LEARN HOW TO MITIGATE THE RISKS YOU FACE AS A MASSAGE THERAPIST

COURSE DESCRIPTION:
This course describes how you can protect yourself from legal malpractice action. Even the best massage therapists make mistakes or are perceived by a client as having caused injury through their professional services. This course includes actions you should take if you suspect you’ll be sued—or if it comes to pass that you are actually sued.

COURSE OBJECTIVE:
In this course, you’ll learn what you can do to safeguard yourself and your practice in the face of a malpractice lawsuit. When you finish this course you will be able to:

· Understand the value of maintaining an objective view during a malpractice lawsuit.
· Define when clients sue.
· Give a legal description of malpractice.
· Describe the four forms of malpractice negligence.
· Identify the first step to take in the event of an adverse incident.
· List four guidelines for making incident reports.
· List two goals of a malpractice investigation.
· Describe two ways to decrease the stress of an investigation through each of legal, self-care and self-protection means.
· Describe three useful ways to participate in a malpractice investigation.
· List five ways to mitigate the blame attached to you in a malpractice lawsuit.

NOTE: The information contained in this course is intended to provide a general overview of actions to take in the event of a malpractice suit.
It’s true that there is risk involved in most professions. As massage therapists, however, you need to be very aware of the different situations that might put you and your practice at risk—as well as what you can and should do if faced with the possibility of a malpractice lawsuit.

To err is human. Even excellent massage therapists fail to connect with clients. The reality is that if a client perceives they have been injured as a result of the professional services you provided, or failed to provide, that client may sue. The question is how should you respond when an incident occurs? Find out here.

**WHAT TO DO IF YOU’RE SUED FOR MALPRACTICE**

If a client perceives they’ve been injured as a result of the massage therapy you provided, or failed to provide, they could sue. Remember, having a client sue doesn’t automatically mean the massage therapist has been negligent—it means that the client perceives negligence.

If you make a mistake in your massage therapy practice, you probably won’t be worried about a lawsuit—at least not initially. More likely, you’ll be concerned about your client. You’ll make sure to attend to the client, reassure the client, and provide comfort and emergency assistance if needed. You’ll also be busy doing any follow-up actions that may be required, as well as documenting in detail what happened.

But first, let’s take a look at the immediate steps you need to take.

**2 simple steps**

The best way to minimize the risk of a lawsuit is by taking action immediately in two common sense ways:

**First**, notify your supervisor and request the appropriate incident report form.

**Second**, contact Healthcare Providers Service Organization (HPSO), your professional liability insurance company when you’re an AMTA member. Even if you are covered by your employer’s malpractice insurance policy, be sure to contact HPSO as well. You’ll get advice on reporting the incident and on how to prepare you for what to do. Perhaps more importantly, HPSO can advise you on what not to do in the event of a lawsuit.

**REPORTING INCIDENTS.** Spotting and reporting incidents is the first step in the professional liability claims process. But how do you know when you’ve experienced an incident?

**INCIDENTS ARE ANY ERROR OR OMISSION IN PROFESSIONAL SERVICES THAT HAVE RESULTED IN A CLIENT INJURY OR CLIENT COMPLAINT** that you think may lead to a claim. Incidents include statements from a client indicating they might file a claim related to your professional services, even when you cannot identify an error in your treatment. Some examples of incidents include adverse treatment results, and signs of a client’s displeasure, such as a letter of complaint or a heated disagreement, to name two.
Once you’ve taken care of these first two tasks, however, the fear of a lawsuit may creep into your mind. How can you protect yourself from legal action? What should you do if you suspect you’ll be sued—or if you actually are sued? In this continuing education course, you’ll learn what you can do to safeguard yourself and your practice in the event of a lawsuit. After identifying a potential incident and reporting it to HPSO, focus your attention on creating the incident report. This report alerts administrators in your practice setting to an event that involved a client injury, resulted in a client complaint or was in some way outside the facility’s ordinary operations.

REPORTABLE CLIENT-CARE INCIDENTS MAY INCLUDE, BUT AREN’T LIMITED TO:

- Falls
- Treatment-related injuries, such as burns
- Complaints of inappropriate touching by the therapist
- Exposure of a body part during the service
- Complaints about unexpected or unusual pain or discomfort
- Equipment-related injuries or events that have the potential for injuries, such as a malfunctioning massage table
- Skin tears or bruising
- Adverse or allergic reactions to oils and scents
Each massage therapy practice should have guidelines for the immediate completion and appropriate routing of an incident report. A typical process is for a written, objective report of the facts to be completed by the massage therapist directly involved (usually in some sort of standardized format) and submitted within 24 hours to a designated member of the management team, such as a supervisor or practice owner. **YOU, THE MASSAGE THERAPIST, ARE REQUIRED TO REVIEW AND FOLLOW SUCH GUIDELINES.**

Visit the Career Guidance area of AMTA’s website, where you’ll find a wide variety of information designed to help you minimize your professional risk. In the Minimizing Professional Risk section of Career Guidance, you can read practical advice on everything from developing effective intake forms to creating a safe work environment. You’ll also find information about creating an Informed Consent Agreement—a document that gives you the opportunity to convey in writing what a client should expect from a massage therapy session with you. Log on now at [amtamassage.org](http://amtamassage.org).
Confi dentiality is crucial.
As you prepare your incident report, keep in mind that both the report form and the information it contains are for internal use only. They should be held in the strictest confidence. If they’re not, confidentiality can be severely compromised.

The law recognizes this need for confidentiality—in fact, many states extend the privilege of confidentiality to include the incident report (you need to use the facility’s official incident report form to maintain this protection). Other states allow a plaintiff access to the report. Check with your local bar association—or facility’s risk manager or attorney—for your state’s guidelines regarding confidentiality protection, as well as the discoverability or admissibility of incident reports made during the normal course of business.

Besides relying on state laws, organizations should have guidelines to protect the confidentiality of incident reports. Perhaps the most important is to keep any reference to an incident report out of the client’s record. Do not copy or place the report in the client’s treatment record. You should also refrain from referring to the report in your treatment record or client intake documentation. Otherwise, clients and their authorized attorneys may be legally entitled to obtain access to those records.

Some organizations require that the incident report be in a letter format addressed to their attorney in order to protect the report under the attorney/client privilege. Others want their attorney’s impression of the incident included in the report, giving the report the legal protection afforded an attorney’s professional documents. These efforts may or may not be successful depending upon the jurisdiction in which a claim is filed.

Confidentiality is crucial not just for the report, but also for information that’s in the report. This information usually arises from confidential conversations, and could be detrimental to the client and staff.

HERE ARE SOME WAYS YOU CAN MAINTAIN THE CONFIDENTIALITY OF THE INFORMATION:

- Limit your discussions about the incident to the few designated individuals who have a need to know, such as your manager and HPSO, your insurance provider.
- Resist the temptation to describe the incident to friends or family.
- Be aware that a breach of confidentiality may itself become the basis for a lawsuit.

WHEN DRAFTING AN INITIAL INCIDENT REPORT, YOUR JOB IS TO OBJECTIVELY DESCRIBE THE CIRCUMSTANCES PERTAINING TO THE INCIDENT.

Give only the facts.
Document the work you did specifically and in detail, writing “The massage therapist placed the hot stones on the client’s lower back for two minutes,” for example. Don’t draw conclusions about cause or fault, and don’t record client impressions. For example, you shouldn’t say: “The massage therapist left the hot stones on too long because she was called away to another client” or “The client was not paying attention.”

SIMPLY RECORD THE FACTS CLEARLY AND SUCCINCTLY.

WHEN THERE IS AN ADVERSE REACTION OR OUTCOME THAT RESULTS FROM YOUR SERVICES, YOU NEED TO BE SURE YOU FACTUALLY RECORD THE FOLLOWING:

- What occurred
- What the client stated
- What steps were taken to resolve or relieve the situation
- Whether the client responded favorably to those steps
- The client’s condition and mode of leaving following the appointment
- The follow-up or referral instructions provided to the client

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The Investigation Begins

Once you’ve submitted your report to your supervisor and/or your insurance provider—HPSO—the investigation begins.

**THE INVESTIGATION WILL OFTEN INCLUDE SOME OR ALL OF THE FOLLOWING ACTIVITIES:**

- Reviewing the records for possible deviations from acceptable standards of care.
- Notifying administrators, attorneys and insurers.
- Determining if the incident is included in the state’s reporting requirements for medical errors.
- Requesting and reviewing records from other facilities/professionals where the client received care.
- Obtaining an expert review of the care provided to the client.
- Securing any equipment involved in the incident so that its condition can be evaluated and maintained for evidence.
- Assessing whether the incident actually led to a client injury.
- Assessing the damage resulting from the injury: Did the client require a hospital stay or additional treatment? Is the injury temporary or permanent? Is the injury considered a sentinel event by The Joint Commission, requiring completion of a root cause analysis?
- Interviewing anyone who was involved in or witnessed the incident.
- Advising and counseling the client and family about the incident.
- Evaluating the client’s and the family’s response to the incident, as well as their general response to the staff and the care received.
- Determining whether the client and family need outside support and obtaining this support if necessary.
- Assisting in planning any public response that’s deemed appropriate.

Besides investigating the incident, the risk management team (or individual) should take steps to prevent similar incidents from happening again. For example, they might identify the causes or factors that contributed to the incident and develop processes for preventing a recurrence in the future. Or, they might put new policies and procedures in place, providing staff-development sessions, retraining staff in the proper use of involved equipment and creating systems for monitoring compliance after the new procedures are implemented. Adding policies and procedures designed to easily identify and deal with potential risks will decrease the likelihood of a repeat occurrence.

**MANAGING THE CLAIM**

So far, we’ve talked only about incident reports, but now we cross the threshold into the world of legal action. The dreaded event has occurred. You’ve been sued for malpractice. What should you do?
Here are some practical tips:

- Don’t attempt to evade being officially notified, either by a process server or by certified mail.
- Resist the urge to place court papers in a drawer and hope the case will go away.
- Don’t assume that someone else has notified HPSO, your professional liability insurance carrier—notify them yourself immediately.

Notifying HPSO lets the insurance investigator get statements from you and other key witnesses before the information becomes stale. Also, the sooner the insurer knows, the sooner your defense can be established and your stress can start to subside. Finally, failure to report a claim in a timely manner may jeopardize your coverage.

Handling the Stress

Litigation places demands on your time, energy, emotions and self-esteem. Here are some practical suggestions to help you cope with those demands. If you’re still experiencing stress after trying these tips, consult your health care provider.

DON’T DISCUSS THE CASE WITH ANYONE outside of your massage therapy practice, including your client, until you’ve spoken with your insurance representative and attorney. Then, proceed as advised. Your insurer will often provide an attorney experienced in medical malpractice.

DO NOT SIGN OR ACCEPT ANY DOCUMENT related to the claim from any party without obtaining approval from your attorney.

AVOID DISCUSSING, COMMENTING UPON, OR TAKING ISSUE with any information you receive regarding judicial or administrative proceedings.

BE SURE YOU DO NOT ADMIT LIABILITY, consent to any arbitration or judgment, or agree to any settlement proposal—and report any such demands to your attorney.

REPORT ANY COMMUNICATION YOU RECEIVE FROM YOUR CLIENT, client’s attorney or any state or federal administrative agency, licensing or regulatory authority to your attorney immediately.

MAKE TIME TO EXERCISE YOUR MIND AND BODY. Engage in aerobics, relaxation, yoga or other activities that can enhance your well-being. Spend time with your family, but don’t discuss the litigation. Be mindful of maintaining good, healthy nutrition.

In the days prior to officially answering questions or giving testimony, make a special effort to maintain your equilibrium so you won’t be overly exhausted, scattered or anxious when the time comes.

DON’T OBSESS. Keep the case “off limits” except when you’re actively engaged in working on it.

IF YOU HAVE TO APPEAR IN COURT, GO THERE AHEAD OF TIME. If the courtroom is being used, stay and watch the proceeding. If it’s empty, get a feel for sitting in the witness box.

DON’T ALLOW THE ALLEGATIONS TO TARNISH YOUR SENSE OF SELF-WORTH, either personally or professionally.

ACKNOWLEDGE THAT YOU MAY BE UNDER SUFFICIENT STRESS TO COMPROMISE YOUR MASSAGE THERAPY PRACTICE. If possible, take steps to compensate for this, such as taking time off.

NOTIFY YOUR EMPLOYER. Even if you have your own professional liability coverage, your employer will most likely need to notify his or her carrier if the incident happened while you represented the facility as an employee. Your employer may also be named in the lawsuit. There is also a possibility that your employer may have assistance programs to support you emotionally and financially.

DON’T ATTEMPT TO CORRECT OR ALTER THE CLIENT’S CHART because such falsification of documents can place your massage therapy license or your ability to practice in serious jeopardy, even if no lawsuit results. Late entries are acceptable when necessary for the client’s continuing care/well-being, but make sure to follow your practice setting’s policy and procedure regarding them.

DON’T SPEAK TO ANY OTHER ATTORNEY (INCLUDING YOUR EMPLOYER’S ATTORNEY) WITHOUT CONTACTING YOUR ATTORNEY FIRST (your attorney may even contact you first). Your attorney may need to be present to protect your interests. Once you’re represented by an attorney, an attempt by another attorney to contact you may be unethical.

DON’T TALK ABOUT THE CASE WITH REPORTERS, clients or staff without first consulting your attorney.

REALIZE THAT YOUR EMPLOYER AND COLLEAGUES, even when they want to be supportive, may have interests that conflict with yours if they’re codefendants.
Participate in the Process

In addition to knowing how to behave in the face of a malpractice suit, you need to be involved in the legal process. Your participation in the process is essential to ensuring the best possible outcome, and has the added benefit of giving you a sense of control, which is an important and positive method for coping with the shock of the situation. To participate in the process:

- Be prepared to learn legal terminology and procedures. By thinking of yourself as the defendant and the person suing you as the plaintiff, you help remove the lawsuit from the emotionally charged realm of client care and professional competence. Instead, the focus shifts to two parties and their attorneys working within the legal system to determine appropriate rights and responsibilities.

- Adjust your schedule to accommodate the attorney assigned to defend you by your insurer. Accept that you’ll likely need to dedicate large blocks of time to this effort.

- Submit in writing any requests, inquiries or additional information you may have to your attorney or insurer.

- Be perfectly candid with your attorney and insurer. Remember, the attorney/client privilege protects the information you provide. Don’t withhold information, even if you think it’s damaging. The plaintiff’s attorney may already have this information, and your attorney would be at a disadvantage if it surfaced for the first time in an official hearing.

- Work closely with your attorney to prepare you for fielding questions from the plaintiff’s attorney. You’ll be advised how to state the facts in your answers and how you should behave during the questioning. You’ll learn the kinds of statements and behaviors that work to your advantage—and the kinds that you should avoid.

- If you don’t know the answer, don’t speculate. Keep in mind that “I don’t know” and “I don’t remember” are appropriate answers during testimony.

- Be trusted by your attorney and cooperate fully. Keep appointments and promptly respond to phone calls and all electronic and hard copy correspondence.

- Comply with court schedules. Failure to appear can result in a default judgment against you.

- Listen to your attorney. You’ve paid for this advice.

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Malpractice 101:
FINDING YOUR WAY THROUGH THE LEGAL LABYRINTH

Massage therapists who’ve been sued may feel overwhelmed by their sudden immersion into the legal labyrinth. Yet the world of law is perhaps no more complicated than the world of massage therapy. To help you thread your way through this environment, here is an overview of its basic structure and concepts as they apply to medical malpractice.

WHAT THE LAW DOES. In general, the law exists to settle disputes, maintain order, protect persons and property, and provide a framework for common expectations about transactions, relationships and events of daily life. In terms of malpractice, the law exists to make a client “whole” again by awarding monetary damages if the client was injured because of medical negligence.

HOW THE LAW IS EXPRESSED. The United States Constitution is the supreme law of the land. No other constitution, law or regulation can be inconsistent with the federal constitution. State constitutions can provide more rights than the federal constitution, but not fewer. Besides their constitutions, federal and state legislatures enact three types of laws: statutes, regulations and case law.

STATUTES are laws enacted by legislative bodies—either Congress or the state legislatures. Federal statutes govern the health care industry, establishing laws and federal regulatory agencies. State statutes govern specific health care provisions, such as the content and availability of client records, living wills and advance directives, as well as privacy and confidentiality rights and protections and the definition of child, spousal and elder abuse.

Each state regulates its own institutional and professional licensing. Statutes governing licensure of health care institutions often contain specific guidance on the care of clients. State boards of massage therapy, created by statute, administer each state’s massage therapy practice act, itself also a statute.

REGULATIONS are the “rules” made by federal and state administrative agencies. State boards of massage therapy, for example, create regulations governing specific details of massage therapy practice. Before regulations become final, the public must be allowed an opportunity to comment on them.

CASE LAW (also called “common law”) is a body of judicial findings handed down in response to lawsuits. The body of case law establishes a precedent for other courts to follow.

WHERE MALPRACTICE FITS IN. Two types of law exist at both the federal and the state levels: criminal law and civil law.

With CRIMINAL LAW, the judgment includes a punishment, usually a fine or imprisonment. With civil law, the judgment generally includes the payment of money as compensation for a loss or injury.

CIVIL LAW includes many areas. Among the more common are corporate law, tax law, constitutional law and contract law. The area of civil law that includes malpractice is called tort law. A tort is a wrong that violates someone else’s person or property. It’s intentional if it’s done for the purpose of causing the violation or with reasonable certainty that the violation will result. It’s unintentional if it results from negligence. Malpractice is an unintentional tort. Therefore, a malpractice judgment generally includes the payment of money as compensation for a loss or injury.

DUTY. As a massage therapist, you have a professional relationship with your client that requires you to act the way a reasonably prudent massage therapist would act in the same or similar circumstances. Called the standard of practice or standard of care, this standard for professional behavior is drawn from various sources. These sources include state massage therapy practice acts, other health care laws, professional association standards, textbooks and treatises, facility policies and procedures, and equipment instructions. This broad base makes the standard of care national rather than local, so an expert witness may be brought in from anywhere in the country. (An expert witness is retained to review or determine whether a standard of care has been breached, as well as the extent of damages, if any.)

In massage therapy, the standard of care implies a duty to apply a method to therapy such as the HEMME
Making A Defense

A massage therapist facing a malpractice suit needs their attorney to marshal all available resources. In those circumstances where the massage therapist didn’t do what the suit alleges, the attorney will focus on disproving the allegations. If the massage therapist did do what the suit alleges, then the attorney will focus on reducing or, if possible, eliminating culpability (referred to as mitigation of damages).

Mitigation of damages can be accomplished via a number of strategies, including claiming contributory negligence on the part of the plaintiff, comparative negligence between the plaintiff and the defendant, an assumption of risk by the plaintiff, statutory immunity on the part of the defendant, an unavoidable accident or an expiration of the statute of limitations. Here’s what each of those terms means.

CONTRIBUTORY NEGLIGENCE means the client’s actions or inactions caused all or part of the damages. Examples include a plaintiff’s failure to follow instructions, such as precautions after a surgery. A defense based on contributory negligence must show that the client’s conduct fell below what a reasonably prudent client would do to maintain personal safety, and that this negligent conduct caused the harm.

COMPARATIVE NEGLIGENCE applies only to situations where both the client and the massage therapist are found to be negligent. When this happens, the judge or jury can assign responsibility for a percentage of the damages to each party. For example, if the client suffered $20,000 worth of damages and the court finds the client 40 percent negligent and the massage therapist 60 percent negligent, the massage therapist would have to pay $12,000.

ASSUMPTION OF RISK has three components: the harm was within an expected risk, the client knew and understood this risk, and the client chose to take the risk freely and voluntarily. Evidence of valid, informed consent is the usual basis for an assumption-of-risk defense. The consent substantiates that the client understood the intervention, the risks involved with it (in legal terms, its material risks), reasonable alternatives to it, its expected outcome and the effects of not performing it.

UNAVOIDABLE ACCIDENTS are events that the massage therapist couldn’t have done anything to prevent. Typically, these accidents happen in the massage therapist’s absence. For example, a client trips because of loose slippers or a robe that’s dragging on the floor.

THE STATUTE OF LIMITATIONS requires that a lawsuit be filed within a specific period of time from the date of the injury or the date when the client discovered or should have discovered that medical negligence occurred. The period varies from state to state, but is usually one to two years with state-specific modifications for minors.

An Opportunity for Growth

We all know that to err is human. What’s important is that you are prepared to respond promptly and appropriately when things go wrong. In this continuing education course, we’ve focused on the steps you can take in the aftermath of an incident and in the event you are named in a malpractice lawsuit.

While nobody wants adverse incidents or client injuries to occur—or lawsuits to result—with the right outlook, such events can represent opportunities for you to improve your administrative and clinical practices, and grow personally and professionally. If it happens to you, remain calm and use it to broaden your professional scope and to help others see that the words legal and nightmare aren’t necessarily bound together.

This mtj article serves as the basis for the AMTA Online Course of the same name. To register for the course and receive continuing education hours, please visit amtamassage.org/onlinecourses.
Malpractice 101: [continued]

approach: History, Evaluation, Modalities, Manipulation, Exercise.

Legal issues are also a part of your duties under the standard of care. Among the things you’re expected to know and comply with are your state’s massage therapy practice act, other federal and state statutes and regulations governing massage therapy, and the laws and regulations governing clients’ rights, confidentiality of medical records and nondiscrimination for your state.

BREACH. A massage therapist breaches the standard of care when they fail to use the care an ordinarily prudent massage therapist would use under similar circumstances.

Here are some areas where the standard of care is commonly BREACHED:

- Failure to maintain all equipment to a safe standard.
- Use of oil that a client is allergic to.
- Failure to maintain the clinic to a safe standard, such as allowing slippery floors or loose rugs.
- Failure to act on a contraindication to treatment.
- Failure to maintain the client’s confidentiality.
- Failure to maintain adequate hygiene.

CAUSE. As you might imagine, cause can often be difficult to determine. More is involved than just a time sequence: The massage therapist did this, and that happened. The link to the harm must be either direct or proximate. Each of those terms has a specific meaning.

Direct causation indicates the “but for” rule: But for the massage therapist’s breach of a duty, this harm wouldn’t have resulted. This would be the case, for example, if a massage therapist improperly used hot stones on an elderly client and the client was burned.

Proximate causation is less clear-cut, and requires that the massage therapist initiated a continuous and foreseeable sequence of events that produced the injury, and without which the injury wouldn’t have occurred. For example, an elderly client who falls from the massage table and breaks her hip becomes bed-ridden and later develops pneumonia and dies.

The exact nature of the causal link in a malpractice case is crucial. The complexities of today’s health care system are such that many other factors—including the client’s condition or actions, as well as the actions or inactions of other health care providers—could have caused the damage independent of what the massage therapist did or didn’t do.

HARM refers to the physical damage being claimed by a plaintiff, plus any monetary damage incurred by the plaintiff as the result of the physical damage. Monetary damages can include the cost of any treatment necessitated by the physical damage, and the loss of present and future income. The client may also claim that they have been emotionally or psychologically damaged.

In a malpractice case, the plaintiff is trying to prove that you are to blame for the harm they have incurred. To be successful in a claim of culpable harm, the plaintiff must show that the harm was foreseeable. For this reason, the plaintiff will do all they can to prove that as a massage therapist, you’re expected to know what will happen to a client when a certain intervention is or isn’t performed or is performed improperly. And, even though you didn’t intend the harm, your training and experience should have alerted you that harm could result.
WHAT WILL IT COST?

No one can determine ahead of time exactly what a malpractice judgment will cost. Many states don’t allow a specific amount to be stipulated by the plaintiff, so the request for compensation is often phrased as for a “reasonable sum.”

There are two types of damage awards—normal and punitive. Normal damage awards are meant to cover the monetary costs associated with a plaintiff’s physical damage. Punitive damage awards are meant to cover the costs associated with a plaintiff’s emotional or psychological damages.

Damage award amounts are determined by losses the client incurred, not by how much money or insurance the defendant has. Some states also allow punitive damage awards if the jury or judge decides the event is so flagrant that additional compensation is in order. In those cases, the amount of the punitive damage award is typically double or triple the amount of the normal damage award.