

# Preventive Action

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## Deposition Guidelines

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At some point every anesthesiologist will encounter a patient outcome that will become the basis of a claim or suit. The malpractice litigation process involves a number of steps, one of which is the development or “discovery” of factual information.

One of the methods used to develop and preserve this information is the question and answer session taken under oath, otherwise known as a deposition. Depositions are recorded by a court reporter, and attorneys for both sides in the legal action usually attend. Depositions are available for the medical experts in the case, as well as other fact witnesses, co-defendants and the jury to review.

### Why am I being deposed?

Depositions are taken for several reasons. The process determines the knowledge and facts you possess regarding the issues in the case. Your testimony in the deposition provides to all parties in advance, information about which you may be required to testify during trial. The deposition can also be used to limit or narrow the issues being litigated. If there are issues that you feel are troublesome, discuss them with your attorney prior to your deposition.

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### Tips for deposition survival

Giving a deposition can be stressful. The following basic recommendations can ease the process.

- Always tell the truth.
- Think before you speak. Make sure you listen to and understand the question completely before you answer.
- Answer the question asked; **only** that question.
- Never guess at an answer. Do not hesitate to say that you do not know the answer.
- Do not characterize your answers—avoid phrases such as “in all honesty” or “I’m doing the best I can.” Likewise, avoid restrictive terms such as “I never” or “I always.”
- Do not offer information voluntarily. It is not your role to educate the examiner.
- Do not let the examiner put words in your mouth. Do not accept his characterization of time, distance, personalities, or events. Rephrase the question into a sentence of your own, using your own words.
- Do not argue or express anger with the examiner. If you feel uncomfortable with the line of questioning, state “on the record” that the proceeding may be reconvened once you are represented by counsel.
- If you do not remember something, say so. You may be asked if a statement or document refreshes your memory, and if it does, say so. If it does not, your answer remains that you do not remember.



- Avoid any attempts at levity. Likewise, avoid even the mildest obscenities or any ethnic slurs or references that can be considered derogatory.
- If an objection is made to a question, listen to the objection carefully. You may learn something about the question and how it should be handled.

*How well you come across as a deponent is often pivotal in the litigation process.*

- Mistakes can happen during a deposition. Do not become upset. If you realize you made a mistake during the deposition, correct it as soon as it is realized. Mistakes that you remember or recognize after the deposition ends

may be corrected when you sign the transcript.

Whenever you are requested to give a deposition, either voluntarily or by subpoena, it is always advisable to consult with FPIC or your personal attorney for guidance.



APAC publishes *Preventive Action* on a quarterly basis as a service to its policyholders. Information in this publication does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained in this newsletter are generalized and may not apply to all practice situations. APAC recommends you obtain legal advice from a qualified attorney for a specific application to your practice. The information should be used as a reference guide only.

For comments, questions, or to obtain additional copies contact the APAC Risk Management Department at 866-294-6014, ext. 3100, or [rm@fpic.com](mailto:rm@fpic.com).

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## Adverse Outcomes: Tips for Handling Difficult Situations

Medical malpractice claims are usually the result of an adverse event or outcome that arises from a medical procedure or course of treatment. Florida Statute 456.0575 requires that every licensed health care provider inform the patient (or a representative of the patient) in person about adverse incidents that result in serious harm to the patient.

Frequently, the actions that are taken immediately after an adverse event or complication occurs are pivotal for claim avoidance.

### First response

Should an adverse event occur, report the situation promptly to APAC. The incident should also be reported to the hospital's risk management department. This is the best time to write down your entire recollection of the events while they are still fresh in your mind. This documentation should be kept separate from the patient's medical record in a secure place where it can be retrieved in the future.

Ensure that any evidence that might be pertinent to the event, including medications and equipment that may have malfunctioned, is sequestered. Malfunctioning equipment should never be returned to the manufacturer, unless that evidence has been preserved.

### What to tell the patient and family

- Accompany the surgeon to deliver the news to family members.
- Express your sympathy in a caring and empathetic manner.
- Do not profess any guilt or innocence.
- Where possible, provide the family with an explanation of what transpired but do not speculate. You may think you should admit blame or indicate cause, but you may not know all of the facts until a thorough analysis has taken place.

Words or statements that can never be taken back can damage a well-deserved defense.

- Assure the family that everything possible was done (and/or will continue to be done) for the patient, and that as soon as an explanation is determined, all remaining questions will be addressed and answered.

The key is to maintain and increase communication with the patient and family in order to maintain rapport and trust. Studies have shown that even the tone of voice and the manner in which bad news is delivered are powerful motivating factors for initiating legal action.

### Report claims promptly

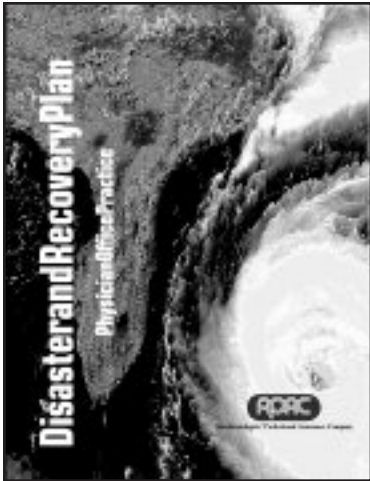
Late reporting may significantly undermine your defense, and may also jeopardize your coverage. Contact APAC as soon as possible when legal notices pertaining to your professional liability are received. Virtually all legal notices require a response or action of some kind within a statutory time frame.

Service of suit papers, such as a summons and complaint, require that an answer and appearance be filed on your behalf within 20 days. Failure to do so could result in a default judgment that may effectively forfeit a defense – and your professional liability coverage.

A Notice of Intent will commence a pre-suit investigative period. Failing to timely report such Notice after you receive it compromises the time frame necessary to investigate and defend the claim being advanced. Moreover, if production of certain information set forth by the Notice is not made within a 20-day time frame, affirmative defenses to which you may be entitled may be lost.

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## Risk Management Products & Services Disaster & Recovery Planning APAC can help you prepare



While the 2006 hurricane season is well underway, it's not too late to ask yourself, "Is my practice prepared to survive and function in the aftermath of such an occurrence?"

The risk management experts at APAC have created a tool to help physicians' offices with proactive disaster planning. Our exclusive booklet, *Disaster and Recovery Plan: Physician Office Practice*, contains a model for disaster and recovery planning designed specifically for the physician office. An extensive checklist format covers things from protecting patient records to third-party billing measures - all designed to help mitigate loss and facilitate recovery. An hour or two spent discussing these questions with your staff can help avoid chaos and confusion, reduce your exposure to loss and

maintain patient safety if and when faced with a disaster.

To obtain copies of *Disaster and Recovery Plan: Physician Office Practice*, or any other APAC risk management reference materials, contact the Risk Management Department at 800-741-3742, ext. 3100 or [rm@fpic.com](mailto:rm@fpic.com). The materials are also available at [www.apacinsurance.com](http://www.apacinsurance.com), under Risk Management, Reference Materials.

### Risk Management Guidelines: Disaster & Recovery Planning

- More than 25 percent of businesses that close following a disaster do not reopen.
- Eighty percent of businesses that experience an extended disaster are out of business within five years.
- Fifty percent of businesses without a recovery plan go out of business within two years of experiencing a disaster.
- A private practice is a business and has both tangible and intangible assets.
- Without a pre-defined plan to protect and recover service operations, most practices will be unable to survive a business outage.

*APAC has available a number of highly effective risk management products and services. These comprehensive products are designed to avoid claims and disciplinary actions, and encourage physician participation. Such products and services are available at no cost to our policyholders.*

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### Reporting to APAC

#### Potential or actual claims:

APAC  
600 N. Pine Island Road, Suite 250  
Plantation, Fla. 33324  
Toll-free phone: (866) 760-2121 ext. 15  
Local phone: (954) 577-2721  
Fax: (954) 577-2725

#### Licensure investigation:

APAC  
1000 Riverside Avenue, Suite 800  
Jacksonville, Fla. 32204  
Toll-free phone: (800) 741-3742 ext. 3293  
Local phone: (904) 354-5910  
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### **What is a tort?**

A civil wrong or injury for which the court will provide a remedy in the form of an action for damages.

### **How long must a physician retain medical records?**

For five years, per Florida Administrative Code 64B8-10.002; however, APAC recommends that records be kept for at least a seven-year period from the point of last patient contact given the maximum statute of limitations for medical malpractice. For patients under age one, records should be retained until the child's eighth birthday. If the patient is age one or older, keep records for the seven-year period.

### **What action should be taken when a medical error is suspected or occurs?**

Contact APAC's Risk Management Department for guidance as soon as possible. Make no admissions of liability. Federal and/or state reporting requirements under strict time constraints may apply. Always attempt to discuss the situation with personal legal counsel or APAC before meeting with hospital risk management.

### **May multiple prescriptions be issued for the same medication on the same day?**

The Florida Board of Medicine's position is that issuing multiple prescriptions for the same medication on the same day to a stable patient is appropriate as long as the statement "do not fill before" is written on the subsequent prescriptions. In addition, the prescription must adhere to the new legible prescription law.

### **What are punitive damages?**

The purpose of punitive damages is to punish the defendant. Where the wrong done was aggravated by circumstances of violence, oppression, fraud, or

wanton and wicked conduct by the defendant, damages are awarded to the plaintiff on an increased scale. Example: A physician found negligent may be ordered to pay compensatory damages to the plaintiff for medical bills and other expenses, and may be ordered to pay punitive damages if the evidence showed the physician had consciously tried to alter the medical record to hide the supposed negligence.

### **How many Physician Extenders (PEs) may be supervised by a physician?**

The ratio of PEs to supervising physician will vary by numerous factors, including the type of PE being supervised. While the American Medical Association does not state a specific ratio, it recommends that the appropriate ratio of physicians to physician extenders should be determined by physicians at the practice level, consistent with good medical practice, and state law where relevant. It is important to maintain a ratio consistent with the term, if any, of your professional liability policy language.