

§900 Interview, Investigation and Evaluation

There is no such thing as a simple medical malpractice case. Litigation in this area of the law is of necessity complex. It deals with a highly specialized and technical subject area, and thus is beyond the knowledge of lay people. Accordingly, preparation and presentation of such a case requires the achievement of two objectives: (1) to acquire a sufficient understanding of medicine to gather the necessary evidence to prove your case; and (2) to prepare an appropriate presentation to a jury to ensure its comprehension. The groundwork for achieving these objectives must be laid during the intake and discovery stage of a medical malpractice case.

Given the highly technical nature of this area and the fact that the defendant will often have far more expertise in the area than you, consider consulting with or retaining an experienced medical malpractice attorney. Such arrangements are not uncommon. However, it is essential that you set up this consultation early in the preparation of the case to avoid certain problems. These include, among other things, a failure to gather all necessary information while it is still available; failure to appreciate certain nuances presented in the case before implementing a discovery plan; having an inexperienced practitioner run the case down because of insufficient knowledge or time to prepare, etc. Accordingly, when you are first consulted by a client, begin deciding whether you will handle the case personally, whether you will refer it to another attorney, or whether you will seek another attorney's consultation and assistance in the preparation and trial of the case.

If your evaluation process is properly carried out, you will turn away the vast majority of medical malpractice cases that you review. The mystique presented by an encounter with the medical field often serves to convince the client that malpractice has been committed even where the result achieved was to be expected or constitutes merely an unfortunate result, the possibility of which the client was made aware. Additionally, even where malpractice has arguably occurred, the extraordinary time and expense that must be invested in the proper preparation and presentation of such a case often compels one to conclude that a particular case is simply not cost effective to pursue. What is important is to realize these deficiencies before you have invested an excessive amount of time, energy and costs or have raised the client's hopes or expectations.

There is no shortcut for either plaintiff or defense counsel in the investigation and preparation of the medical malpractice case. Consultation with medical experts is almost always necessary, even before beginning the discovery process. The materials provided in this section are intended to assist you in reaching a decision on whether to take a medical malpractice case in the first instance, and to begin to prepare it for trial, with or without consulting another attorney. The client interview questionnaire in this chapter (§901) is designed for use in conjunction with the general client interview questionnaire in §111.

§901 Client Interview Questionnaire

The Medical Malpractice Incident

1. Identify all health care providers you believe caused your injury. _____
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2. Describe the location of the incident (e.g., hospital, doctor's office, emergency room). _____

3. Describe in detail how and why you believe the incident occurred. Include in your response the source of this information or belief. _____

4. List the name and address of all health care providers (doctors, nurses, hospitals, technicians or other hospital or medical personnel) who were involved with the incident. _____

5. Were you referred to these health care providers by anyone? _____
If so, by whom? _____

6. List the name and address of all doctors, nurses, technicians, or other medical or hospital personnel who examined you, interviewed you, or came into contact with you before the incident. _____

7. Did you have any previous contact with any of the same doctors, nurses, technicians, medical or hospital personnel before the day the incident occurred? _____
If so, give details. _____

8. Were you asked to sign any waiver forms, informed consent forms, or other documents before or after the incident? _____ If so, did you sign? _____ Do you have a copy of the document? _____

9. Were any of the persons involved your regular treating physician? _____
If so, give his/her name and address _____

11. Did you give a history to anyone? _____ If so, to whom? _____

12. If you yourself did not give a history, did anyone give a history on your behalf? _____ If so, who gave the history? _____

To whom? _____

13. List the name and address of the defendant's insurance carrier, and describe how you acquired this information. _____

14. List the name and address of the defendant's insurance adjuster, and describe how you acquired this information. _____

15. Have you communicated with the adjuster? _____ If so, when? _____

16. Have you received any documents from the health care providers, their insurance carriers, or their adjusters concerning the incident? _____
If so, do you have copies? _____

17. Did you give any statements to anyone concerning the incident? _____
If so, to whom did you give the statement, where and when did you give the statement and do you have a copy? _____

18. List the names and addresses of all witnesses to the incident. Include any persons who accompanied you to the hospital or doctor's office. _____

19. Have you spoken to any of the defendants, their agents, or to any other person about the incident? _____ If so, give details. _____

20. Have you applied for any medical or insurance benefits as a result of the

22. Have any of the defendants (or their insurance carriers) made any settlement offer to you? _____ If so, was the offer oral or written, who made it, when was it made and what was the amount? _____

23. Were any photographs, pictures or films taken of you after the incident? _____ If so, who took them, when and where? _____

Do you have a copy? _____
24. Were you being treated at the time of the incident for a condition or injury which you sustained in the course of your employment? _____

25. Has any other health care provider ever told you that malpractice was committed? _____
If so, identify, the health care provider. _____
Provide the date that you were first given this knowledge. _____
What did the health care provider tell you? _____

Do you have anything in writing from this health care provider? _____

26. Provide the name of your healthcare insurer or HMO, as well as policy number, number on identification card, and any documents you have received from your provider, insurer or HMO. _____

NOTE: There are potential claims that can be brought against HMOs on theories of direct liability, and vicarious liability, such as nondelegable duty by contract, nondelegable duty by statute, joint venture, agency and apparent or ostensible agency. §§ 907-908 *infra*; Baumberger, "Vicarious Liability Claims Against HMOs," 34 TRIAL 5 at 30 (May 1998); Salman, "Litigating Claims Against Managed Healthcare Organizations," 31 TRIAL 2 at 80 (February 1995); Malone & Thaler, "Managed Healthcare: The Plaintiff's Perspective," 32 TORT & INS. L. J. 123 (Fall 1996).

27. Provide any additional information you consider important but which has not been asked for above. _____

§90 Expert Witness Intake Sheet: Medical Malpractice Cases

See the CD for this form.