The Anatomy of a Medical Malpractice Suit

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Preface

This article has been prepared to provide a basic overview of what a health care provider needs to know and understand when accused of medical negligence.

It generally reviews the Texas law relating to prosecution of a health care liability claim, and gives a practical understanding of the various stages of activity involved as a claim or lawsuit works its way through the court.

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January 2018

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While each medical malpractice case has its unique aspects, most professional liability cases take on a familiar, predictable pattern. Many components are common to any civil lawsuit, but in Texas, there are certain laws that have special relevance to health care liability claims. This outline is intended to provide a health care provider with an overview of what is involved in a medical malpractice case so that he or she can know what to expect during the different stages of a lawsuit.

I.

PRE-SUIT NOTICE OF CLAIM

Chapter 74 of the Texas Civil Practice & Remedies Code outlines the specific legal requirements a patient must satisfy to pursue a health care liability claim. Under this law, the patient or the patient's attorney must send written notice of a health care liability claim by certified mail. Technically, this notice must be made 60 days before any suit is filed. However, a patient can file suit at the same time the notice letter is sent or many months after the notice letter arrives. A notice letter must also be accompanied by a particular type of records authorization, which is specified by law. The purpose of the notice requirement is to allow some claims to be resolved before suit is ever filed, and to allow the doctor or nurse to obtain records of other health care providers that may bear upon the case by using the required authorization. If a plaintiff's attorney sends such a notice, it extends the statute of limitations by a period of 75 days as to all parties or potential parties, which means that the plaintiff has an extra 75 days to file suit against such parties. The bottom line is that anytime a health care provider receives a certified letter from an attorney containing a valid records

authorization and language that says they are giving that health care provider notice of a health care liability claim, such a letter and authorization should immediately be sent to the health care provider's insurance carrier.

II.

PLEADINGS

A. The Plaintiff's Original Petition

In any civil lawsuit, the pleadings consist of a petition, filed by the plaintiff, and an answer, filed in response by the defendant. In the petition, the plaintiff generally outlines the basic facts of the case sufficient to show that the allegations relate to a specific event and to show that the suit is filed in the correct county. These pleadings can be specific, but, in most circumstances, are quite general and vague. The plaintiff's petition also generally describes the type of damages that the plaintiff believes he or she has suffered because of some alleged act of malpractice. The facts recited in the petition may be far different than the true facts surrounding a patient's care. They are contentions or allegations designed to put the best spin on the plaintiff's case. They often include statements that the health care provider was reckless or completely disregarded basic standards of medicine. The defendant should understand that the language used within the petition is designed to make the conduct of the doctor or nurse named sound as bad as possible. Actually proving the claims made is a completely different matter.

The plaintiff's petition normally does not specify a monetary amount of damages sought. Under Texas law, the petition may simply state that the amount claimed "is within the jurisdictional limits of the court." Nevertheless, sometimes a plaintiff's lawyer will

include a specific monetary relief requested in the petition. This number is only limited by the imagination of the lawyer. The specification of exactly how much is sought from the health care provider usually occurs later during the progress of the case by an amended petition or by correspondence from the plaintiff's attorney.

The plaintiff usually alleges "negligence" on the part of the health care provider. Claims are made that some act or omission on the part of the defendant fell below the expected standard of care or was different than what a reasonably prudent health care provider would have done under the same or similar circumstances. The plaintiff's petition may also contain allegations of a special legal term, "gross" negligence.

1. Questions of Coverage

Gross negligence means more than momentary thoughtlessness, inadvertence, or error of judgment. To establish gross negligence, the plaintiff must prove, by clear and convincing evidence, that (i) some act or omission by the defendant involved an extreme degree of risk, considering the probability and magnitude of harm to others, and (ii) the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Clearly, this standard is not easily met.

2. The Amount of Damages Claimed

Since all policies of medical malpractice insurance cover only acts of "negligence" and exclude coverage for intentional acts, whenever pleadings alleging gross negligence are filed, the medical malpractice insurer must inform the health care provider that he or she is not covered for such allegations. The letters sent from the insurance company will state that the health care provider is free to hire their own personal attorney to protect their "excess"

interest. The same information must be given to the health care provider if the plaintiff specifies that they are suing the defendant for a sum of money that exceeds the monetary limits of the defendant's insurance policy. Historically, cases pursued against health care providers rarely end with an award of exemplary or punitive damages. The allegations are often made without much factual basis for the sole purpose of making the defendant feel unprotected by his or her insurance policy. The defendant should understand that oftentimes allegations of reckless conduct or descriptions of outrageous amounts of damages are included so the defendant's insurer will shake the defendant's confidence. The defendant should remain strong knowing that the attorney must prove any allegations made.

Even if the plaintiff's claim exceeds the defendant's insurance coverage, it should be remembered that the defense counsel employed by the insurance company to represent the health care provider owes his or her first loyalty to the health care provider, not the insurance company. However, when valid questions about the potential of exposure beyond the limits of liability protection exist, the health care provider should ask questions about the potential for exposure and freely discuss the matter with the insurance company's representatives and defense counsel.

B. The Defendant's Original Answer

The defendant's attorney must also file a pleading in response to plaintiff's petition, which is called an answer. In this document, the defendant may request more specificity as to the allegations made. The answer will also contain statements denying the allegations and requests for the plaintiff to prove each and every aspect of the case. From time to time, there may be additional pleadings of special importance the defendant's attorney may wish to file

with the court. These may include statements that assert that the damages were caused by plaintiff's pre-existing conditions, or were unavoidable or unforeseeable *sequelae* of an illness. Some legal defenses, such as the timeliness of the suit, may also be raised to prevent or limit the plaintiff's recovery of damages. Regardless of what the specifics of the case are, the defendant's pleadings are typically short and deny all of the allegations made by the plaintiff.

During the course of the suit, any party's pleadings may be amended. The plaintiff may make new allegations or amend his or her petition to make allegations more specific. The defendant may also amend his or her answer if new facts are learned or new defensive matters need to be asserted. Strategically, some defenses may be developed before the actual answer is amended and filed.

III.

INITIAL EXPERT REPORT REQUIRED BY LAW

Texas law (Chapter 74) states that a plaintiff must serve on each party, or the party's attorney, an expert report written by a qualified health care provider for each defendant against whom a health care liability claim is asserted. The plaintiff must serve this report not later than the 120th day after the defendant files his or her original answer. This expert report, sometimes called a "Chapter 74 report," must provide a fair summary of the expert's opinions regarding the applicable standard of care, how the defendant deviated from the standard of care, and how that deviation caused the plaintiff's injuries.

Within 21 days after the report is served, the defendant can challenge the adequacy of the opinions in the report and/or the qualifications of its author. Because this preliminary

report requirement technically hinders a citizen's right to sue, the law requires judges to be very lenient in considering the adequacy of Chapter 74 reports, and will only grant a defendant's motion challenging the report if the report is so inadequate as to not even represent a good-faith effort to comply with Chapter 74's requirements. Even if the report is deficient, the court must give the plaintiff's attorney 30 days to cure the deficiency found. Although challenges to these reports can be successful, resulting in the dismissal of a plaintiff's case, defense counsel will use them sparingly and only challenge a Chapter 74 report if there are dramatic errors unable to be cured.

IV.

DISCOVERY

Discovery is a stage of the case that can take a very long time. It is a time when both sides attempt to "discover" what the other side intends to use in evidence during the trial. It is during this stage that the parties collect pertinent medical records. The parties also exchange written questions called "interrogatories," which must be answered in writing and returned to the opposing attorney after they have been sworn to by the party to whom they are directed. The parties may also file "requests" for production of certain documents or other materials which may be relevant to some aspect of the case. The scope of discovery is very broad. Many times, the party to a lawsuit is required to produce copies of text messages, patient sign-in logs, records of continuing medical educations, or contracts with physician groups. Although the types of information that can be discovered is very broad, what is actually admissible in evidence is limited by specific rules. There is one important rule about protecting and preserving the integrity of documents that may be required to be produced

during discovery, which should be made clear. The health care provider notified that he or she may be sued should never attempt to alter or destroy items that may relate to the case in any way. Alterations in records will always be discovered and used by the plaintiff to make the defendant look dishonest, even if the change was minor. Also, data on a computer, in an email or contained in a text message may be instrumental in winning a case. Preserve everything! Even notes, lab slips, phone messages and text messages can be important.

Discovery of the case is also the time when depositions occur. A deposition is when an attorney is allowed to question a party or witness in a case. This oral examination becomes a part of the records of the court and can be read or referred to during the trial of the case.

Because interrogatories and depositions are the main components of discovery, a little more detail is needed in describing each one of these important aspects of a malpractice case.

A. Interrogatories

As indicated above, interrogatories are written questions that can be directed to the defendant health care provider, which require a written response. These answers will have to be sworn to and given to opposing counsel. Although some extensions can be obtained, the answers are typically due 30 days from the date that they are received by the defendant's attorney.

During the course of a case, if interrogatories are received, they will be sent to the defendant to be answered. The defense attorney may answer some legal questions or assert objections to improper inquiries. Responses to interrogatories will be carefully reviewed with the defendant because the answers are extremely important.

B. Depositions

Depositions are sworn testimony given by a party or witness in response to questions asked by the opposing party's attorney. Whenever a defendant's deposition is requested, it is very important for the physician or nurse to thoroughly review his or her memory and records relating to the case. Defense counsel will also carefully and closely work with the defendant in preparing for the anticipated areas of questioning. A confidential pre-deposition conference will occur so the physician or nurse knows what to expect and truthfully respond to the questions asked. Preparation will require hours of intensive work by the defendant. The defendant will be instructed on the best method of answering questions and also warned about potential pitfalls and traps that may be waiting for them when he or she is questioned by the adverse party's attorney.

The health care provider's attorney will also request and take depositions of the plaintiff or other witnesses identified by the plaintiff. Questioning by defense counsel will attempt to develop important facts that will assist the health care provider in defending the case and discovering other favorable evidence.

When depositions are taken, any party to the lawsuit has the right to be present. It is the usual practice that only the party to be questioned and the lawyers for all the parties attend each deposition. On occasion, it may be helpful to have the physician or nurse be present when a plaintiff or some other witness is deposed. Whether the defendant attends depositions of other parties or witnesses will depend upon the preference of the defendant and the advice of the defense attorney.

V.

TESTIFYING EXPERT WITNESSES

A. The Plaintiff's Testifying Experts

The law requires the plaintiff to designate experts first. After all, because the plaintiff has made the allegations, he or she has the obligation to come forth with evidence to prove those same allegations. At times, it may be difficult for the plaintiff's lawyer to find an expert willing to support the allegations.

As previously discussed, a plaintiff must, within 120 days after a defendant's answer is filed, provide the defendant with a Chapter 74 expert report, which must describe a departure from the standard of care that allegedly caused some injury to the plaintiff. Although the plaintiff will almost always formally designate the "Chapter 74" expert as the plaintiff's *testifying* expert, the plaintiff is not required to do so, and may designate a different expert to testify against the defendant in the case.

The testifying expert will be presented for deposition, during which the defense lawyer will vigorously question the witness about all areas of criticisms and the basis for every opinion. The negative opinions are explored to raise questions as to their credibility and accuracy. The ultimate goal is to refute or lay the groundwork for discrediting the adverse testimony offered against the defendant physician or nurse. The physician or nurse sued often assists the defense lawyer in evaluating reports of the adverse experts and in preparing for and analyzing the depositions of the expert witnesses once they have been taken.

B. The Defendant's Testifying Experts

The defense lawyer will also be consulting with and possibly identifying experts who are supportive of the defendant's care. In most circumstances, the defendant should be seeking out knowledgeable individuals who might be willing to review medical records and testify in a way supportive of the defendant's care. If a qualified person is located, the defendant should suggest this individual to the defense lawyer as a potential defense expert. In trying to assemble witnesses supportive of the doctor or nurse, the defense attorney plays a very important role. Because any communication between the defendant and a potential expert witness could be "discoverable" by the plaintiff's attorney, the defense lawyer usually takes the initiative in contacting the potential experts and getting them ready for trial. This way, communications with the expert can be protected and retain the objectivity which lends credibility to the supportive witness. The opinions of defense witnesses will be viewed as impartial, objective thoughts of individuals who have not been inappropriately influenced by the defendant health care provider.

Experts called on behalf of the physician or nurse need to be developed as early as possible. This does not mean that they will be identified to the plaintiff's lawyer immediately. It is best to have these experts "waiting in the wings" for formal designation at the appropriate time. There are occasions when no outside retained expert may be necessary for the defendant. The defendant, and possibly other health care providers involved in the case, may be more than enough to support the defendant's care.

In summary, the plaintiff must come forth with at least one witness who will back up the allegations made. At the same time, the defendant should be carefully grooming

individuals who, if called upon, will be ready, willing and able to respond to the plaintiff's expert and support the accused physician or nurse. These valuable witnesses will assist the defendant and defense counsel in discrediting plaintiff's witnesses and educating the jury as to medical realities. When properly taught, jurors can understand the defendant's case and hopefully will decide in his or her favor.

VI.

MEDIATION

After discovery has been substantially completed and expert witnesses have been developed and possibly deposed, it is not uncommon for a case to be scheduled for mediation. Mediation is a common method of attempting to accomplish the pre-trial disposition of lawsuits by settlement. In most cases, the judge will order the parties to mediation prior to a case proceeding to trial. Basically, mediation is an informal forum in which an impartial person (the "mediator") facilitates communication between parties to promote settlement. A mediation usually consumes one day's time and is usually held at a lawyer's office.

Typically, the defendant, defense counsel, and a representative of the insurance company will attend the mediation. All other parties, their counsel and insurance representatives are also required to attend. No formal testimony is presented during the mediation; in fact, all communications are confidential and cannot be used in any way at trial. The physician's or nurse's role is mainly to attend and participate with counsel and the insurance company representative in making decisions about settlement. Depending on the case, mediation can be an effective tool to resolve lawsuits without a trial.

VII.

SETTLEMENT EVALUATION AND SETTLEMENT DISCUSSIONS

As the case approaches trial, there is usually some discussion about possible settlement of the dispute. Sometimes settlement is a welcomed result of many months of difficult negotiations. On other occasions, the defendant physician or nurse may choose to refuse to settle any case under any circumstances. Whatever the status of the particular lawsuit may be, the parties should always be evaluating the prospects of a reasonable resolution of the controversy, if at all possible. Since the trial of any case exposes all parties to potential risks, settlement may be an acceptable option. The appearance of the parties, the sympathetic nature of the injuries, the skill of the plaintiff's lawyer, the liberality of the county where the case is tried, and many other factors all must be considered in evaluating settlement.

Whenever settlement is demanded by the plaintiff's attorney, the doctor or nurse is advised. Under most insurance policies, the defendant must consent before any money is offered to the plaintiff. The insurance company, defense counsel and the doctor or nurse all participate in suggesting and evaluating what an appropriate settlement response should be in that unique case.

One last general thought about settlement is that resolving a case by agreement does not constitute an admission of guilt by the defendant. Most settlement agreements expressly state that is not an admission of guilt. The papers describe the settlement as a compromise reached between the parties to resolve a disputed matter in order to avoid the inconvenience, expense and uncertainties further litigation would entail. Confidentiality and non-

disparagement agreements are often included in settlement papers.

VIII.

TRIAL SETTINGS

Because of the overcrowded condition of the courts, there are many times when a lawsuit will be set for trial and later reset to a subsequent date for one reason or another. Most of the time, the courts are required to schedule many cases for any particular week. During that week, there can be a variety of reasons that cause a trial to be postponed. While this continual delay may be frustrating, there is little to nothing that defense counsel can do to assure a definite date for trial. In some counties and under certain circumstances, the court may establish a "special" setting. A special setting means that no other cases will be called ahead of the special case on that day. These settings are definite and should be planned for as the actual date of trial.

As the defendant is informed of trial settings, he or she should advise defense counsel immediately if there are unavoidable conflicts that would prevent the defendant from being available for trial if the matter was actually reached for trial on the given date. As the trial date approaches, defense counsel will be in touch with the defendant to advise as to how realistic the chances are that the case will actually be reached for trial at that setting.

IX.

TRIAL PREPARATION

As the case approaches trial, the defendant physician or nurse should carefully review his or her own deposition testimony and all of the medical records applicable to the case. The defense lawyer will also be in close contact with the defendant to go over the specifics of

the case and finish trial preparations. Because it is the obligation of the plaintiff to go first in the trial of the lawsuit, some of the last-minute trial preparation may be done during the evenings when the case is actually in the process of being tried.

The unique complexities of individual lawsuits make a complete discussion of trial preparation difficult. The most important aspect of trial preparation is for the defendant to be thoroughly familiar with the case and his or her previous deposition testimony. The physician or nurse should also remember that the courtroom is the "operating room" of the attorney. To the greatest extent possible, the defendant should follow the suggestions and instructions of defense counsel so the case can be properly presented to the judge and jury.

X.

TRIAL

Trial is the culmination of all of the various stages of discovery, which have been outlined above. By the time of trial, all of the pleadings have been placed in final form, all discovery has been answered and all of the expert witnesses have been identified and deposed. All reasonable and acceptable means of resolving the case by settlement have been exhausted.

Trial begins with selection of a jury and is followed by opening statements in which the attorneys give a general overview of what they expect to prove during the course of trial. After opening statements, the plaintiff presents evidence and the defendant is allowed to cross-examine and question witnesses called. When the plaintiff completes his or her case, they "rest." The defendant then puts on any evidence that has not already been developed during the previous questioning of witnesses called by the plaintiff.

After all of the evidence is completed, the court prepares what is known as the Court's Charge. The charge of the court is a written document that consists of questions submitted to the jury for answering. These questions will inquire whether, based upon the evidence, the jury believes (1) the defendant was negligent, (2) whether such negligence was a proximate cause of damage; and (3) how much money should be awarded to fairly and reasonably compensate the plaintiff, if any. At the end of the trial, the Court's Charge is read to the jury and the attorneys are allowed to give their final arguments. During this argument, the attorneys will try to convince the jury to answer the questions in a way that favors their respective clients. After the arguments, the jury retires to the jury room and answers the questions contained in the Court's Charge. In Texas state courts, 10 of the 12 members of the jury must agree to all of the answers contained in the jury's verdict. After the verdict is received, the court then interprets and applies the answers of the jury to render what is called a final judgment. In other words, the court looks at the verdict and decides who has won the case based upon the answers of the jurors.

SOME CONCLUDING THOUGHTS

It is hoped that the foregoing outline will help the physician or nurse understand what can be expected during the course of a typical medical malpractice case. Like a patient suffering from a prolonged illness that he or she may not understand, a health care provider is unaccustomed to being a defendant in a lawsuit and must endure certain things as the case runs its course. Although it may not remove the pain, anger or frustration experienced by a doctor or nurse accused of malpractice, it is hoped that a general understanding of what a lawsuit entails may remove some of the questions and alleviate the fear of the unknown. The

ultimate goal of the defense is to properly respond to each aspect of discovery, aggressively develop the defendant's evidence as the case progresses and win a victory at trial. With good preparation and teamwork, the most difficult cases can be managed and resolved in a manner that is acceptable to the health care provider.