

MIEC Claims Alert

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When Trouble comes knockin'...What to do when legal papers arrive

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*Most physicians will be faced with the threat of being sued for professional negligence at least once in the life of their medical practice. In order to prevail in a medical malpractice lawsuit, a plaintiff (patient) must prove that the defendant (doctor or other licensed health care provider) had a **duty** of care; that the defendant **breached** that duty (was negligent); the breach was a proximate **cause** of an injury; and the injury resulted in **damage** to the plaintiff. Negligence is defined as the failure to maintain the “standard of care”— in other words, the failure to exercise the level of skill, knowledge and care in diagnosis and treatment that other reasonably careful and similarly skilled physicians would possess and use under similar circumstances. A physician is not necessarily negligent simply because of an error in judgement, his or her efforts were unsuccessful, or a complication arose that was reasonable under the circumstances.*

Patients sue their physicians for a multitude of reasons, but usually because they suffered—or believe they suffered—an injury. They may also choose to litigate because of factors that have little to do with the quality of medical care. If a patient is unhappy with the outcome of care or with the treating physician, it is possible that he/she will seek a second opinion—from an attorney. In that event, the attorney may begin the process that leads towards litigation,

often starting with a request for records, or another legal document. This newsletter will discuss the most common legal documents likely to be received in a medical practice and offers suggestions on how to respond if you receive one. Early reporting to MIEC of patient care problems and the receipt of legal documents or letters from patients or their attorneys can often prevent your involvement in costly litigation.

What to expect when you call

When you call MIEC to report the receipt of legal documents, a claims assistant will ask for your name, specialty, address, the nature of your call, the patient’s name and date of birth, and your MIEC policy number. You should have the patient’s chart available, along with the legal papers you received. The information will be given to an MIEC Claims Representative, who will return your call promptly. It is advisable to call the Claims Department personally, rather than to delegate the responsibility.

If you receive:
 A legal document that concerns you,
 An inquiry from an attorney, or
 A threat of legal action from a patient

Call the MIEC Claims Department!
(1-800-227-4527)

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ity to your staff, as the Claims Representative will ask questions that must be answered with your knowledge of the situation. MIEC does not “kill the messenger” and does not penalize its policyholders for reporting potential liability issues.

What to report

Report the receipt of any legal documents, including: requests for medical records if you believe the request indicates a potential claim; requests for a Medical Claim Conciliation Panel review

Related correspondence between your office and MIEC or your legal counsel should be kept in a separate file, not in the patient’s chart, and should never be produced with a patient’s medical records.

(Hawaii only); receipt of a 90-day Notice of Intent to Sue (California only); the Pre-Litigation Screening Request (Idaho only); correspondence from a patient or an attorney threatening legal action or demanding compensation; a Summons and Complaint; a Notice of Deposition; a Demand for Arbitration; or investigative correspondence from the state medical board. Likewise, any oral threats to sue should also be reported. Other events that may be a precursor to a lawsuit, and therefore considered for reporting to MIEC’s Claims Department, include: unexpected complications of treatment, inadvertent patient injuries, untoward events, significant fee disputes, unexpected patient death during treatment, or difficult deliveries if injury is suspected. Call MIEC at once to report any concern or event that you believe may lead to a lawsuit.

Common legal documents

Legal documents frequently used or seen in pre-litigation claims and lawsuits include:

Request for Records: An attorney representing a patient in any legal matter (Workers’ Compensation, personal injury, medical negligence) may request a copy of the patient’s medical records with the patient’s written authorization. It is not always obvious that a patient wishes to name you in a medical malpractice lawsuit.

Thus, while there are many routine requests for medical records arising from workers’ compensation claims or third-party personal injury lawsuits, there are some circumstances which may suggest careful review of the request and prompt notification to the MIEC Claims Department. For example, requests for records pursuant to California’s Evidence Code §1157 following a bad medical outcome, a suicide, a serious dispute about billing, or a breakdown in the physician/patient relationship may suggest that there is a strong likelihood of a claim. Moreover, records requests from attorneys known to specialize in suing physicians should prompt a careful review of the chart to determine if there was an unfavorable outcome which might lead to the filing of a lawsuit. Report such requests to the MIEC Claims Department if you think a claim may be made.

Do not make any alteration to any portion of the chart following such a records request.

90-Day Notice (California only):

This formal notice that a lawsuit may be filed is also referred to as the Notice of Intent. The notice often comes in letter form and can be from the patient or his/her attorney. It is usually non-specific regarding the allegations.

Summons and Complaint: A Summons notifies you that you

are being sued and indicates who in addition has been sued and in what capacity (as an individual, corporation shareholder, or partner). The Complaint describes the plaintiff’s allegations against the defendants. Filings that may follow in the wake of a Summons and Complaint include:

◆ **Answer**—A defendant is required to file this written response to the allegations made. The defendant may raise affirmative defenses or deny the allegations.

◆ **Demurrer**—This written challenge to the allegations may involve complaints regarding the absence of one or more essential elements of a medical malpractice lawsuit, the Statute of Limitations (*see page 4 for definition*), proper venue, punitive damages, and more.

◆ **Motion for Summary Judgment**—This written request by a defendant, usually made to the court before the trial, asks that all or portions of the case be dismissed and ruled in favor of the defendant because the plaintiff has not met the burden of proof. Reasons for the request range from complaints about the Statute of Limitations, expert witness testimony, incorrect defendants, and more.

◆ **Request for Production of Documents**—This request sent by either party asks for specific documents (e.g., medical records, billing information, telephone logs, and scheduling books) to be provided to the requesting party (and all parties to the lawsuit) for review.

The law imposes a specific time frame, as stated on the served documents, for filing a response to the Summons and Complaint (*see State-specific table*). Failure to comply with the time limit may result in a default judgement or

other penalties. If you receive a Summons and Complaint in the mail, do not call the patient's attorney. Do not sign, date, or return to the patient's attorney the "Acknowledgement of Receipt" accompanying the Summons and Complaint until you have spoken with an MIEC Claims Representative or the attorney retained by MIEC. However, if you receive a Summons and Complaint by personal service, you or your representative may have to sign the "Acknowledgement of Receipt" prior to speaking with an MIEC Claims Representative. Legal counsel will be retained on your behalf to file a response and to protect your interests in the lawsuit.

Subpoena: This document is issued by a court to compel the appearance of a witness or the submission of evidence (e.g., records or documents). Subpoenas should never be ignored; failure to appear can result in contempt of court citations, monetary fines and other sanctions.

Subpoena *Duces Tecum*: This type of subpoena requires that a witness bring to the issuing court, or to a deposition, original documents that are in the witness's possession. Most commonly, a Subpoena *Duces Tecum* is used to compel production of medical records after a lawsuit has been filed, and may require the physician or the custodian of records to appear in court with the original documents before a court reporter, notary or other court-appointed designee. On rare occasions a physician will have to appear to produce medical records. The original record must be produced, but may only be inspected and photocopied. In many cases, the subpoena permits the physician to send a certified photocopy of the records in lieu of the originals.

Failure to respond to a Subpoena *Duces Tecum* may subject the physician to a contempt of court citation, fines, or other sanctions.

Note: A Subpoena *Duces Tecum* does not always indicate the names of all defendants who are named in the lawsuit. Even if you believe you will not be named in a lawsuit in which your records are subpoenaed, notify the MIEC Claims Department for advice before responding (an exception is the physician who regularly receives subpoenas for Workers' Compensation cases in which the care is not in question). **A Subpoena *Duces Tecum* cannot be ignored.**

Failure to respond to a Subpoena *Duces Tecum* or Notice of Deposition may subject the physician to contempt of court citations, fines, or other sanctions. Failure to produce documents may preclude a party from using those documents at the time of trial. A subpoena cannot be ignored, even if the physician has not been named in the action.

Notice of Deposition: If your testimony is required, you will receive a notice of deposition issued by an attorney or law firm that will state the date, time and place you are to appear, along with any documents you are instructed to bring. A Notice of Deposition, although different than a subpoena, should also never be ignored.

Demand for Arbitration: This document confirms that the plaintiff has elected alternative dispute resolution as a means of resolving a malpractice complaint. An arbitration demand should be treated with the same sensitivity as a subpoena or any other legal document; it represents an action or allegation against a physician and must be answered with the

same diligence reserved for other legal documents.

Notice of Medical Board inquiry: This document is usually generated as a result of complaints by patients, other physicians, or government agencies about the professional conduct of a physician. Alleged negligence or incompetence are common reasons for an inquiry.

Frequently asked questions

► **What is "Discovery" and what does it have to do with a lawsuit?**

Discovery is conducted after a lawsuit is filed, but prior to a trial, to determine the facts of a case and to "discover" what evidence all parties will present during the trial. Both sides question (depose) witnesses and declared expert witnesses, gather interrogatory information, file motions and subpoena records, all for the purpose of building their cases.

► **What is a "Deposition?"**

A deposition is a pre-trial discovery method in which a witness answers a series of questions under oath in the presence of the opposition who may cross-examine the witness. Depositions are recorded and transcribed stenographically. Oral depositions are taken in person and include a physician's testimony that may be used during the trial. You are advised not to attend an oral deposition without an attorney. It is possible that if you are deposed without counsel, you could inadvertently compromise your defense if ultimately you are named in the lawsuit. Any party to a lawsuit (plaintiff, defendant), or witnesses (expert witness, co-treaters, or staff), who can provide information on what happened, or what should have happened, can be deposed.

► What are Interrogatories?

Submission of interrogatories is a pre-trial discovery method that requires the answering of written questions designed to: clarify the facts and circumstances surrounding the event, find out general or specific information about the alleged injury, and help attorneys prepare their litigation strategy. Interrogatory responses may be used by either party during the trial.

► What is an “Expert Witness” and why do I need one?

The law requires that each party in a medical malpractice lawsuit retain at least one expert witness. The primary purpose of an expert witness is to provide testimony regarding the standard of care, to explain the medicine, and, if necessary, to interpret the medical records for the jury. A medical expert witness clarifies the medicine and is usually a physician who has recent experience in the same specialty, and who possesses similar training and education as the defendant physician. Expert witnesses are also retained to opine on the economic impact of the alleged injury and the life expectancy of the plaintiff, when germane.

► What is the “Statute of Limitations?”

The Statute of Limitations refers to the timeframe in which a plaintiff may file a lawsuit. If a patient attempts to file once the Statute of Limitations has passed, he/she may be barred from filing a lawsuit unless he/she is able to show good cause for the delay. There may be circumstances when the law “tolls” the statute. Tolling simply means to (temporarily) stop the (litigation) clock from running so that the ability to pursue a lawsuit is not compromised (see State-specific table).

► Do I have to include other physicians’ records that are in my chart when satisfying a Subpoena *Duces Tecum*?

Generally speaking, if you used records from another physician to determine a diagnosis and as part of your care and treatment, those records should be included. If you choose not to include the records, you should include a statement such as, “Portions of the medical record have been omitted because they were generated by another healthcare provider and I cannot attest to their completeness or accuracy.”

► If the subpoena requests “any and all” medical records does that really mean everything in the chart?

This is a phrase used to ensure that no document is withheld. You will often see “any and all documents including...” as a method of delineating the medical information requested. If you receive a subpoena that requests “any and all” medical records and you wish to limit what you release, discuss the subpoena with your assigned attorney, who will advise you about your course of action. If the information requested includes specially-protected information (HIV test results, mental health records protected by the Lanterman-Petris-Short Act [California only], drug and/or alcohol inpatient treatment records), your attorney will ensure that you receive the additional patient authorization required by law to release this protected information.

► Can I provide medical records on a CD-ROM to satisfy a Subpoena *Duces Tecum*?

Yes, if the requesting party has the ability to read a CD-ROM. However, if the requesting party specifically requests a paper copy of the medical records, you must honor the request.

► What if I no longer have the records requested in a Subpoena *Duces Tecum*?

You should notify your attorney that the records are no longer available and he/she will advise the court.

Important points to remember

- Help is only a phone call away. Patient-specific questions should be addressed to the Claims Department. Contacting the Claims Department will not jeopardize your coverage and may protect you against a potential lawsuit.
- Do not discuss a potential claim with anyone other than a representative of MIEC or legal counsel assigned by MIEC to protect your interests. Do not discuss the patient’s case with any physician except those involved in the continuing care of the patient and only when your input is required for continuing care and treatment.
- Refuse any invitation from a plaintiff’s attorney to discuss a matter directly with him/her. MIEC or its legal counsel will contact the attorney on your behalf.
- Failure to comply with the Summons and Complaint within the specified time limit may result in a default judgement or other penalties. Do not sign, date, or return to the patient’s attorney the “Acknowledgement of Receipt” in response to a Summons and Complaint served by mail until you have spoken with an MIEC Claims Representative.
- Failure to appropriately respond to many legal documents mentioned in this newsletter may subject you to a contempt of court citation, fines, or other sanctions. Failure to produce documents may preclude a party from using those documents at the time of trial. Don’t ignore legal documents even if you have not been named in the action.

Alaska Legal Procedures and Documents

Statute of Limitations	A lawsuit must be filed two (2) years from the date of discovery of the injury, or when the injury reasonably should have been discovered. If the plaintiff is under the age of majority (18), or incompetent by reason of mental illness or disability at the time of the injury, the statute begins to run when the plaintiff reaches the age of 18 or the disability is lifted. Wrongful death claims must be brought within two (2) years after death. A reasonable failure to discover an essential element of the cause of action tolls the running of the two (2) year wrongful death limitation period.
Pre-filing requirements	<p>Medical malpractice cases are to be reviewed by an Expert Advisory Panel. In some parts of the state (such as Southcentral Alaska, including Anchorage, Kenai, and Palmer/Wasilla) panels are not currently being used. In certain cases the court may also determine that a panel is not necessary.</p> <p>If a panel is used, the court appoints three panel members who may interview witnesses, physically examine the injured person, consult with appropriate specialists or learned works, and compel the production of relevant documents for examination before submitting a written report to the parties and to the court within 30 days. The Panel may request an additional 30 days within which to complete its review of the case. The panel may meet in private, but a record of any written or oral testimony must be maintained. They answer the following questions, and any others by the court:</p> <ul style="list-style-type: none"> ■ Why did the patient seek medical care? ■ Was a correct diagnosis made? If not, what was incorrect about the diagnosis? ■ Was the treatment or lack thereof appropriate? If not, what was inappropriate about the treatment or lack thereof? ■ Was the patient injured during the course of evaluation or treatment or by failure to diagnose or treat, and if so, what was the nature and extent of that medical injury? ■ Was the medical injury caused by unskilled care? ■ If a medical injury had not occurred, how would the plaintiff's condition differ from his or her present condition?
Summons and Complaint	This document describes who is being sued and the allegations being made. Timely response must be made pursuant to the instructions on the document, usually within 20 days after the complaint has been served, not counting the date of service. Failure to comply with the time limit may result in a default judgement or other penalties.
Subpoena <i>Duces Tecum</i>	This document informs the recipient of the date, time and place to appear. If appearance is scheduled for a date less than 10 days from the date of service, your attorney can draft a written objection and probably get it rescheduled. If the documents are produced to the requestor in advance of the scheduled deposition date, a "records deposition" can usually be avoided.
Notice of Deposition	This document informs the recipient of the date, time and place to appear. If you are a "party" (defendant) you may receive only a "notice" from opposing counsel, as a subpoena is not required. However, if you are not a party to a lawsuit, and your testimony is required, you may be subpoenaed by the court and you may also receive a notice by an attorney or law firm. Non-parties who are subpoenaed for a deposition are only entitled (per court rules) to be paid \$12.50 for travel and deposition time less than three (3) hours, or \$25.00 if more than three (3) hours, plus a mileage fee if you travel over 30 miles (total) for the deposition.
Allowable production charges	None

California Legal Procedures and Documents

Statute of Limitations	A lawsuit must be filed one (1) year from the date of discovery, but no more than three (3) years from the date of the injury or when the injury should have been discovered. The statute for retained foreign bodies runs until the plaintiff discovers or should have discovered the injury. The statute for minors is within three (3) years from the date of the injury, unless the child is under age of six (6); then the Complaint must be filed within three (3) years or prior to the child's eighth (8th) birthday, whichever is longer. The statutory period begins to run for adults at the time of discovery, but for minors at the time of injury.
Pre-filing requirements	The 90-day Notice of Intention to Commence Legal Action is a formal notice that a lawsuit may be filed. The notice often comes in letter form but may also be typed on a legal form similar to an actual Complaint. The Notice may be from the patient or his/her attorney and may be sent directly to a care provider (physician) or care facility (hospital). [Do not contact either the patient or his/her attorney upon receipt of a 90-Day Notice. Refuse any invitation from the attorney to discuss the matter directly with him/her. Notify MIEC. MIEC or its legal counsel will contact the attorney on your behalf.]
Summons and Complaint	This document describes who is being sued and the allegations being made. Timely response must be made within 30 days after receipt. Failure to comply with the time limit may result in a default judgement or other penalties.
Subpoena Duces Tecum	The subpoena must satisfy either (a) or (b): (a) serve the physician with a document or "proof of service" attesting that the patient was served as required by law with a copy of the subpoena; a supporting affidavit showing good cause for production; and the "Notice to Consumer," a notice of the patient's right to object. The document must show the patient was notified at least 10 days before the date set for production of the information (15 days if the patient was served by mail) and at least five (5) days prior to personal service on the physician; or (b) furnish the physician with evidence signed by the patient or the patient's attorney that the records may be released (written authorization). [In either event, follow the instructions shown on the subpoena. Do not place original records in the mail. File written authorizations for the release of medical information in the patient's chart. Respond within 15 days if served by mail, and 5 days if by personal service (mail, "substitute service" to your office staff, personal service, or publication in general circulation newspaper.)]
Notice of Deposition	This document informs the recipient of the date, time, and place to appear. The practice in California is to pre-arrange the deposition date, time, and place with the deponent (or through the legal counsel).
Allowable production charges	If records are photocopied or inspected at your office, you may request up to a \$15.00 in clerical fees, plus the actual costs of postage. If applicable, you may also charge any fees you paid to retrieve and return the records. The actual costs of the copy service are paid by the requesting party.

Call the MIEC Claims Department if you receive:

- A request for records (from an attorney)
- A 90-Day Notice
- A Summons and Complaint
- A Subpoena
- A Notice of Deposition
- A Demand for Arbitration
- Investigative correspondence from the state medical board
- A request for pre-litigation activity
- A notice from a licensing agency
- An attorney's request for a meeting, a report, or money
- Correspondence from a patient or an attorney threatening to sue or asking for compensation

Hawaii Legal Procedures and Documents

Statute of Limitations	A lawsuit must be filed within two (2) years after the date of discovery or when the injured party reasonably should have discovered the injury, but no more than six (6) years after the date of the injury or death. For minors, the statute is within six (6) years from the date of injury, unless the child is under 10 years, in which case the action need only be commenced within six (6) years from the date of the injury or by the child's 10th birthday, whichever is later. The statute is tolled if the child's injury could not have been discovered through the use of due diligence. If a plaintiff is mentally disabled or incarcerated, the statutory time begins when the disability is removed or the person is released.
Pre-filing requirements	Generally, a Medical Claim Conciliation Panel (MCCP) consists of two attorneys, one of whom will be the MCCP chairperson, and one physician (usually selected from the same specialty as the respondent physician), who collectively will conduct an expedited and informal confidential and privileged hearing to determine whether the physician/care provider has been actionably negligent. No record of the proceedings is made. After its review and determination, the Panel files a written advisory decision with the Insurance Commissioner, including the amount of damages, if any, which it believes should be awarded in the case. The MCCP's decision against a claimant is not a bar to proceeding with litigation. Similarly, a decision against a respondent does not prevent the respondent from demanding a court trial. An MCCP decision, conclusion, finding or recommendation is not admissible in any subsequent trial regarding the case.
Summons and Complaint	Action must be taken within 20 days of service upon the defendant, exclusive of the day of service. Failure to respond results in a default judgement for the relief demanded in the Complaint pursuant to the instructions on the document.
Subpoena <i>Duces Tecum</i>	This document can be issued only after a lawsuit has been filed or a request for a hearing has been filed with the MCCP. The subpoena may be issued by any party of the claim or lawsuit and may be served by mail or by process server. Compliance with a Subpoena <i>Duces Tecum</i> must be within five (5) days of receipt. Generally, as a courtesy, responding parties are given ten (10) days from receipt to respond. There is also a <i>Subpoena to Appear for Trial Testimony</i> which may be considered defective if it is served within 48-hours of the time the witness is scheduled to appear in court.
Notice of Deposition	This document informs the recipient of the date, time, and place to appear. The practice in Hawaii is to pre-arrange the deposition date, time, and place with the deponent (or through the legal counsel).
Allowable production charges	Reasonable copying charges of no more than 25¢ per page are permitted by the courts.

Idaho Legal Procedures and Documents

Statute of Limitations	A lawsuit must be filed two (2) years from the date of injury. The statute for retention of a foreign object begins when the injured party knows or should have known of the injury. Such actions may be commenced within two (2) years of the injury complained of or one (1) year following the date of discovery, whichever is later. If under the age of majority (18) or mentally disabled, the minor's age and/or the mental disability tolls the statute. The minority or mental disability must exist at the time the cause of action occurred and tolling only continues during the existence of the minority or disability. The statute may not be tolled due to minority or mental disability for more than six (6) years (after which time it will begin to run again). The two (2) year statute for wrongful death begins to run at the time of death.
Pre-filing requirements	A Pre-Litigation Screening Panel conducts an expedited and informal hearing prior to a lawsuit being filed with the court. The Panel is comprised of a doctor, a lawyer, and a layperson. A hospital administrator joins the Panel when the allegations include a hospital. Each side meets separately with the Panel and does not hear the opposition's case. The hearing is confidential, there is no discovery, no rules of evidence apply, no record is kept of the proceeding and the evidence and documents are returned to the parties at the close of the hearing. The Panel issues an advisory decision (indicating whether the matter appears to be frivolous, meritorious or another description that is not binding or admissible as evidence in court). Although the decision of the panel is advisory in nature, it is nonetheless a prerequisite to medical malpractice litigation. After a thirty (30)-day "cooling off" period, the plaintiff is free to file a medical malpractice lawsuit in the district court. A physician needs representation and should notify MIEC immediately upon receiving notice that a patient has requested a Pre-Litigation Screening Panel hearing.
Summons and Complaint	This document describes who is being sued and the allegations being made. A timely response must be made within 20 days of service upon a party. Failure to comply with the time limit may result in a default judgement.
Subpoena <i>Duces Tecum</i>	This document requires the recipient to appear at a designated time and place to provide testimony and/or produce documents, electronically stored information, or tangible evidence or allows inspection of premises. When production is requested the recipient has 30 days following service of the subpoena to comply.
Notice of Deposition	This document informs the recipient of the date, time, and place to appear.
Allowable production charges	None

How to reach MIEC:

Phone:

Oakland Office: 510/428-9411
 Honolulu Office: 808/545-7231
 Boise Office: 208/344-6378
 Outside: 800/227-4527

Fax:

Loss Prevention: 510/420-7066
 Oakland: 510/654-4634
 Honolulu: 808/531-5224
 Boise: 208/344-7903

Email:

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