouse, and other relatives. List the family members with whom you have been in contact, including what was said to them. It is of great importance to include all details of the interactions, which may be helpful to the defense of the claim.
- Identify the strengths and weaknesses of the provided care and treatment. What weaknesses can we criticize? Indicate whether the care provided met the community standard and provide supportive data about why it did or did not do so. Recommend specific areas for defense counsel to research.

*Assignment of the Defense Attorney*

The claims professional will assign a lawyer to defend us against the claim, if one has not already been assigned. Most liability insurers choose a lawyer from a panel, found in every state, of defense firms experienced in malpractice cases or from the one law firm that handles most of the company's trial work. The importance of our relationship with this attorney cannot be overemphasized and is discussed in Chapter 7.

**Becoming a Defendant: What Can I Expect to Feel?**

My first feelings after being charged with medical malpractice were of being utterly alone. Suddenly I felt isolated from my colleagues and patients. Since then I have learned, in the course of my own suit and trial and in the research I have conducted, that this feeling of aloneness is not at all unusual, that almost every physician accused of being negligent has a similar reaction. I also understand that what I experienced during the 5-year span of my own case—that it swallowed up my life completely, demanded constant attention and study, multiplied tension and strain, generated a pattern of broken sleep and anxiety because I felt my integrity as a person and as a physician had been damaged and might be permanently lost—are the common reactions of most physicians accused of negligence.<sup>13</sup>

Our reaction to being sued reflects our own personalities, the specifics of our case, and the sum of other variables that make each charge of negligence a unique experience.

Dr. Richard Allen describes his reaction: "It was terrible. It was terrifying. It was depressing. I had acute anxiety."<sup>14</sup> He attributes his episode of atrial fibrillation immediately afterward to the surge of adrenaline that accompanied his intense anger. In addition, he felt that his partner and some of the other physicians began to point fingers at him, whereas some of the physicians who had been intimately involved in the case were not even named in the complaint. Looking back, he felt that he began to carry a burden for years of unexpressed anger that had no direct outlet.

Dr. Laura West describes her reactions somewhat differently. The hospital risk management office alerted her that the complaint was coming. It was delivered to her personally while she was busy seeing patients. She found the lawsuit distracting and upsetting but because she remained distressed by the trauma associated with the case, "it just prolonged my misery."<sup>15</sup>

Physicians who feel isolated are often in invisible communion with colleagues having the same experience: An infectious disease specialist, named in six lawsuits and yet to give his first deposition, has "no particular reaction. I'm often called into a case when the patient is extremely ill. I don't know how I'm going to feel in the deposition." This contrasts with the recently widowed and about-to-be-retired

family practitioner who, charged with negligence in the case of an 18-year-old cerebral palsy patient whom she had delivered and treated all his life, sat on her living room sofa all night long “in shock and just stared.”

We may feel surprised and stunned or, having anticipated it uneasily for years, we may feel some relief. If there are a number of claims against us, we will react differently to each. If convinced that the charges are inappropriate and unjust, we may feel misunderstood and angry. If we judge ourselves that there may be some basis to the complaint, we may feel devastated and fearful. We may react in any or all of these ways. Our reputation is impugned; our livelihood at risk, our honor is at stake. CBS commentator Andy Rooney spoke for all of us after he was publicly accused of making discriminatory remarks: “It is not clear yet to me whether I have been destroyed or not, but I know that a denial from anyone does not carry anywhere near the same weight as an accusation.”<sup>16</sup>

#### *Immediate Responses to the Lawsuit*

The varied ways in which we are officially informed of the case can set the stage for our feelings about the entire experience. Dr. Thomas White describes a man dressed in a tee shirt and shorts, apparently representing the appropriate legal entity, demanding loudly to the office staff in front of patients to see the physician immediately so that he could personally serve him with a malpractice complaint. Dr. Joseph Daley’s children were present when his subpoena was served at home. He was shocked at his oldest boy’s response: “Mommy, does that mean that Daddy has to go to jail?” Other physicians tell of sitting quietly at their desks in the late afternoon after a long day of seeing patients and opening a certified mail package whose contents transformed them suddenly into defendants. Our lawsuit may begin uniquely, but our initial responses will have much in common.

## Recommendations

WE SHOULD CAREFULLY AND FULLY HONOR ANY REQUEST FOR RECORDS. We should guide our response by the recent federal HIPAA legislation and relevant state laws.

WE SHOULD RESIST ANY TEMPTATION, LARGE OR SMALL, TO ALTER THE RECORD. Consult the claims representative or risk manager for answers to any questions about altering the record. They often suggest that we include, in our written narrative, any information that is not in the contemporaneous version of the chart.

AFTER ADJUSTING TO THE INITIAL SHOCK, WE SHOULD MAKE IMMEDIATE CONTACT WITH OUR INSURER. Even though we may feel apprehensive and distracted,

we cannot ignore the complaint or fail to notify the insurer right away and for whom we review and to whom we forward a copy of the chart.

AS SOON AS POSSIBLE, WE SHOULD GAUGE OUR IMMEDIATE REACTIONS TO THE NOTIFICATION AND ITS URGENT RAMIFICATIONS. Dr. Richard Allen was served his complaint on a Friday afternoon; he reacted intensely and developed an arrhythmia early Saturday morning. Fortunately, he was able to obtain the necessary medical consultation and treatment over the weekend. Others may not have that luxury. It is wise to notify our partners of the complaint so that, should the need arise, they can cover for us. We may not be at our best providing care if we are scheduled to cover the emergency department on that same evening and are pre-occupied, not to say obsessed, with the allegations made against us in the complaint. Understanding how overwhelming this turn of events can be, especially if the accusations concern a serious outcome, we need someone to cover for us. On such occasions, sensitive partners may even offer to switch coverage with us before we even ask them.

UNLESS THE INSURER HAS REQUESTED IT PREVIOUSLY, WRITE A NARRATIVE OF THE CASE AS SOON AS POSSIBLE. Due to the lengthy interval between the events and the resolution of a claim, you may need this narrative to help you recall key recollections such as conversations with colleagues, the patient, or the patient's family. These may not be part of the chart but crucial to the defense by organizing the information into a coherent sequence and giving defense counsel a first-person overview of all the facts and circumstances surrounding the claim.

WE SHOULD UNDERSTAND THAT ALLEGATIONS IN THE COMPLAINT MIGHT HAVE LITTLE RELEVANCE TO THE FACTS OF THE CASE. These knife-like statements are finely honed to disrupt and unnerve us by their outrageous and assaulting character.

AFTER RECEIVING A COMPLAINT, WE SHOULD REJECT ANY IMPULSE TO CONTACT THE PATIENT OR THEIR ATTORNEY DIRECTLY TO GET THINGS STRAIGHT. Once the lawsuit is filed, the process of litigation takes over and our only consultation should be with our claims representative and our attorney about such impulses.

NEVER RESPOND DIRECTLY TO INTERVIEW REQUESTS OR COMMENTS FROM MEDIA INTERESTED IN OUR CASE. Instead, we should contact the insurance company that is experienced in guiding physicians through the media minefield.

REALIZE FROM THE START THAT THE PROCESS INTO WHICH WE HAVE BEEN DRAWN MAY BE QUITE LENGTHY. After we have been stung by a seeming nuisance suit, we may not face trial by jury for 3 or more years, whereas a serious wrongful death claim against us may be dismissed within 1 year for a variety of reasons. It is helpful