

The plaintiff's deposition in medical malpractice

Your plaintiff needs to be prepared for questions related to three common defenses

By Shirley Watkins

When preparing your plaintiff for deposition in a medical malpractice case, it is important to recognize common defenses that the defense may try to exploit during the deposition. All three involve dates and events, and it is easy for the unprepared plaintiff to become confused about a string of events and when they happened.

Preparing for statute-of-limitations defense

In California, there is a complex medical-malpractice statute of limitations. Unlike personal-injury cases in which the statute of limitations is two years (with tolling of the statute of limitations during the plaintiff's minority), medical-malpractice actions must be commenced within three years from the date of the injury, or one year from the date the plaintiff discovers or *reasonably* should have discovered the injury, whichever occurs first. If the medical-malpractice action is based upon the presence of a foreign object found inside the plaintiff's body, the statute of limitations does not start to run until the plaintiff discovers, *or should have* discovered, the object. This statute of limitations for medical malpractice is applicable to adults and minors six years of age and older. For medical-malpractice actions involving minors below the age of six, the action must be filed within three years of the date of the injury or before the minor's eighth birthday, whichever period is greater. There is no tolling period for minority. (Code Civ. Proc., § 340.5. See, also, *Understanding the Statute of Limitations for a Medical Malpractice Birth Trauma Case*, Shirley K. Watkins and Steven B. Stevens, *Plaintiff* Magazine, December 2007).)

It is not uncommon for a medical-malpractice plaintiff to have no idea that there may be a claim. Doctors and other health-care providers frequently do not voluntarily disclose their opinions about potential malpractice despite their

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personal beliefs. Hospitals are able to hold their peer review in closed sessions and even though providers may be found to have acted negligently, that information is seldom, if ever, released to the patient. Moreover, most health-care providers, in the face of a bad outcome, will continually reassure the patient that "nothing more could have been done," or that "it was just one of those things that can happen," or that "it was unclear" how a poor result occurred. Accordingly, it is crucial to be aware of the statute-of-limitations issue when preparing your client for deposition.

If the lawsuit was clearly filed within one year of the date of the negligent event (surgery, treatment, death, etc.) and there is no government-claim issue (see section 4, below), then when the plaintiff thought there might be a claim, what caused the plaintiff to think there might be a claim and why the plaintiff sought a lawyer is not relevant and not reasonably calculated to lead to admissible evidence, and I typically do not allow my clients to answer these questions, either in deposition or in interrogatories.

If the lawsuit was filed outside of the one-year anniversary of the event which caused the injury, then you must be prepared to have your clients explain what caused them to become aware of the possibility of a claim. Many times, the explanation is simple: the doctors continually reassured the plaintiff that the event "had no explanation" or gave an explanation which was untruthful or incomplete. Usually, there was some triggering event to cause the plaintiff to seek a lawyer. Many times, clients will call a lawyer to "find out what really happened" while not suspicious that there was malpractice. Sometimes, a provider or friend or family member may suggest that something went wrong.

In all cases, it is important to establish that there was no suspicion within one year of the event and facts became known within one year of the filing of the complaint. Typically, that happens when they consult an attorney and records are obtained and reviewed which leads to knowledge that there is a claim. It is important to learn at the outset of the case whether the client sought legal consultation within one year of the event. If so, the delayed-discovery rule will be difficult to uphold since going to the lawyer usually meant there was some suspicion that something may have gone wrong, and a court is likely to count the first attorney consultation in calculating the statute of limitation. In a medical-malpractice case, you cannot wait until preparation for deposition before you find out whether the client consulted with another attorney within one year of the event but the lawsuit was not filed until after that one-year limitation. (Knowledge of that fact would probably lead to rejection of the case because of statute-of-limitations problems.) Be prepared to understand what the plaintiff understood the cause of the problems to be, what he was told to reassure him and lead him to believe that there was no malpractice or not suspect malpractice, and what was the triggering event to cause the suspicion or belief that there may be malpractice, occurring within one year of the date of filing of the complaint.

Preparing for a government-claim defense

An added complexity to medical-malpractice statute of limitations is the requirement to file a government claim when one of the defendants is a public entity. Typically, you will see this in cases where the hospital is a county facility (Ventura County Medical Center, Harbor UCLA Medical Center, LAC/USC Medical Center) or a state district hospital (Kaweah Delta, Hemet Valley, Antelope Valley, Sierra View Medical Center). Public entities require a claim to be filed within six months of the date of accrual of the claim. The date of accrual is generally the same as the date of discovery. Accordingly a government claim must be filed within six months of the date the plaintiff knew or reasonably should have known that he might have a claim. This information would be known to you at the outset of your representation since claim-requirement compliance has to be pleaded in the complaint. Even though you may have successfully weathered a demurrer on this issue, if the claim was filed more than 6 months from the date of the event, the statute of limitations remains an issue through trial. Therefore, expect questioning of the plaintiffs on factual circumstances of the delayed discovery and make sure the clients are prepared to give a rational explanation of why they decided to seek an attorney.

Preparing for binding arbitration defense

In addition, another issue frequently appearing in medical-malpractice cases is binding arbitration. The plaintiff needs to be fully prepared to answer questions at the deposition on binding arbitration. One common problem for the defense is when the arbitration agreement is signed in English but the plaintiff is a primary Spanish speaker. Then there may be a factual argument about what the plaintiff was told in translation or whether the document was translated at all. Evidence of the plaintiff's education in the United States, his work experience in which he may have been trained in English or required to speak English at work, or his ability to read English will be covered at the deposition and if relying on this defense to the arbitration agreement, a full and comprehensive examination of these issues in deposition preparation must be undertaken.

Conclusion

Before a plaintiff is presented for deposition in any type of case, thoughtful and thorough preparation is required. In medical malpractice, special concern must be shown to the statute of limitations. Careful preparation will lead to a successful deposition in which nothing happens to hurt the case.

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