

# MALPRACTICE

Medical and legal malpractice claims require 3 elements to succeed:

1. A duty to provide a service (implied or explicit contract).
2. A breach of the “STANDARD” in performance of the duty. In medicine, it is called the “standard of care.” The standard is established by testimony of “experts.”
3. Damages must be directly the result of the breach.

A doctor or lawyer may be ineffective, but a medical malpractice case requires damages, usually physical, that result in impairment of function. Emotional upset is not damage. If a patient remedies a breach of care by seeking care elsewhere, malpractice is obviated. A patient cannot hold the doctor responsible if they ignore advice or refuse treatment. Doctors are careful to document patient communication in charts, but they must share this with the patient and other treating doctors. Failure to communicate is a common cause of malpractice.

Legal malpractice requires that an adverse legal judgement would not have occurred but for the malpractice of the attorney. Even if the attorney appears drunk in court, unless the outcome is different this is not malpractice (but does subject the lawyer to discipline).

Experts are a key component to malpractice cases and their use is governed by the Daubert Rule. This requires that experts base opinions on generally acceptable scientific principles and that the expert has the education, training, and experience to be familiar with those principles and the acceptable standards of practice in their profession. A common situation arises when experts differ in opinion. This is resolved by a jury who accepts as fact one expert over another.

It is an imperfect system, resulting in unfair results and defensive medicine which increases costs. Some problems include the incredible expenses required for prosecution and defense of malpractice. An industry of “paid guns” in expert testimony. Academic specialists opine based on expertise that many doctors do not possess.

Medical and legal mistakes happen frequently, but malpractice requires that mistake to damage the client seriously. Examples include delayed diagnosis of cancer resulting in death or improper surgery resulting in loss of function that is not treated.



**DOCTOR, IS IS BETTER TO BE  
SAFE OR TO BE SORRY**