Life as a Medical Malpractice Attorney

A medical malpractice case lands on your desk. What is your first thought? What is your plan? If you're stumped or not sure where to begin, studying the anatomy of a successful medical malpractice case may be in order.

Pre-litigation planning. Selecting expert witnesses. Conducting discovery. Submitting motions in limine. Crafting closing arguments. You have much to contemplate and much to prepare. The following will guide you through decisions that may help you prevail, regardless of whether you sit on the plaintiff or defense side of the table.

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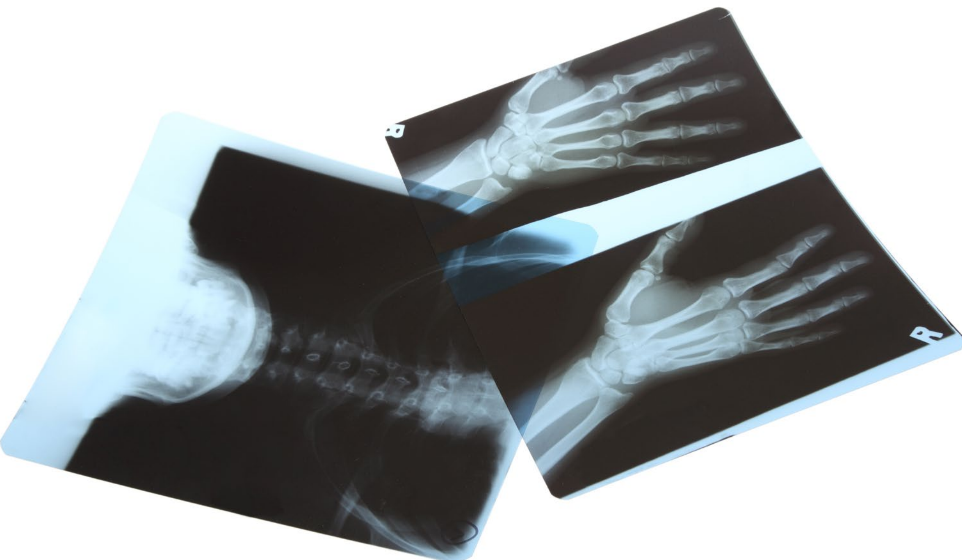

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Make Sure the Juice is Worth the Squeeze

A plaintiff attorney needs to review all factual evidence, taking into account the number of defendants and experts and the complexity of the claim. You're responsible for every piece of the puzzle, and assembling them will draw heavily on your physical, emotional and financial resources—perhaps more so than any other type of case. Will you or can you make the commitment?

Brandon Bass of The Law Offices of John Day in Tennessee advises that you "make sure the juice is worth the squeeze."

Bass goes on to say that if you can get a victory, but it's worth only slightly more than minimum wage based on how long it took you to get there—and it required you, in the process, to post up $100,000 worth of capital for hard costs to reach that point—you would have been much, much better off going on vacation and investing the money in the stock market.

In short, medical malpractice litigation can be a costly and time-eating proposition, you need to know that in the end it will have been worth your time and your hard work—for you and your client.

Assess critical medical and legal information with confidence. A powerful tool to add to your medical malpractice arsenal, LexisNexis MedMal Navigator® takes you step-by-step through legal analysis, case valuations as well as intricate medical research. From a single, simple platform, you can locate experts; research case law, verdicts and settlements, even Elsevier® medical content; and understand standard of care.

Organize or Die

Once a case is accepted, the pre-litigation planning begins for plaintiff counsel. The defense attorney typically won't enter the picture until after the complaint is filed, but the planning stage is much the same. Organization is crucial at this point. Medical records alone can pile up to 10 or 20 volumes. A certified legal nurse consultant (LNC)—sort of a cross between a paralegal and a nurse—can save hours of valuable time by gathering, organizing and summarizing the records and doing preliminary research. The consultant can also help identify witnesses and experts. The downside: LNCs can be costly; their hours add up quickly.

Know the law and the medicine

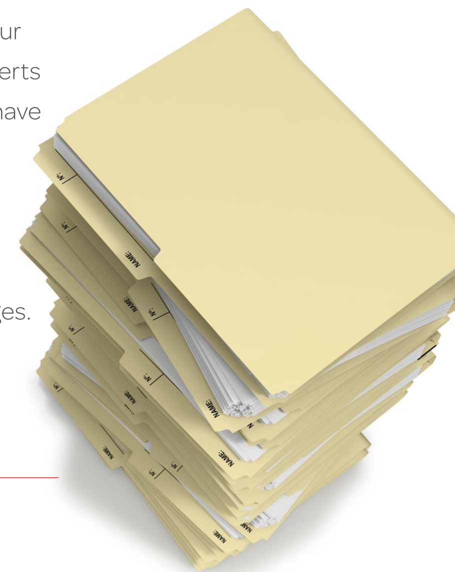
Based on the medical records, what are the legal issues? Is it informed consent? Medical necessity? Caliber of performance? Failure to diagnose? The answer to those crucial questions triggers your medical research. Research encompasses studying and learning the medicine.

Those medical records form the foundation of your case. For plaintiffs, evaluate the case from a hard defense standpoint. How strong is the liability? How strong is the causation? Hiring an LNC at this point can help sift through the facts buried in the records.

Know exactly who you're dealing with

Research should also include checking the backgrounds of your clients, opposing parties, witnesses and experts. Never discount the benefits of checking what opposing parties are posting on social media. Defense attorney Robert Graziano of Roetzel & Andress in Florida said he researches licensures. "We want to make sure our client is telling us the truth and has a good license, that the experts we consult have active licenses, and that prospective experts have licenses in good standing."

You should also know your state's rules and whether it has any pre-filing requirements. Be sure all elements of the case are covered, e.g., standard of care, deviation, causation and damages. "As a good defense lawyer, I can knock any one of those out, and I win," Graziano said.



Quick Tip

It may seem like a small thing, but make sure you can correctly pronounce the medical terminology. Juries tend to frown on attorneys who don't get the basics right.

Bring in the Pros: Working with Expert Witnesses

When it's time to have the experts take a look at your case, choose the best. Who is writing the peer-reviewed literature on these topics? Who's at the cutting edge of these issues in the relevant medical community? Research them. Then call them. Make sure you have their up-to-date curriculum vitae and that all-important fee schedule. Know what you are in for in terms of fees. And don't send them any records to review until they commit to testifying at trial if you think you will need them. A lot of money is wasted on experts who never intended to testify in court.

Get the most out of expert depositions in three easy steps:

1. **Gather the expert's professional background.** You want to know if the expert works exclusively for plaintiff or defense. Does he have a consulting organization? What percentage of his work is consulting? How much is he being paid? Has he ever been disqualified by a court?

2. **See what the expert has reviewed in your case.** Which records did he examine? Did he review the medical records "blind," or did he have a hint about what he was looking for?

3. **Extract the opinions.** Thoroughly extract every opinion. Then, most importantly, you must ask, "Do you believe you've done everything you need to do in order to form and state your opinions in the case?"

Locate and investigate expert witnesses with LexisNexis MedMal Navigator by medical condition and jurisdiction, including past case involvement and background.

Learn more at www.lexisnexis.com/med-mal-navigator

Ferret out the Facts

Written discovery can unearth important details. Were material changes made to the medical records? Is it the same record that was provided pre-suit? Comparing records line-by-line often results in case-changing nuggets.

Additionally, make sure you confirm any handwritten notes and that you are interpreting abbreviations correctly.

When conducting a plaintiff deposition, distinguish between what the doctor does routinely and what is the standard of care. Convince an opposing expert that professional organization's journals are authoritative; it lays the foundation for using the medical literature at trial.

Be prepared to summarize. Condensing hundreds of pages of medical records into a summary exhibit paints a clear, concise picture for the jury. You do not want to overwhelm them.

What's In and What's Out?

Motions *in limine* can be used to keep information out, but they can also tell you what will be admitted. A preliminary ruling on issues that appear close to the line alerts the court that they will be raised and allows the court to provide guidance in advance. It's not unusual for each party to file in excess of 10 *in limine* motions in a case. "You need to know what your strategy is going to entail, and not have a flow chart that says, 'Well, if the judge stops me here, then I'll go to this.' You've got to know the key evidentiary rulings that you'll actually encounter *before the jury's even brought in*," Bass said.

When it comes to whittling down the jury pool, asking yourself these questions can help:

1. Does the juror understand that the plaintiff has the burden of proof and that the burden is "more likely than not"?
2. Can you come up with a catchy phrase for the medical issue that will get people talking and help them understand the science?
3. Has the juror lost a loved one or known anyone who has undergone a similar procedure or treatment? Despite the sympathy over the tragedy, can the juror still find for the defense? Or, similarly, if the doctor was just doing his best, can the juror still find for the plaintiff?

The last word

When it comes to closing arguments, you can artfully summarize the facts and testimony, but, for a plaintiff attorney, one of the most common mistakes is failing to ask the jury to award a specific amount of damages. Don't worry that the jurors will think you are greedy. They already do. But if they find in your client's favor and have no point of reference, the award could be inadequate. Said Graziano, "It's like asking someone to put a value on a car when they have never seen one."

Avoid this!

One of the most common mistakes is failing to ask the jury to award a specific amount of damages.

Key Points

For plaintiff counsel, decide whether to commit:

- Can you afford the up-front outlay?
- Are you mentally and physically up for the challenge?
- Will the potential result be worth your while?

Pre-litigation planning—Organizing is key:

- Consider an LNC or powerful technology option such as MedMal Navigator or both
- Determine the legal issues
- Conduct research due diligence
- Know your terminology
- Do background checks
- Know your state's rules

Experts:

- Hire the best
- Research them
- Know their fees
- Make sure they will testify

Discovery and depositions:

- Look for modifications to the medical records
- Confirm handwritten notes
- Explore adherence to the standard of care
- Create summary exhibits

Motions *in limine*:

- Keep information out
- Get an indication of what will be allowed

Closing arguments:

- Plaintiffs—always ask for a specific damages figure

Content of this resource guide is based on a nationally Web-streamed seminar—*A Day in the Life of a Small Firm Attorney: Medical Malpractice and Personal Injury*, sponsored by LexisNexis and presented by Brandon Bass of The Law Offices of John Day in Tennessee and Robert Graziano of Roetzel & Andress in Florida.

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