

Is It Malpractice? How You Can Find Out.

Includes:

- **Investigating your own malpractice case**
- **Hiring the best lawyer if you decide to pursue a lawsuit**

By Patrick A. Malone

(This article is adapted and expanded from an article I wrote for the Washington Post Health section a number of years ago.)

The doctor said my friend's rectal bleeding was from hemorrhoids -- nothing to worry about. It turned out to be colon cancer.

A widow told me how she had taken her husband to the emergency room after he woke up with terrible chest pain. The doctors said it was indigestion from something he ate and sent them home.

Two hours later, he was dead on the kitchen floor with a heart attack -- the bottle of Maalox near his outstretched hand. Medical malpractice? Possibly so. But it's also possible that in both cases the doctors were blameless.

How do you tell?

There are many clues. When a routine illness turns into disaster without warning, when doctors abruptly turn defensive and uncommunicative -- these are the signs that sometimes make patients and their families start to ask difficult questions about the quality of the medical care.

If you're reading this now, chances are you or a loved one is facing this issue. How to proceed is a delicate and difficult task. Like most people, if something has taken an unexpected turn for the worse, you want to know why. But you don't want to alienate caregivers who still might be important to ongoing care.

I have worked for twenty years advising families who face potential medical malpractice issues and guiding them through lawsuits if the facts warrant bring a suit (and usually they don't, for reasons I will explain). The best way to proceed, I believe, is to follow some simple, logical steps.

Step One: Ask the caregivers non-judgmental questions about what happened.

Your first step is to find out what happened. As Joe Friday said, "Just the facts, ma'am." This is not the time to make judgments. There will be time for that later. You don't necessarily have to confront the main caregiver whom you fear has caused an injury. In most hospital settings, there are numerous doctors and nurses who are knowledgeable about the case and can fill in at least part of the picture. Ask them what they know. If they don't know, ask them:

- Who else should I talk to?
- Do they recommend any Internet research, books, articles, etc., which can help you understand the situation?

What if they won't talk to you, or speak only in generalities, or technicalities that

you can't understand? Here's where it helps to know your rights. The patient (or the patient's representatives if the patient is incapacitated) has an absolute right to know what has happened to them. You can read it right in the American Medical Association Code of Ethics (section 8.12), which is worth reprinting in full (I've italicized some of the key language):

"It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients. Patients have a right to know their past and present medical status and to be free of any mistaken beliefs concerning their conditions. Situations occasionally occur in which a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment. In these situations, the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred.

Only through full disclosure is a patient able to make informed decisions regarding future medical care. Ethical responsibility includes informing patients of changes in their diagnoses resulting from retrospective review of test results or any other information. This obligation holds even though the patient's medical treatment or therapeutic options may not be altered by the new information.

Like most people, if something has taken an unexpected turn, you want to know why.



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Concern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with a patient."

Issued March 1981;

Updated June 1994.

More recently, the AMA has backed off this noble ethical position with a new statement that shows more concern for doctors' legal liability: Ethics section 8.121, issued in

December 2003, states in part:

"When patient harm has been caused by an error, physicians should offer a general explanation regarding the nature of the error and the measures being taken to prevent similar occurrences in the future. Such communication is fundamental to the trust that underlies the patient-physician relationship, and may help reduce the risk of liability." (Emphasis added.)

A "general explanation," of course, could turn out to be so broad and vague that it is no explanation at all. But the old ethical provision, section 8.12, is still on the AMA's books and is worth calling to the attention of health care providers who refuse to be informative.

Some doctors argue that they should not have to explain anything to patients that could land them in a lawsuit. A few state legislatures have responded with laws that protect

How sincere is an apology when it is offered under a legal cloak of protection?

anything a doctor says by way of a p o l o g y o r explanation from being used against the doctor in court. But how sincere is an apology when it is offered under such a legal cloak of protection? Other health care providers, notably the Veterans Administration Hospital in Lexington, Kentucky, have adopted a policy of full disclosure and let the chips fall where they may. The Lexington VA hospital has found that patients appreciate the candor and are no more likely to sue than at other hospitals where patients find it harder to learn the facts. You can read more about the Lexington VA program at:

<http://www.annals.org/cgi/reprint/131/12/963.pdf>

Step Two: Ask the hospital to investigate.

You can ask the hospital to do its own investigation, especially if the injury is particularly serious. You may meet someone called the hospital "risk manager." The "risks" they

manage are mainly risks of lawsuits, and only secondarily risks to patient safety. So once the risk manager is involved, you may not learn much useful information. Unfortunately the official results of any hospital investigation are protected by law in most states from disclosure to patients or their lawyers. However, you can expect at least some explanation will be forthcoming from the hospital's official investigation, so it might be worth trying.

Step Three: Ask for an independent investigation by a health care quality agency.

Your choices here are limited. It's a waste of time to ask the local or state medical society to investigate. They have no power to do anything and are likely to side with the providers. (But sometimes the medical society will have a reasonably honest mediation service for billing disputes. Go here for a list of medical society ethics committees:

<http://www.ama-assn.org/ama/pub/category/13365.html>)

The Joint Commission on Accreditation of Healthcare Organizations, which is a joint project of various medical and hospital private associations, will investigate a quality of care complaint but won't tell you the results. Go to www.jcaho.org.

Government agencies which investigate complaints of poor quality health care include:

- The state or local health department can investigate outbreaks of infection to find if proper sterilization procedures were followed. Unfortunately most health departments have no ability to go beyond infections to other issues, nor do they have the manpower or expertise.

- The state licensing board has the power to revoke or suspend any health care provider's license. But this is done typically only in egregious circumstances, such as illegal drug use or other criminal behavior. Most boards are grossly understaffed and unequipped to deal with ordinary negligence or carelessness that hurts patients. You can find a list of licensing boards at the umbrella organization for licensing boards: the National Board of Medical Examiners, www.nbme.org.

- The local Medicare Quality Improvement Organization (QIO). Never heard of it? Most people haven't. But these groups, which were set up by Congress



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and funded by the taxpayers to improve the quality of care given to Medicare beneficiaries, have the muscle to get to the bottom of incidents in hospitals. And patients have a right to find out what the QIO learned.

How do you get the Medicare QIO to do an investigation? A Medicare beneficiary, or someone acting on the beneficiary's behalf, must file a written complaint. The subject of the complaint has to concern "the quality of services ... not meeting professionally recognized standards of health care." (The statute is 42 U.S.C. § 1320c-3(a)(14).) In the mid-Atlantic area, complaints should be directed to:

District of Columbia:

Delmarva Foundation for Medical Care
www.dfmc.org, 202-293-9650
1620 L Street, NW, Suite 1275
Washington, DC 20036

Maryland:

Delmarva Foundation for Medical Care
www.dfmc.org, 410-822-0697
7240 Parkway Drive
Suite 4001
Hanover, Maryland 21076
410-684-3362

Virginia:

Virginia Health Quality Center
www.vhqc.org, 804-289-5320
4510 Cox Rd. Suite 400
Glen Allen, VA 23060

You have to hunt diligently on the web site to find how to make a formal complaint. Here's the page for D.C. and Maryland:

http://www.delmarvafoundation.org/html/content_pages/Medicare_Connection/care_concerns.html

and the page for Virginia:

http://www.vhqc.org/index/Exercise_Your_Rights

Thanks to a lawsuit brought against the federal government by Public Citizen, you have a right to learn the results of any investigation done by a QIO. The Court of Appeals for the D.C. Circuit ruled that: "At a minimum, this means that the [QIO] must disclose its determination as to whether the quality of the services that the recipient received met 'professionally recognized standards of health care.'" *Public Citizen, Inc. v. Department of Health and Human Services*, 332 F.3d 654 (D.C. Cir. 2003).

Step Four: Hire a lawyer – but not just any lawyer.

There are three issues here. Why hire a lawyer? And what lawyer to hire? And what happens if things don't work out with the first lawyer?

Why hire a lawyer?

However candid or guarded the health care providers appear to be in your dealings with them, there is only one way to get to the bottom of whether malpractice has occurred. That is to have the treatment evaluated by expert physicians of the same specialty with no connection to the treating doctors.

If you have medical connections among your family or friends, you can try to do this on your own. Usually, though, people turn to lawyers to advise them and act as go-betweens in obtaining independent evaluation. The good news is that there are many highly competent lawyers who will do this initial investigation for you without charging for their time.

It takes time to find the right lawyer and get the best advice. This can be frustrating, but in the long run, it's best to go slow. Rushing into a lawsuit when one is still feeling shock and anger is usually unwise. Lawsuits can linger for years and involve maddening uncertainty. Worse, the legal process forces a victim to relive the experience over and over in microscopic detail.

The only way to get to the bottom of whether malpractice has occurred is to have the treatment evaluated by expert physicians with no connection to the treating doctors.

A careful study beforehand helps to insure that the decision to sue -- or more often, not to sue -- is the right one. The evaluative process starts with getting copies of all the pertinent medical records.

You can expect to be asked to sign a number of release forms which the lawyer will then use to request the records. This often means contacting half a dozen or more doctors and hospitals for office notes, X-ray films, lab tests and other pertinent data.

Then the lawyer must find the right specialist to go over the records. Sometimes the expert will want to see the patient; more often a good preliminary evaluation can be made from the records supplemented by well-focused statements from the patient and family members about the chronology of key symptoms and treatment events.

The expert looks at the case with two questions in mind:



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- Did the care violate established standards of practice?
- Did the care make a significant difference in worsening the patient's health?

If the answer to either or both questions is no, there is no malpractice case. And that is the usual situation. Experienced medical malpractice lawyers report that nine out of ten times, they ultimately tell the family that there is no case -- even where circumstances at first suggested serious wrongdoing.

This reality is at odds with the common myth that lawyers will encourage meritless suits in hopes of scoring a quick settlement from the insurance company. The fact is that companies insuring doctors fight claims tooth and nail, both meritorious ones and those without merit. Industry statistics show that more than half of all malpractice claims are closed with no payout to the patient, and of cases that go to trial, doctors win about 70 percent.

That is why good malpractice lawyers, whose fee is nothing if they lose, pick and choose their cases carefully.

What lawyer to hire?

How do you find a good lawyer to make the initial study of the case? It's hard enough to find a good doctor – and there you have plenty of word-of-mouth advice from friends about doctors they have dealt with. Few if any of your friends will have experience with a subspecialty like medical malpractice lawyers.

If you turn to the Yellow Pages, you will find page after page of bold-faced headlines from attorneys who claim to ***For the same fee, you could handle medical get a lawyer with two years malpractice cases. The ads of experience, or one with twenty.*** feature claims like:

- “No fee if no recovery.”
- “Free initial consultation.”
- “Millions recovered for our clients.”

Each of these statements can be literally true, and yet mean very little about whether the lawyer is right for your case. “No fee if no recovery,” for example, is true for virtually all lawyers who represent victims in personal injury cases. And nearly all of these lawyers give a “free initial consultation.” And any lawyer who has practiced more than a few years will be able to say “millions recovered” because it doesn't take many cases to reach that number.

The Internet is another resource where consumers need to be careful. A Google search for “malpractice lawyer” turns up a mixture of:

- Malpractice “wannabe’s.” These are lawyers who would like to grab your case and either settle it quickly for low dollars for you (but a high return for the lawyer’s time investment) or refer it out to a competent lawyer with a referral fee.

- Lawyer “referral services” which screen lawyers only by their willingness to pay cash to the web site that is referring them cases.

- Real lawyers who are experienced and will do a good job for you.

So how do you find a real lawyer?

Here are three resources for finding lawyers who have been selected by their colleagues as among the very best.

- The Best Lawyers in America. (www.bestlawyers.com) This book features thousands of lawyers across the country in all legal specialties, including personal injury.

- Inner Circle of Advocates. (www.innercircle.org) This has a much shorter list of exclusively personal injury lawyers. The Inner Circle is limited to 100 of the top plaintiffs’ personal injury lawyers in the United States. Again, the lawyers in this group have been elected by their peers for their professional accomplishments.

- The Lawdragon 500 Leading Plaintiff Lawyers in America. (http://www.lawdragon.com/index.php/newdragon/nom_honor_plaintiffs)

Lawdragon’s list of 500 leading plaintiff lawyers was compiled by its staff from interviews with leading lawyers and from client votes. Lawdragon also rates other types of lawyers.

If you can’t find a lawyer near you in one of those books, you will need to ask some pointed questions to make sure you are hiring a real lawyer and not a “wannabe.” Here are some of the most important questions:

1. What kind of cases does this lawyer handle on a day-in, day-out basis?

Some lawyers are general practitioners who do a little of everything, including personal injury practice. Their work may include occasional medical malpractice cases or suits against drug manufacturers. But if they don’t do this type of work every day, injured people who hire them are at a disadvantage. It takes a specialist in any legal field - whether



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serious personal injury lawsuits or other specialties like immigration or real estate – to really know that field backwards and forwards, to practice at the highest skill level – and to get the best results for the client.

2. How long has the lawyer been working in the field in which you need a lawyer?

By and large, lawyers who work on personal injury lawsuits for injured persons charge the same fee no matter how long they have been practicing. (This is the contingency fee, a percentage of the amount recovered.) That means that for the same fee, you could get a lawyer with one or two years of experience, or a lawyer with 20 years of experience. As in any other field, experience helps!

3. Does the lawyer try lawsuits in court, or is every case settled out of court or referred to other lawyers to try?

This is an important question that many lay people never think to ask. In every city, there are “clearinghouse” lawyers who advertise heavily and get many clients as a result – and who then either settle their cases quickly or refer them to other lawyers to do the real work. (The “clearinghouse” lawyer gets a piece of the fee for making such a referral.)

On the other hand, real lawyers actually go to court and try cases the old-fashioned way: in front of judges and juries. Real lawyers settle cases out of court too, but they also compile a track record of verdicts that they will tell you about if you ask. One problem with “clearinghouse” lawyers is that they are generally interested in volume and quick turnover. This means they try to settle cases quickly, sometimes at the expense of the client whose good case may be shortchanged in the lawyer’s rush for a fee.

Some lawyers even brag about their “fast work” and “quick results.” In the malpractice world, that usually means the client is being sold short. Serious malpractice cases take time to develop and to obtain the best results. Another problem with “clearinghouse” lawyers is that the client can become confused about who their real lawyer is. They hired the “clearinghouse” lawyer, but that lawyer is not their real lawyer.

Clarification: In the personal injury field, lawyers often collaborate with each other on cases. There is nothing wrong with that. It can be a good way for a client with a serious injury to get two lawyers for the price of one, because the lawyers typically share between themselves the same

contingency fee that would be charged if only one lawyer was handling the case.

4. What is the lawyer’s track record of verdicts and settlements?

The longer the lawyer’s list of successful case outcomes, the better it usually is for the client. The insurance companies who defend personal injury and malpractice cases know who the attorneys are in your area who actually go into court to try cases and who do not.

The insurance companies use that information to evaluate their risk. One of the first questions an insurance adjuster will ask when a serious claim comes in is: who is representing the plaintiff? Be sure to ask about recent verdicts and current cases to find out whether he or she is currently active -- and successful -- or whether the claim to expertise is based on past and faded glories.

5. Does the lawyer teach other lawyers?

Lawyers who frequently lecture at legal meetings (called “CLE” – or continuing legal education) have the esteem of their peers. Lawyers who regularly write articles in legal publications also can usually be counted on to know what they are talking about.

6. Is the lawyer a member of legal organizations that specialize in representing injured people?

Major organizations include the American Association for Justice (AAJ) formerly Association of Trial Lawyers of America), AAJ state affiliates like Virginia, Maryland or D.C. Trial Lawyers Associations, the Etheridge Society (an organization of Virginia medical malpractice plaintiff lawyers), and the Inner Circle of Advocates.

All these organizations provide extensive education for their members. You can certainly find a lawyer who doesn’t belong to any of these groups, but why would you want that lawyer to represent you in a serious injury lawsuit?

7. Has the lawyer won any honors or awards?

Remember, you want to hire the best lawyer for your case. Especially if it’s a serious injury, you can attract top-level lawyers to work on your case. One mark of a top lawyer is any awards and honors they have been given by legal organizations. Leadership of bar associations is another type of honor. Lawyers who are elected to leadership posts tend to have a lot of hustle that has attracted the admiration of their peers.



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8. Does the lawyer have the financial and personnel resources to take on my case?

Lawsuits involving serious or catastrophic personal injuries can be very expensive to take to court. A typical case can involve three, six or even more medical specialties, each one of which needs to have an expert witness hired to deal with issues in that specialty. If a lawyer lacks the resources to fund a case properly, corners can be cut at the expense of the client's case. Or a client can be pressured into taking an inadequate settlement. It pays to hire a lawyer who has the financial resources to take a case all the way to trial, if necessary.

9. Ask the lawyer, "Who will actually handle my case"?

Find out if the lawyer plans to actually work on your case, or give it to someone else to work on. You need to know the skill and experience of the lawyer who will actually work on the case, not just the lawyer you first see. There's nothing wrong with having more than one lawyer on the case. Top lawyers typically run teams of lawyers who handle different aspects of the case. The senior lawyer may delegate more routine functions to less experienced lawyers. Find out how the team functions.

Let's say you're past the point of hiring a lawyer. That raises our next question: What happens if it doesn't work out with the first lawyer you hire? What if you're reading this after the fact? You've already signed on with a lawyer, and now you've concluded that he or she is not right for you. The good news is that it's not hard to fire a lawyer, especially if it's early in the case. If the lawyer has spent significant time and money on the case, he or she may be entitled to some share of the eventual fees plus expense reimbursement. Sometimes a better option than firing the lawyer is to ask the lawyer to bring in as co-counsel another more experienced lawyer or law firm.

Usually this can be done with no extra charge to the client; the two firms will split the work and divide the eventual contingent fee accordingly.

The other problem that happens between lawyers and clients is that the lawyer may get cold feet about the case. Sometimes, especially with inexperienced or poorly capitalized lawyers, this happens when the lawyer reaches the end of his or her competence and/or bank account. If you've followed the advice above in screening the lawyer you hire, that should not happen.

But good lawyers also sometimes "fire" their clients. There are two reasons that good malpractice lawyers may decline to proceed with your case:

First, the injuries may not be serious enough to make a lawsuit cost-effective. When a new potential client is on the telephone, one of my first questions is: Did the care cause a serious and permanent injury that has affected the victim's entire life? Injuries that qualify include loss of a limb, loss of an eye or some other important organ, or some other serious and permanent disability. (Of course, death obviously qualifies as a serious and permanent change.) Injuries that looked serious at first but have resolved with no permanent consequences are difficult to attract a competent lawyer. The economics of running a law office and paying for everything necessary to pursue a malpractice case – expert witnesses, court reporters, etc. – dictate this.

Second, the lawyer may conclude that the case is too hard to prove. The ***Did the care cause a serious and permanent injury that has affected the victims life?*** lawyer may decide that the health care providers did nothing wrong. Or it may be difficult to prove that anything the providers did wrong caused a serious injury. This latter issue – the lawyer shorthand term is "causation" – is a common Achilles heel in malpractice cases. For example, if a cancer could have been diagnosed three months sooner by more diligent attention from the doctor, that three months might not have mattered in the ultimate outcome. If the delay in diagnosis lasted 12 months or 24 months, that is much more likely to pass the test of causation.

Some lawyers give potential clients the brushoff with excuses like "I'm too busy." That usually means "I don't think you have a very good case."

In any event, when the injury is very serious, it can pay to get a second legal opinion. I have had seven-figure outcomes in cases that other lawyers have declined to pursue, and I'm sure that some of the cases I've declined have turned out to work in other hands.

Conclusion

When pursuing a potential malpractice issue, the bottom line is that the best advice -- as in so many situations -- is to be careful and ask lots of questions.

Are there any questions too stupid to ask?

No.



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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Health

D.C. Board of Medicine



May 12, 2005

██████████ M.D.
 ██████████
 Bethesda, MD 20817

Re: Ms. ██████████

Dear Dr. ██████████

The D.C. Board of Medicine (the "Board") has received the enclosed complaint about your treatment of the subject patient. The Board requests a written reply from you regarding this matter.

In accordance with administrative rules, you are hereby informed that:

1. You are not required to respond to the complaint;
2. The Board may send a copy of your response to the complainant; and
3. Failure to respond shall not be held against you in any subsequent action based on the complaint.

The Board meets the last Wednesday of each month (except August). Should you choose to reply, your reply would be appreciated at least five (5) days before the next meeting. Please forward your reply to Mr. James R. Granger, Jr., Executive Director, at the address shown in the footer of this letter. In the event that you choose not to reply, the Board may initiate an investigation to determine if there have been any violations of the *Health Occupations Revision Act*.

Sincerely,

William E. Matory, M.D.
 Chairperson

Enclosure as specified above.
 WEM/lr
 Via certified mail: 7004 0390 000

717 14th Street, N.W., Suite 600

The daughter of a patient who died wrote to the licensing board with her concerns about the doctor's care. Here is how the board passed on the complaint to the doctor. Note the number of times the board tells the doctor he has no obligation to respond.



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Joint Commission
on Accreditation of Healthcare Organizations
Setting the Standard for Quality in Health Care

September 2, 2004

Ruth [REDACTED]
[REDACTED]
#203
Washington, DC 20011

Regarding: [REDACTED] University Hospital
Case: # 40460

Dear Ms. [REDACTED]

My translation: "You'll never hear from us again. But thanks for writing."

This is to advise you of action taken on the complaint you forwarded to us about the above organization. We have contacted the organization for its response to this matter.

The Joint Commission gives serious consideration to all issues that may reflect noncompliance with Joint Commission standards and we appreciate your providing us this information. We will evaluate the potential standards implications and the organization's response and will follow-up until a decision is made by us that the organization is in compliance with Joint Commission standards. **Please be aware, our current Public Information Policy precludes us from providing you with the specific results of any complaint investigation.** However, the Joint Commission makes available to the public a Quality Report regarding an organization's most current triennial survey.

If you are interested in receiving a copy of the organization's last Quality Report, please contact our Customer Service Center at (630) 792-5800 or write to the Customer Service Center at the address indicated at the bottom of this page. Quality reports are also available at the Joint Commission's web site on Internet in Directory "Quality Check" at <http://www.jcaho.org>. That report will reflect the organization's performance based on the Joint Commission's last triennial survey for which survey findings have been finalized.

Thank you for bringing your concerns to our attention. Please identify the above case number on any inquiry relating to this subject.

Sincerely,

Rosemarie Savino, RN, BSN
Office of Quality Monitoring

One Renaissance Boulevard
Oakbrook Terrace, IL 60181
(630) 792-5000
<http://www.jcaho.org>

Member Organizations
American College of Physicians
American College of Surgeons

American Dental Association
American Hospital Association
American Medical Association



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