

Crucial Questions To Ask A Prospective Medical Malpractice Client

You meet a prospective client who wants to sue a health care provider because of the care he or a loved one has been given. What information do you need? Medical malpractice has one of the lowest success rates for plaintiffs at trial (37%, Federal Judicial Center, integrated database, fiscal years 2002 -- 2003). How can you maximize your chances? This is determined mostly at the outset. Case selection is paramount.

Start with the basics:

The Basics

- Name, age, gender and contact information of the injured person.
- Date of the malpractice; date the malpractice was discovered – are you within the Statute of Limitations? Many states, like Florida, have a Statute of Limitations that begins when the malpractice event should have been discovered.
- Is the prospective client likable?

The next two questions are the core of all medical malpractice cases.

- The negligence: what did a healthcare provider do or omit that was careless (that was different from what a careful provider would have done)?

You must get this information from the client himself. It is impractical to go through a stack of medical records "looking for the negligence" -- that is similar to a patient asking a doctor "please fix me" without relating any symptoms. That job becomes much easier when a patient says, "I have chest pain on exertion" or "I have blood in my stools."

- The resulting harm: If the malpractice had not occurred, *how would things be different now and in the future, and how can we show this harm to a jury?*

Types of harm that do not lend to easy medical malpractice claims include (1) past pain, (2) mental anguish in waiting for treatment or test result where ultimately the outcome was favorable, and (3) current and future pain in the absence of concrete proof we can show a jury.

If there is no clear answer to these last 2 questions (negligence and harm), a medical malpractice claim will be difficult. If the basics have favorable answers, then you can dig deeper.

As you listen to the client, see what patterns fit his story. The following are common patterns. Most stories will fit into more than one pattern, and you will need all those answers.

Delay or failure to diagnose or treat

Many cases involve a delay in either diagnosing or treating a condition. In that case, here are the crucial questions that need to be asked:

- What were the symptoms?
- What was the wrong diagnosis?
- What was the right diagnosis?
- How did you get the right diagnosis?
- When should the diagnosis have been made?
- When did it get made?
- How long specifically was the delay (for example, 3 months)?

If one doctor misses a diagnosis, but another doctor discovers it shortly afterwards, you will have to prove that those few weeks made an actual difference. This is often so difficult that it precludes bringing a malpractice claim.

Cancer

Patients are shocked when faced with cancer. Looking back, they get angry if their symptoms had been ignored. The crucial questions are the ones for Delay (above), and the following:

- In what area of the body did the cancer start?
- What was the cell type and stage at diagnosis?
- What is the current stage and outlook?

Some types of cancer have such a bad prognosis (pancreatic, small cell lung) or "good" prognosis (early Hodgkin's lymphoma, testicular) that even a long delay in diagnosing and treating may not matter.

Problems after surgery

Surgery is involved in many claims. The crucial questions are:

- What was the reason the surgeon recommended the procedure?
- What was the actual mistake that led to your harm?

Surgery has a high (10-50%) chance of complications in the absence of negligence.

Disfigurement

Patients are often unhappy with the results of plastic surgery. These are difficult claims; you can decide whether there is enough to pursue a case by asking for before and after pictures of the affected area or areas.

- What was the reason the surgeon recommended the procedure?
- Do you have the promotional literature showing what to expect?

Infection

Infections acquired while getting health care for an unrelated condition (nosocomial infections) are unfortunately much too common. The crucial questions are:

- What was the condition for which you were being treated?

- What was the bacteria or virus with which you were infected?
- What was the actual mistake that led to the infection?

MRSA (Methicillin-resistant *Staphylococcus aureus*) has been in the news a lot recently. A person getting MRSA at a hospital without being able to prove what the hospital personnel did wrong has a tough case.

It is usually hard to prove that an infection was caused by malpractice. An exception is an infection due to a central line: there is good data that excellent technique brings the infection rate to almost zero.

Foreign object left behind

In some cases, the negligence seems easy. If a foreign object is left behind, find out where the object is now, the circumstances of the first surgery, the symptoms that led to discovery of the object, and the circumstances of the retrieval surgery. Send a letter requesting that the facility possessing the object preserve it, as it may be involved in litigation.

Wrong drug

- What was the condition for which you were being treated?
- What drug was given?
- What should have been given?

Recall

If a drug or device was recalled, here are the crucial questions:

- What drug or device was recalled?
- Where is the device or drug bottle now?
- Do you have the Device ID card?
- Why was it recalled?
- Did you suffer from the recall? How?

Emergency department

In cases involving emergency care in Florida, Texas, and other states, you may have to prove that the care was reckless, not just negligent.

Death

If someone died as a result of the malpractice, find out whether there is a potential claimant. For example, in Florida you need a surviving spouse who will live long enough to bring a claim, or a child under 25, or otherwise dependent on the decedent. An adult independent child does not have a medical malpractice claim in Florida for the death of a parent, except to recoup funeral expenses.

- Is there a surviving spouse who will live long enough to bring a claim?
- Was there an autopsy? Do you have the autopsy report?

An autopsy report is very helpful; its absence makes proving your case difficult.

Conclusion

You should get the information above from the potential client, but back up the answers with the medical records. Organize and paginate the records before sending them to an expert. That way

it's easy during discussions with the expert to refer to a particular page and to cull out the "smoking gun" documents. Medical malpractice is a specialized, difficult area of the law with a low success rate. When practiced effectively, it has its rewards. When plaintiffs win at trial, the median amount awarded (\$600,000) is higher for medical malpractice than for almost any other kind of personal injury (Federal Judicial Center, integrated database, fiscal years 2002 -- 2003).

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