

Who Decides Whether to Defend or Settle a Malpractice Case?

At some point in the litigation process, you may have to face a crucial decision. Are you committed to seeing your case all the way through trial and verdict, regardless of the risks you will be taking and the emotional toll you will pay? Or is it your goal to seek settlement for an acceptable amount, even though this will encourage others to presume that the charges against you have some justification?

SVMIC was founded on the principle that it would not settle a claim solely to avoid the costs of litigation. We believe that the best way to discourage unfounded malpractice suits is through vigorous, uncompromising defense. But many medical and non-medical factors must be considered when making the defend or settle decision.

Sometimes physician defendants have trouble separating their emotions from the decision to settle or defend. This may lead to insisting on settling a defensible claim for reasons ranging from simple fear to not wanting to take the time to deal with the situation.

Or in some cases, a physician will make an objective decision regarding settlement versus defense only to panic later and reverse this decision. This usually happens when a trial date is set for the lawsuit, and makes appropriate and timely handling of the claim difficult.

In order to help separate emotions from objective facts, the following is a list of factors which commonly assist in evaluating the defensibility of a malpractice claim. Evaluation of each of these factors will help to direct a more objective assessment of the defensibility of your claim.

Results of SVMIC Investigation

A claims attorney experienced in the investigation and handling of medical malpractice claims is assigned to your claim and will promptly conduct an initial investigation to obtain objective facts regarding the merits of the claim, as well as positive and negative defense factors.

The complexity of the case will be a factor in determining how long it takes to complete the initial investigation. It can take a few weeks or a few months. Records of other physicians or hospitals may have to be subpoenaed in order to evaluate any injury claimed by the plaintiff. This and any other delay in collecting necessary information will affect the length of the process.

The claims attorney will coordinate the claim through all stages of the investigation and defense, working with you and the defense attorney. Any material facts discovered that may alter the defend/settle decision will be given further consideration.

Claims Management Committee Feedback

When a claim or suit is filed against an SVMIC policyholder, a committee of physicians is available to review the facts and make a recommendation whether to defend the claim or attempt a settlement. The Claims Management Committee (CMC) brings hands-on physician management, with clinical and surgical expertise, to the review of your claim. At SVMIC, you are kept fully informed on the status of the claim and participate in the decision to settle or defend. The Company will not settle a claim without your consent.

Medical Evaluation of Medical Records

One or more physicians with adequate training and experience in appropriate medical specialties will review the records and report a medical opinion on the “standard of care” provided to the patient. This will be used to determine if actual or probable negligence could be present in the care and treatment of the patient.

Defensibility of Medical Records

The availability of accurate and complete medical records is essential for the defense of a medical malpractice claim. Too often, inadequate or inappropriate documentation is a key reason for recommending settlement of a claim which, from a medical standpoint, may have been defensible.

Serious Documentation Errors, Omissions or Alterations

The presence of serious errors or omissions in documentation will impact negatively on the defense of any malpractice claim. Missing records will hamper the defense of a claim. Alteration of records will automatically destroy most chances to defend the claim. Alteration of records also violates the terms of your policy and may jeopardize your insurance coverage.

It is imperative that your claims attorney or defense attorney be notified immediately if any of these documentation problems exist. If discovered later by the plaintiff’s attorney, the effect will be devastating and your defense attorney will be left unprepared to deal with the damage to your defense.

Anticipated Finger-Pointing Among Defendants

In cases in which one or more of the defendants is trying to shift blame away by directing it toward other defendants, the plaintiff will get free assistance in establishing a case for negligence, even when it does not exist. It is hoped that a cooperative relationship among defendants can be worked out, but if finger-pointing does exist, it will impact negatively on the ability to defend the case.

When evaluating whether to defend or settle a claim, the positives and negatives under each of the above factors must be weighed and considered for your individual case. This requires a certain degree of experience and objectivity. The Claims Management Committee and your claims attorney have experience reviewing hundreds of claims and following many of them through to resolution. In addition, you should strongly consider the advice of your defense attorney. They will help you evaluate objectively the claim and the defense position.

There are many emotional factors associated with being sued. It is not uncommon for the physician defendant to have trouble separating the emotional aspects of the claim from the objective facts. However, it is essential that the physician be able to do so when participating in the decision to settle or defend a claim. Under no circumstance, however, will a case be settled without the authorization of the insured physician.

Significance of Indemnity Payments

A malpractice indemnity payment is a serious consideration for a physician, as the payment will appear indefinitely on the malpractice claim history of the physician. An adverse claim history with payments for multiple or serious claims may impact negatively on future insurance and premiums. In addition, indemnity payments must be reported to the National Practitioners Data Bank and appropriate state licensing authorities.

If a claim is clearly defensible, it would be in your best interest to defend the case in the hopes of avoiding an indemnity payment. Defending non-meritorious claims has been a long-standing policy of SVMIC that has been successful in discouraging these claims. Under the terms of SVMIC's insurance policy, each insured is obligated to cooperate and assist in his or her own defense.

In situations in which it is clearly not advisable to defend a claim, attempts to view unrealistically the exposure and defend the claim may result in an excessive jury award. In such cases, settlement with the plaintiff could have controlled and minimized the amount of indemnity payment on the physician's record. Not every case will be clearly a liability or no liability situation. Therefore, all factors for the individual claim must be considered in making a decision to settle or defend. In some cases, settlement may be recommended but the plaintiff's demand is unreasonable and this may force defense of the claim. The payment of unreasonable settlement demands sets a dangerous precedent that encourages future excessive demands.

The decision to settle represents a desire to minimize the severity of the claim by controlling the cost. If it can be avoided, it is best not to rely on an unpredictable jury to determine the value of the claim when liability exists or the case is otherwise indefensible.

Due to the unpredictable nature of malpractice liability, there is no set procedure that will guarantee that the decision to settle or defend will be the right one. But the best informed decision possible can be made by taking the time to evaluate the claim objectively using the advice of the experienced medical, legal and insurance professionals working with

you.

Excerpt from SVMIC's "The Physician Defendant - A Handbook".

