What patients can and should expect when pursuing a medical malpractice case.

Pre-Suit Investigation

In New Jersey (where I practice), and in other states that allow parties to a lawsuit to engage in full pretrial discovery, when a plaintiff-patient sues a defendant health care provider, a medical malpractice case will go through several phases and will usually take several years to get to trial.

At the outset of malpractice litigation many states require a patient to serve the doctor with an Affidavit of Merit (AOM). The AOM must be signed by a physician with credentials similar to the defendant doctor and it must state that after reviewing the pertinent medical records the expert believes (a) that the defendant doctor practiced medicine below accepted standards of care and (b) that this harmed the patient. For this reason, before a lawsuit is filed against a physician, a patient's lawyer must obtain all of the medical records pertinent to the claim for the expert's review.

In addition to the medical records, my office provides a reviewing expert with the relevant medical literature and any insight obtained from our own review of the patient's records. Why? In a perfect world, paying experts hundreds of dollars an hour would guarantee a thorough review of a case. Realistically speaking, however, because (a) physician experts have extremely demanding schedules and (b) experts feel compelled to complete their review of a case as quickly as possible (because they are usually charging an exorbitant hourly rate) experts tend to speed through medical records when reviewing a file. Highlighting the important facts in the records and providing an expert with up to date literature allows an expert's review to be more efficient and ensures that the expert will be in a position to familiarize himself with the nuances of the medical care provided to the patient.

The pre-suit investigation is often the most critical part of a medical malpractice case. If a firm does nothing more than provide an expert with a patient's medical records, they will not be in a position to evaluate their expert's review of the case. Moreover, there are other reasons why an attorney must become conversant with the facts related to a plaintiff's medical care and educate himself with the medical literature relevant to a litigation. When the case goes into suit, a lawyer will have to have a full command of these subjects. Every defendant in a medical malpractice case is a free defense medical expert consultant to defense counsel, and they have an obvious motive to give their attorney all the help they can. A vigilant pre-suit investigation from the patient's attorney is the best tool to neutralize this advantage.

Commencing the Lawsuit

Once the pre-suit investigation of the claim is complete and an expert has signed an AOM, a lawsuit is started when the patient files a complaint with the court that spells out the pertinent

facts and the allegations. Complaints describe, in very broad strokes, the care the doctor provided to the patient, identify those aspects of the care that the patient contends were negligent, and indicate how these mistakes harmed the patient. Once the complaint is filed, the doctor is served with a copy of the filed complaint, along with a summons. At that point, a defendant physician will notify his malpractice insurance carrier that a lawsuit has been filed, and the carrier will hire an attorney to defend the physician in the lawsuit.

Medical malpractice litigation is a very specialized field of law. As a result, there are usually a handful of defense firms representing most physicians who are sued as in a single geographic area. If your attorney regularly litigates medical malpractice cases, the firm hired on behalf of a defendant doctor will know your attorney and have a good understanding of his professional reputation. Conversely, if your attorney does not regularly litigate malpractice cases and does not have an established reputation in this field, defense counsel will know this as well.

The Discovery Phase of a Lawsuit

PAPER DISCOVERY RESPONSES

Once a defense attorney enters an appearance and files an Answer, your case enters the discovery phase of litigation. Generally speaking, during discovery, all parties have an opportunity to investigate the merits of the other side's legal and factual position. The first phase of discovery involves the exchange of paper discovery demands and responses. Each side propounds interrogatory questions on the other side which are written questions that require written responses. Most attorneys also serve a demand for production of documents, which requires the other side to provide copies of all documents pertinent to the case. Finally, attorneys may propound a demand for admissions, which requires the responding party to affirm or deny the truth of a set of factual allegations.

Your attorney will draft your paper discovery responses which you will then be required to review and supplement. After you approve your discovery responses a finalized draft will be forwarded to defense counsel, with a certification page signed by you that indicates the answers and documents are true and complete. All pertinent medical records and other items demanded by the defendants in discovery will be attached as exhibits to your paper discovery responses.

More often than not, defendant physicians do not provide complete and comprehensive paper discovery responses. There are a variety of reasons for this, but one is that many attorneys who represent patients simply do not insist on this. Obtaining complete and comprehensive discovery responses takes time and effort. First, an attorney representing a patient must send a detailed correspondence to the physician’s attorney outlining why the doctor's discovery responses are deficient, and demand more information. Assuming the doctor does not cure the deficiencies, a motion then has to be prepared and filed with the Court to compel more specific answers. Often, the motion will require a court appearance. Many attorneys conclude that this process is too time consuming, especially since after paper discovery is exchanged, a patient’s lawyer will have an opportunity to depose a doctor and clarify issues in the doctor's paper discovery responses.

A good lawyer knows, however, that the purpose of discovery is not only to obtain information from the other side, but to require a defendant to provide a precise factual statement about the facts of a litigation which can be used at trial as affirmative evidence, or for the purpose of impeaching or contradicting a defendant doctor's trial testimony. Only after a doctor takes a precise position in his paper discovery responses can these be used an impeachment device in later proceedings. Additionally, insisting on comprehensive and complete paper discovery responses enables an attorney to better prepare for depositions.

DEPOSITIONS OF THE PARTIES AND FACT WITNESSES

After paper discovery responses are exchanged the parties will schedule depositions. During a deposition a witness is placed under oath and required to provide verbal responses to questions asked by counsel. Everything said during a deposition is taken down by a court reporter, and a written transcript of the testimony is created. At trial, a party's deposition transcript can be read directly to the jury. Additionally, an expert's transcript and the transcripts from non-party witnesses can be read to the jury if a witness contradicts his deposition testimony on the stand at trial.

Most of the time plaintiffs are depose first. Before you are deposed you will meet with your attorney to prepare for that proceeding. Your deposition will take place in a conference room, usually at your attorney's office. The attorneys representing all parties will be present. Defendant doctors have a right to be present, but they rarely attend. The attorneys who represent the doctor will ask you questions about the following subjects:

(a) The care provided by the defendants;

(b) Your medical history before and after the incident that gave rise to the malpractice claim;

(c) The injuries and disabilities that you suffered as a result of the negligence of the defendant and how these impact your life.

After your deposition takes place your attorney will have an opportunity to depose the defendant physician and any other health care providers who may have knowledge of facts related to your claim. It is often difficult to schedule depositions of defendant physicians because they have very demanding schedules and courts will usually provide them with latitude because of this. Occasionally it will be necessary for your attorney to file an application with the court compelling the deposition of the defendant if the deposition is rescheduled repeatedly.

The deposition of a defendant physician is obviously focused on the care provided to the plaintiff-patient. Nevertheless, this proceeding is not the time for a patient's attorney to "discover" the medical facts relevant to the case. By the time the deposition of a defendant takes place, a patient's attorney should have a full command of the facts and a complete understanding of the medicine. The goal of the deposition of the doctor should be to lay the evidentiary foundation necessary to prove that the doctor's medical treatment of the plaintiff was below accepted standards of care and to lock the defendant into a precise factual position.

EXPERT REPORTS

After depositions are completed, expert reports are exchanged. Generally speaking, a patient will serve his expert reports first. Depending on the nature of your case, you will have at least one medical expert. If the liability and damages issues in your case span more than one medical specialty or there are multiple defendants in the case, you will likely have more than one medical expert who will write a report on your behalf. Additionally, if the medical malpractice of the defendant made you disabled, your attorney may hire an economic expert to provide testimony about your future lost wages.

Experts base their opinion on a review of (a) the pertinent medical records, (b) the relevant literature, (c) the paper discovery responses exchanged during discovery, and (d) a review of the deposition transcripts of all of the relevant witnesses. This is a very labor-intensive process. Nevertheless, in New Jersey and many other states, the court rules enable experts and attorneys to engage in a collaborative process prior to the issuance of expert reports and these activities are protected from disclose under the work-product doctrine. As a result, knowledgeable attorneys will provide guidance to experts in the preparation of their reports for the same reasons that attorneys provide guidance with respect to an expert's initial review of a case in anticipation of securing an Affidavit of Merit.

In medical malpractice cases, experts issue reports with a common format. The report will begin by listing the evidence that an expert reviewed. Next, the expert report will provide a factual chronology that highlights the important facts based on expert’s review of the evidence. The report will finish with a discussion of the expert's conclusions about why he believes a defendant deviated (or did not deviate) from accepted standards of care, citing to the medical literature on the subject. When the experts your attorney retains complete their reports, your attorney will serve them on counsel for the defendant physicians, and you will also receive copies.

DEPOSITIONS OF THE EXPERTS

After expert reports are exchanged, the parties will be provided with an opportunity to depose the experts. Customarily, a plaintiff's expert is deposed first. Your attorney will meet with your experts to prepare them for that proceeding. In my office, we insist on meeting with an expert at least a week in advance of his deposition so that the expert has time to digest what is discussed and so that the expert can utilize the information we provide in the meeting during his own pre-deposition preparations.

After your experts are deposed, your attorney will depose the defense experts. This is a critical part of a medical malpractice litigation. It is not unusual for my firm to spend as much time preparing for expert depositions as we spend preparing for trial. In addition to all of the medical research and factual review, background checks of all experts are undertaken. All relevant medical publications of the expert are reviewed prior to the deposition. Additionally, all available deposition transcripts of an expert are reviewed, so that we are in the best position to challenge the credibility and the science behind the expert's opinions.

The Resolution Phase of a Malpractice Litigation

SETTLEMENT DISCUSSIONS

After expert depositions are complete, the case enters into the resolution phase of the litigation. In New Jersey, a defendant doctor must consent to settling a medical malpractice case. If (a) a doctor consents to settle the case and (b) the doctor's insurance carrier authorizes a defense attorney to make an offer of settlement, the parties begin settlement negotiations. This may occur in a settlement conference before the judge the parties are assigned to for trial. It may also occur during voluntary mediation, or simply through informal conversations between counsel.

As a general rule, because the stakes are so high, insurance carriers do not engage in settlement discussions in medical malpractice litigations until after they have had an opportunity to evaluate how the parties and the experts perform during discovery.

Obviously, your attorney has more experience than you do at evaluating the merits and value of a litigation, and he will provide you with guidance about what he thinks the settlement value of your case is. Ultimately, however, the decision about whether to resolve a case for an amount offered is the client's alone. You are free to reject your attorney's advice about whether or not to resolve a case. An attorney has an ethical obligation to advise you of every offer made, and he is ethically bound to abide by your decisions in the negotiating process.

TRIAL PREPARATION

If the parties cannot find common ground through settlement discussions, a case must be prepared for trial. Your attorney will prepare motions in limine regarding legal issues that will come up during the trial. Attorneys must also prepare other pleadings in the form of voir dire questions, proposed charges, a pretrial information exchange, and a proposed verdict sheet. On top of this, your attorney will meet with you and all of the witnesses who testify on your behalf to ensure that they are ready to testify at trial.

In addition to preparing pleadings and making sure that witnesses are ready for trial, in the modern digital age attorneys must also prepare demonstrative exhibits. Slides will be prepared to assist and keep the jury's attention during opening and closing statements. Medical records will be scanned so that they can be projected onto screens or televisions when defendants and their experts testify. Deposition transcripts and paper discovery responses are also scanned so that they can be used for impeachment purposes. At my office, we have software programs that enable us to digitally reproduce any document so that it can be projected onto a screen. Evidence is bar coded so that when a witness testifies we can call up relevant documents during a trial with a bar code scanner. If a witness contradicts a medical record or sworn testimony, in less than one second we can project the pertinent impeachment evidence on a screen while we are engaging in our cross-examination. Organizing all of this information so that it can be used effectively takes a great deal of planning and is very time consuming.

THE TRIAL

Trials can last several days and complicated cases will result in trials that last several weeks. In most instances it is best if the plaintiff is in court every day during the trial. Exceptions to this rule have to be made for clients who are catastrophically injured and are physically incapable of sitting in a courtroom.

Jury selection usually takes a day to complete, but can take longer in a case that will take several weeks to try. After a jury is selected, they receive preliminary instructions from the judge. Following this, all parties present their opening statements. After opening statements, the plaintiff patient presents his witnesses; preferably the fact witnesses are called first, followed by the expert witnesses. The defense will call their witnesses after the plaintiff completes his case. The parties will then provide the jury with their summations, the judge will charge the jury and then the jury will deliberate until a verdict is reached.

POST-TRIAL MOTIONS AND APPEALS

A case is not necessarily over when a jury returns a verdict. If the trial judge made a mistake on a legal ruling of consequence either party may move to set aside the verdict and request a new trial. Additionally, legal rulings of the trial court can be appealed. Frequently, when a physician loses a malpractice trial they will file an appeal and attempt to negotiate a settlement that is less than the verdict. Your attorney will provide you with guidance throughout this process.