

Medical Malpractice Litigation

What to Expect as a Defendant



Protecting providers.
Promoting safety.

Being named as a defendant in a malpractice suit may be your first exposure to civil litigation. You will probably wish it would just go away. However, no matter how you feel about the merits of the claim, you must not ignore it.

To alleviate some of your concerns, CRICO/RMF tries to demystify the process and explain how a successful defense may be mounted. Understanding the process and what your involvement is likely to be along the way strengthens your ability to cope with it. While you will face occasional spurts of activity related to your case, you may not hear anything new about the proceedings for extended periods of time. For case-specific information, contact your risk manager, CRICO/RMF claim representative, or attorney. For general questions regarding malpractice litigation, this document and CRICO/RMF's web site (www.rmfm.harvard.edu) can help.

The Malpractice Litigation Process

Coverage

As a CRICO-insured physician or employee, you are covered under a professional liability policy with limits of \$5 million per claim and \$10 million per year. Those limits include the defense cost and any pre- and post-judgment interest.

Personal Financial Exposure

CRICO's coverage limits are among the highest in the industry. Moreover, coverage is aggregated when more than one covered provider is found liable for an adverse outcome. That said, in very rare events potential damages exceed the available insurance coverage and the personal assets of a defendant become, at least theoretically, exposed.

Filing/Burden of Proof

According to the law, to prevail against you in a medical malpractice case, the plaintiff has to prove "more likely than not" all of the following:

- You had a duty to provide services to the patient and meet certain care standards;
- A failure to meet the standard of care occurred;
- Damages (a loss or injury) resulted; and
- The failure to meet the standard of care directly caused the damages.

Both sides use expert testimony to establish the applicable standard of care and whether or not any failure to meet it resulted in the alleged loss to a "reasonable degree of medical certainty."

CRICO/RMF's Claims Department is responsible for the investigation, evaluation, and the ultimate resolution of your case.

Your Role as Defendant

Unless otherwise advised, your representation through CRICO/RMF confirms your coverage for the matter at hand.

Your CRICO/RMF-appointed counsel and your claim representative will discuss the option to retain personal counsel, who can assess the implications of a verdict above the coverage limits.

The accusatory wording of a Summons and Complaint or plaintiff attorney's letter can be difficult to absorb. You will need to remind yourself that much of what goes on is less personal than it feels.

Confronting the emotional impact of a suit is important in preparing your defense. Discussing facts of the case with colleagues risks their being called by the plaintiff to testify about those discussions. However, you can share your emotional response with trusted friends and colleagues. Furthermore, conversations with your spouse, your CRICO/RMF claim representative, your defense attorney, and a professional counselor are protected from discovery.

Your claim representative can direct you to peer support available within your institution. In addition, the film *Sued: The Physician's Journey* (available from CRICO/RMF) provides insight from physicians who have experienced an accusation of medical malpractice.

The Malpractice Litigation Process

Investigation

Upon notification by the plaintiff, CRICO/RMF will begin to capture all the pertinent information and determine a course of action. You and other clinicians or employees involved in the patient's care will be interviewed. Your defense team will include you, your *claim representative*, and your *defense attorney*.

Your CRICO/RMF claim representative coordinates the investigation and serves as your resource for questions about your claim.

CRICO coverage includes the appointment of and payment for your defense attorney. The attorney CRICO/RMF selects will be experienced in defending medical malpractice cases. He or she will be your advocate and is independently responsible for litigating your case.

When multiple CRICO-insured defendants (including non-physicians) are named in a malpractice suit, CRICO/RMF usually assigns one law firm to provide a coordinated defense for all defendants. However, if conflicts of interest exist or arise among defendants, separate legal counsel will be assigned.

Pleadings

The civil *complaint* you have received initiated the lawsuit. To contest the complaint, your CRICO/RMF-assigned attorney will file an *answer* together with any motions requesting that the court take some action in the case.

Your Role as Defendant

Even though your attorney is hired and paid for by CRICO/RMF, you are the client for whom he or she will be working.

If you choose to hire a personal attorney, he or she will be restricted from direct involvement in your malpractice case, and CRICO/RMF will not contribute to fees charged by such counsel.

You do not have to respond, personally, to the complaint. Your CRICO/RMF-assigned attorney handles that action.

The Malpractice Litigation Process

Tribunal

Massachusetts requires that all medical malpractice suits be heard first by a tribunal composed of a health care provider practicing in the same specialty as the defendant, an attorney, and a judge. The tribunal does not decide fault or weigh the credibility of evidence. Its purpose is to determine if the plaintiff has presented sufficient evidence to raise at least one issue for further inquiry. The plaintiff's evidence at the tribunal ordinarily contains a letter from a medical expert supporting the allegations made.

The defense cannot present evidence during a tribunal, but can highlight weaknesses in the plaintiff's case. Even after a tribunal finding in your favor, plaintiffs can proceed by posting a \$6,000 bond per plaintiff.

Discovery

In addition to investigating the circumstances giving rise to the suit, your defense team will engage in the legal processes of *discovery* in order to gather information from the plaintiff and anticipate the likely arguments at trial.

You will have to provide written answers to *interrogatories* (written questions) from the plaintiff's attorney. As part of your defense, your attorney will submit interrogatories for the plaintiff to answer.

Copies of your records within your control may be requested by the plaintiff via a Request for Production of Records, which can be attached to the deposition notice, or served independently.

Depositions are question and answer sessions given under oath and recorded by a court stenographer. Generally, depositions are held in the plaintiff attorney's office over the course of several hours, or even days. The plaintiff's attorney will ask a series of questions (often expanding upon the interrogatories) in order to obtain information about your professional background and the medical care at issue in the case.

Your Role as Defendant

Defendants are not expected to attend the tribunal proceedings.

A tribunal finding in favor of the defendants does not necessarily end the case.

During the discovery phase you will be most directly involved in the litigation—assisting your attorney as the facts underlying the lawsuit are brought out.

Your defense attorney will assist you in responding to interrogatories.

Before, or at the time of your deposition, you will have to supply the plaintiff with unaltered copies of your (relevant) medical records. Even if you discover a notation error, you cannot amend or alter your medical records. If necessary, you will be able to augment the information in your records through answers to the interrogatories or during deposition.

Your attorney will help you prepare for your deposition, and accompany you through the process. Your answers are considered sworn testimony and must be truthful. Transcripts from depositions can be used at trial to highlight inconsistent testimony.

The Malpractice Litigation Process

Medical Experts

Expert medical witnesses are key to defending medical malpractice allegations. Both parties use experts to establish the applicable standard of care and whether or not any failure to meet that standard led to compensable damages.

The expert's role is to explain to the attorney—and if necessary, the jury—how your treatment compared to the standard of care. CRICO/RMF carefully researches potential expert medical witnesses to determine if they:

- have clinical or research experience relevant to the case;
- can communicate clearly and simply to a jury;
- are willing and available to testify in court;
- have published consistent views on the pertinent issues;
- are board certified in the relevant medical specialty.

Disposition

Except for clear cases of malpractice, CRICO/RMF aggressively defends claims. Over the 30+ year history of the program, roughly two-thirds (63%) of the claims against CRICO-insured providers have been resolved in their favor and without payment to the plaintiff.

Even if defending a claim will cost more than a settlement, CRICO/RMF believes this posture discourages the filing of non-meritorious claims and reduces costs in the long run.

Some lawsuits are dismissed, either by the plaintiff, or by the court. Some cases are settled in the discovery phase. In the absence of dismissal or a settlement, a lawsuit is prepared for trial.

Deciding to Settle

Settlement is not an admission of negligence; it is a formal agreement that ends the legal dispute. Settlement may occur at any point in the life of a claim or suit. Since 1999, 29 percent of claims against CRICO-insured defendants have been settled.

Your Role as Defendant

You will have an opportunity to suggest the most appropriate individual for review and/or consultation in your case.

Local experts are more likely to be respected by jurors and also incur fewer travel and scheduling conflicts. However, your defense team will work to avoid any conflict for both you and the expert.

Confidentiality is stressed with experts. Upon your request, no one with whom you have professional or social contact will be asked to review or testify in your case.

Drawing on facts learned through the discovery process and your deposition, your attorney will thoroughly prepare you to testify before a judge and jury—even if your defense team is pursuing other case resolution options.

Where circumstances warrant, CRICO/RMF may retain an attorney-specialist to work with you and your attorney in developing your testimonial skill, so that you may feel more confident and relaxed while testifying.

You will be included in the process of resolving the claim or suit in which you are named, including any decision to settle with payment to the plaintiff. CRICO/RMF retains the right, however, to settle any case without insured consent.

The Malpractice Litigation Process

Alternative Dispute Resolution Methods

CRICO/RMF ardently pursues alternatives to resolving suits by jury trial. Upon agreement of both sides, mediation or binding arbitration may be used. In *mediation*, a third-party helps both parties arrive at an acceptable settlement, if possible. In *binding arbitration*, the arbiter (often a retired judge) decides whether or not there has been a breach in the standard of care; if so, he or she determines the damages and whether or not they were causally related to the negligence. Binding arbitration decisions are final, i.e., they cannot be appealed.

Going to Trial

Since our inception, only 11 percent of suits naming CRICO-insured defendants have gone to trial, and defendant physicians win a substantial majority of those that do (88 percent). In Massachusetts, most cases take at least three years to reach trial. Trials can run from a few days to several weeks.

Being well-prepared is critical to the clear presentation of facts and, ultimately, a persuasive defense case. Defense counsel will spend significant time preparing you to cogently respond to questions posed at trial by attorneys for both sides.

Your Role as Defendant

In both forms of ADR, your participation is direct. In mediation, you will confer with your counsel as the defense develops its negotiating position in a dynamic process. In arbitration, you will testify before the arbitrator as to the facts of the matter.

If your case continues to trial, you will have to spend time preparing with your defense attorney and CRICO/RMF claim representative. You will be expected to attend the entire trial.

The Malpractice Litigation Process

Reporting Payments

All malpractice claims filed against physicians must be reported by CRICO/RMF to the Massachusetts Board of Registration in Medicine when the file is closed.

Any medical malpractice claim payment made on your behalf must be reported to the National Practitioner Data Bank (NPDB) if it meets *all* of the following criteria:

1. Payment was made to the claimant...
2. resulting from a written complaint or claim specifically naming you and demanding monetary payment for damages...
3. based on the provision of health care services.

The entity that actually makes the payment on your behalf is responsible for filing the NPDB report. (CRICO/RMF reports on behalf of CRICO-insureds.)

Your Role as Defendant

The NPDB will send you a copy of the report submitted, and you have the right to request factual changes. The NPDB will also provide you an opportunity to add a brief statement in response to the contents of the report. For more information on accessing your NPDB file, call the Data Bank Helpline at 1.800.767.6732, or go to www.npdb-hipdb.com.

You can also expect to be asked to self-report a history of any closed and open claims against you when applying for or renewing medical licensure, seeking clinical privileges, or joining certain “preferred provider” networks or plans. The information and time frame sought can be extremely variable. Read any forms requesting this information very closely. CRICO/RMF will readily provide you assistance in seeking information on your own claims history. Please contact CRICO/RMF Customer Service Representative, Angela Tassone, at 617.679.1527.

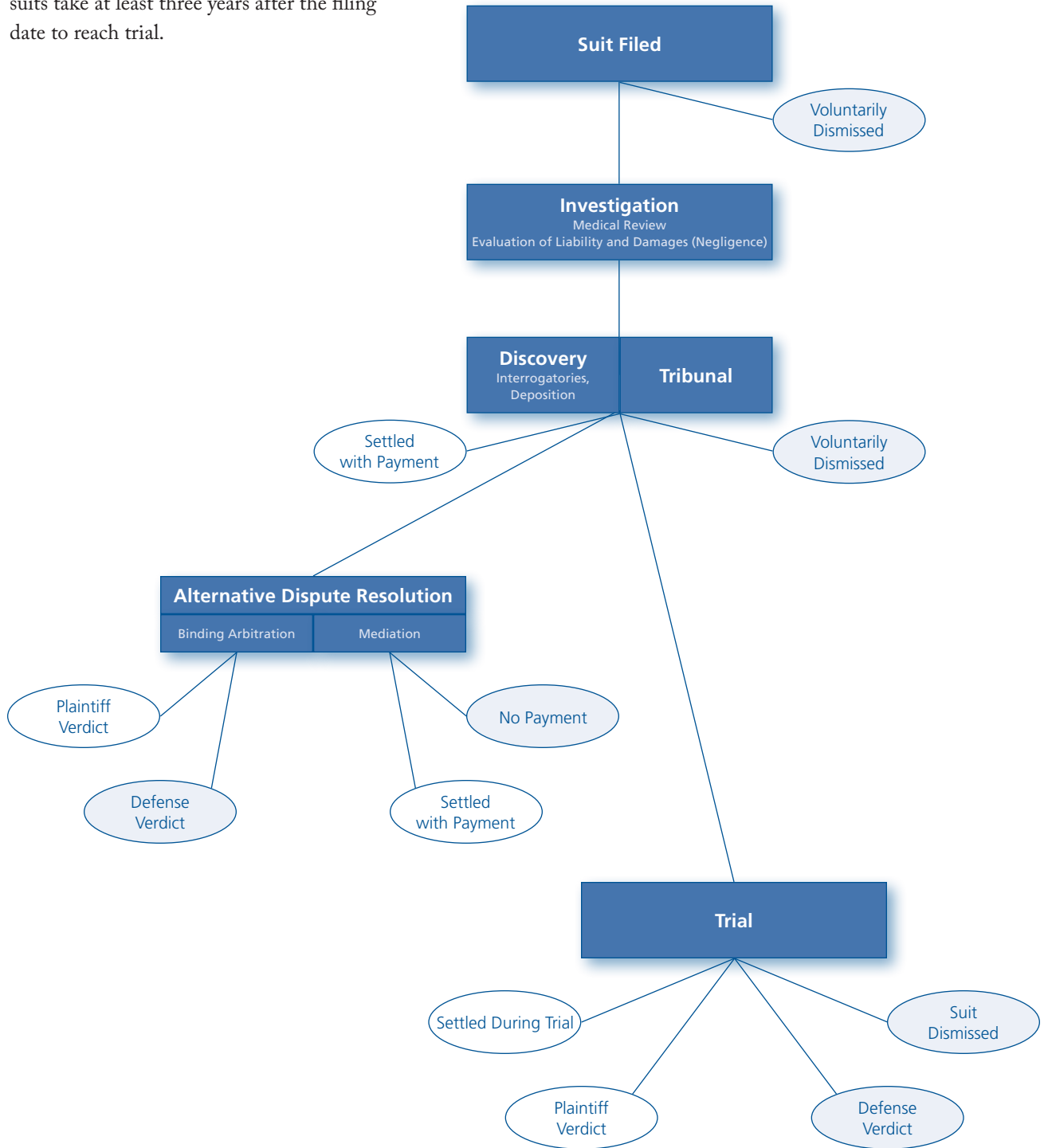
Summary

CRICO/RMF understands the stress faced by defendants in lawsuits that challenge their professional judgment and competence. We are committed to arranging the best available defense on your behalf, and to keeping you fully informed and consulted throughout the process. Please do not hesitate to contact your CRICO/RMF claim representative with any questions or concerns you may have. For further information regarding these and related issues, visit our web site at www.rmfm.harvard.edu.

For more information, call your CRICO/RMF claim representative at 617.495.5100 or visit www.rmfm.harvard.edu.

The Chronology of a Malpractice Lawsuit

Your suit may be dropped or dismissed shortly after the original filing, or it may take years to go through the entire trial and appeal process. In Massachusetts, the majority of suits take at least three years after the filing date to reach trial.



Medical Malpractice Litigation Glossary

Alternative Dispute Resolution

A formal malpractice case resolution process outside the jury trial system.

Answer

The written response to the initial complaint of the plaintiff, setting forth the grounds of the defense.

Binding Arbitration

Both sides agree that a third party arbitrator will decide the matter in dispute.

Causation

The causal relationship between the alleged act of negligence and the alleged damages.

Claim

A written or oral demand for compensation for damages caused by an alleged act of negligence.

Claimant

The person filing the claim.

Claim Representative

The CRICO/RMF employee who coordinates the activities of the defense team.

Clinical Review

A review of the medical records pertinent to a malpractice claim or suit usually conducted by medical consultants prior to review by medical experts.

Complaint

Written material filed with the court to institute a civil action (suit).

CRICO

Controlled Risk Insurance Company

CRICO/RMF

Risk Management Foundation of the Harvard Medical Institutions, Inc.

Damages

Refers to both the injury to a patient and the monetary compensation for those injuries.

Defendant

Individual (e.g., physician, nurse) against whom a lawsuit is brought.

Defense Attorney

Legal counsel assigned by CRICO/RMF to represent your interest in a malpractice lawsuit.

Deposition

A method of discovery in which the lawyer for one side asks questions of a party or witness on the other side.

Discovery

A variety of legal mechanisms used by both sides in a case to obtain information from the other party.

Duty

An obligation to the patient who was (allegedly) harmed.

Indemnity

The monetary payment made to a claimant for damages under an agreement of insurance.

Interrogatories

A series of written questions from one party in the case to the other side to be answered under oath.

Lawsuit

A claim that has formally entered the civil litigation system.

Liability

Responsibility for conduct falling below the standard of care.

Medical Expert

A qualified individual providing evidence based on inference after reviewing available medical information, not personal knowledge of the situation being considered.

Medical Malpractice

Liability based on acts or omissions in the provision of health care or professional services.

Mediation

Both sides agree on a third party to help them reconcile differences or negotiate a resolution of the matter in dispute but retain the decision-making power.

National Practitioner Data Bank

Federally established repository of information regarding malpractice payments and disciplinary actions against health care providers.

Negligence

A legal theory based on the duty of an individual to act and use such care as a reasonably prudent person would do in the same or similar circumstances.

Peer Review

Discussions, analyses, and recommendations of a physician's diagnosis, care, and treatment of patients conducted by colleagues with similar training and background in the same practice setting.

Plaintiff

One or more individuals, or someone authorized to act on their behalf, who files a lawsuit seeking monetary damages or other relief.

Risk Manager

The person within a health care institution responsible for coordinating the institutional risk management program.

Settlement

The resolution of a formal claim or lawsuit by the parties involved, without judicial intervention or proceedings.

Standard of Care

The standard of care and skill of the average member of the profession practicing a given specialty, taking into account advances in the profession. Expert testimony is required to establish the relevant standard.

Statute of Limitations

The time period in which a lawsuit alleging malpractice must be brought.

Subpoena

An official order requiring a person to appear at a certain place and time to give testimony on a particular matter or to present certain documents in his/her possession.

Suit

See Lawsuit

Summons and Complaint

Notification that an action against the recipient has been filed in court.

Tribunal

A screening mechanism in Massachusetts for lawsuits alleging medical malpractice.

CRICO/RMF is the patient safety and medical malpractice company owned by and serving the Harvard medical community since 1976. CRICO/RMF's proven ability to combine strong insurance protection with expert legal services and best practices in patient safety enables physicians, institutions, and employees to focus their considerable expertise on their patients and their research.

Insurance coverage is provided by Controlled Risk Insurance Company of Vermont, Inc. (A Risk Retention Group) and Controlled Risk Insurance Company, Ltd. (CRICO).

Risk Management Foundation (RMF) was incorporated by the Harvard Medical Institutions in 1979 as a charitable, medical and educational membership organization. Today, CRICO/RMF is an internationally renowned leader in evidence-based risk management. We serve nearly 10,000 physicians, 18 hospitals, and 238 other healthcare organizations.

With a consistent history of fewer claims than the national average, CRICO/RMF is able to offer policy limits that are among the highest in the country, and predictable premiums that fall significantly below local market rates. The strength of the program comes from exceptional claim management with vigorous, yet fair, malpractice defense strategies and a steadfast commitment to leading edge patient-safety enhancements. Our three decades of experience as a trusted partner to the Harvard medical community, and more than 25 years of claim-based data, highly qualify us to assist physicians and institutions in their goal of delivering the safest health care in the world.



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