

# THE BEST DEFENSE IS A GOOD OFFENSE

Five steps you can take today to help protect yourself and your practice in the event of a lawsuit.

**BY ADAM B. KRAFCEK, JR, JD  
AND CHARLES M. O'DONNELL, JD**



Adam B. Krafcek, Jr., JD is the co-founder of Bryn Mawr Communications, which publishes *Modern Aesthetics*. He is also a partner in the law firm of Krafcek & Krafcek LLC. He can be reached at adam@bmctoday.com

Just as the title of this article applies to sports, it applies equally to your medical practice in today's litigious society. Spend a few minutes searching online to learn more about the evolving landscape of medical malpractice lawsuits. You may be surprised to learn that sites exist recruiting patients who had poor outcomes from a variety of medical procedures. The fact is, if you encounter surgical complications, which most surgeons will at some point in their career, you risk a lawsuit. Unfortunately, you do not necessarily have to be negligent or at fault to get sued. Once you are served with legal process (i.e., a Complaint, which is typically the first document filed initiating a lawsuit by a plaintiff), even if the suit has no merit, you can easily spend tens of thousands of dollars proving your innocence. The good news is that you can take a few simple steps right now to protect yourself and your practice in the event of a lawsuit.

## STEP 1: BE PROACTIVE AND CONSULT A LAWYER

Find and consult a competent attorney with whom you are comfortable concerning the matters discussed in this article, and ensure that he or she has experience in the areas of medical malpractice and corporate law. These issues require specialized expertise, and it is not advisable to consult your friend who specializes, for example, in real estate. Act now, because if you wait until after you are sued or are threatened with a lawsuit, it may be too late. You cannot turn back the hands of time to change

the corporate structure of your practice, your malpractice insurance coverage, your informed consent procedures, or your recordkeeping practices. Your personal counsel can be vital to you and your practice in reviewing these issues today before you are involved in litigation.

## STEP 2: EVALUATE THE LEGAL STRUCTURE OF YOUR PRACTICE

How is your medical practice structured? For example, is it a partnership, corporation, limited liability corporation, or limited liability partnership? Each of these structures provides different forms of protection. Who organized the practice and when, and why was the practice structured in that particular way? Are you at risk personally in the event that you are singled out in a lawsuit? What is your exposure for acts of your employees? These are questions you need to address with your attorney today. Whether you are a solo practitioner or a large medical practice, the laws that apply to corporate structures and medical practices are constantly changing and often vary slightly from state to state. Consult your lawyer to ensure that your practice is legally established in the way that best suits your needs and that you are aware of and compliant with any recent changes in the law that may govern your activities i.e., are you HIPPA compliant; if using social media to promote your practice, do you know what you can and can't say and/or post online; are you aware of the recent Physician Payment Sunshine Act, and whether it applies to you etc.?

## STEP 3: ASSESS YOUR INSURANCE

When was the last time you reviewed your malpractice

DO THIS NOW

Find and consult a competent attorney with whom you are comfortable concerning the matters discussed in this article, and ensure that he or she has experience in the areas of medical malpractice and corporate law.

## BOTTOM LINE

Taking the right defensive measures today will not guarantee you a “win” in the event you are one day faced with a lawsuit, but it will better position you, your practice, and your case.

insurance for both your practice and yourself? Do you know what type of malpractice insurance you currently have and what types of claims are covered and what claims are excluded? Do you know what your policy limits and deductions are? How much coverage is enough, particularly in light of issues concerning joint and several liability? Do you have excess coverage, and is it really necessary? Can your insurer settle a claim without your consent? Chances are, you may not know the answers to these and other relevant questions relating to your malpractice insurance. If not, consult your lawyer and a reputable professional liability insurance carrier.

### STEP 4: REVISIT YOUR INFORMED CONSENT

Have you carefully read your informed consent, and is it written in layman’s terms? What are your current procedures for obtaining your patient’s informed consent and who handles the process in your office? Informed consent typically plays a role in most malpractice lawsuits, with the plaintiff alleging that it was inadequate, and the defendant asserting the informed consent as part of the defense. The informed consent process, along with the actual written document itself, has increasingly become procedure-specific, often tailored to the particular procedure or surgery being performed.

Avoid simply copying an informed consent form from an unknown source, and review with your attorney

whether or not you should be using the same form for all your procedures. It is imperative that you review these and other relevant current informed consent practices and procedures with your attorney.

### STEP 5: REVIEW YOUR RECORD KEEPING

How adept are you at keeping patient records? In this case, records do not strictly pertain to those medical in nature. Records can also refer to notes detailing conversations with your patients in which you have recorded questions they ask and your answers, consultations in which you advise the patient of procedural risks, and follow-up examinations, as well as your routine medical office practices. In the event that you are sued, expect a subpoena for all medical records relating to the patient in question, and then some. Unless you have previously been involved in a legal proceeding, you cannot fully appreciate the value of notes or the records of events and/or patient consultations that are recorded at the time they occur. This is one of the best forms of evidence you can present during a legal proceeding to demonstrate your actions, as opposed to your verbal testimony that you allegedly did or did not do something based solely on your recollection of events that have often occurred a year ago or more. If the testimony is strictly verbal, it’s going to be your word against the plaintiff’s, and your fate rests with a jury of your peers to judge credibility. On the other hand, if the evidence is written contemporaneously with the issue at hand, it will be compelling. The rule of thumb is to document and to document well.

### A BETTER POSITION

Although taking these and other defensive measures today will not guarantee you a “win” in the event you are one day faced with a lawsuit, it will certainly better position you, your practice, and your case. ■

*Reprinted and updated with permission from Cataract and Refractive Surgery Today.*