



# Analyzing and prosecuting medical malpractice cases

*Accepting a med-mal case and staying focused on the most important aspects of proving the negligence*

By **BRUCE G. FAGEL**

There is a growing disconnect between two statistical facts — over 400,000 people die in the U.S. every year from medical mistakes and yet, according to insurance industry statistics, some 75 percent of all medical malpractice claims are dismissed without the payment of any money to the plaintiff. Of course, these statistics are not immediately comparable since many cases of death from medical mistakes are not provable medical negligence and many of the cases dismissed involve secondary or uninvolved defendants who are named in cases and properly dismissed to focus on more liable defendants. But the reality of medical negligence cases is still true — there are

too many cases filed that are not good cases and there are too many valid claims that are not filed.

The first step in analyzing any medical malpractice case is understanding that such a case is inherently different from any other type of personal-injury claim. While the level and nature of damages are important in any case, damages cannot be the driving motivation in a medical negligence claim. If the jury cannot get past liability, then the damages are irrelevant and both defense attorneys and insurance claims analysts are adept at using a causation defense to prevent a jury ever getting from negligence to damages.

While potential clients may have some initial understanding about negligence

and a somewhat better understanding of their claimed damages, few if any victims of medical negligence will understand causation. In medical negligence cases, causation is more than just cause and effect; it also involves proving that the injury or death was preventable. This issue must be analyzed before filing any medical negligence claim even if the answer is not completely clear at the time of filing a complaint, but a failure to consider this issue will doom many cases to failure.

## **Deciding to take the case**

This is the most important decision to be made in any medical negligence case and the wrong initial decision can be costly and emotionally devastating to both the client and the attorney. In a



complicated game of chess, sometimes the best move is not to play at all. However, when meeting with a new potential client who has an often tearful and damning story to tell about their experience with a doctor or in a hospital, the natural instinct of any plaintiff personal-injury attorney is a desire to help the client, and the initial facts can sound pretty outrageous. One advantage in California, as compared to many other states, is that a claim can be filed without an affidavit from an expert. Some states even require a separate affidavit from an expert for each proposed defendant. This requirement limits a plaintiff to the medical records and the limited evaluation by a medical expert based on the medical records alone. Unfortunately, the medical records in many cases are either insufficient to identify the negligence, or in some cases the records actually cover-up the negligence.

In California however, without the requirement for such an affidavit by an expert, discovery can take place after filing of the complaint and essential information can be obtained which can then be used to build the factual foundation basis for a favorable expert opinion on both negligence and causation. In such circumstances, both the attorney and the client need to understand in advance that the failure to discover sufficient facts through depositions or other discovery may require an early dismissal of the case. It is better to advise a client early on that the prosecution of the case will be dependent on establishing certain facts and will require dismissal of the case if the facts do not come to light, rather than ignoring the facts and riding a losing case to trial.

### Evaluate the plaintiff

This is the second most important decision in a medical negligence case, and it is often ignored in the face of significant damages with good liability. But in a case where the personality of the plaintiff is a potential problem, any attorney must be very circumspect in taking

such a case. In all medical malpractice cases, the defense prefers to have the jury see the case in very personal terms, i.e., the suing plaintiff against the caring doctor or nurse. Since most cases involve facts and issues that are beyond the knowledge or opinions of the plaintiffs, the clients need to be aware that their testimony can rarely make a case but often can destroy the case. A plaintiff who exaggerates their injury or the effect of their injury can easily be made the focus of the case by the defense. Also, any significant contributory negligence will allow the defense to shift the focus of the case, and despite the legal principle that contributory negligence does not bar recovery, the reality in medical malpractice cases is more often "all or nothing" to a jury.

Even where a plaintiff's testimony or actions are peripheral to the issues in the case, the defense will go to great lengths to make the plaintiff look bad in front of a jury. This is especially true where the defendant doctor or nurse makes a more credible witness, which is more often the situation. Any attorney pursuing a medical negligence case must be prepared to handle a sympathetic defendant doctor or nurse who will come across well to a jury. The rarer situations where the doctor or nurse does not make a sympathetic or credible witness is more often going to be settled by the defense insurance carrier, but this situation can rarely be evaluated before the case is filed and even the client's impression of the defendant doctor may be different than what comes out at a deposition.

### Experts

Medical experts on negligence and causation are an essential element in any medical negligence case, regardless of the damages. The effective use – and avoiding the misuse – of experts is the real key to success in any medical negligence case. There is no panacea for obtaining the best experts for any case, but there are certain basic principles for the use of any expert once retained. First, the attorney should conduct as much research as

possible about the medical issues in the case before retaining any expert. The Internet is replete with all levels of information about almost all medical topics with varying levels of importance from Wikipedia to Pub Med, the NIH repository for all medical literature. In between, there are many on-line publications from medical schools, professional societies and other organizations that offer not only information, but often lead to the identity of possible experts, or at least those who appear knowledgeable in the field.

Once an expert is retained, the attorney should send selected medical records with some focus or direction for the expert. Without divulging the attorney's belief on the liability focus, which if based on the client's impression, is often wrong, the attorney should focus the expert with specific questions based on the attorney's own research. Otherwise, a medical expert faced with a box of records and some knowledge about the injury or death can more easily conclude that there is no liability based on their own prior prejudices. While such a review may satisfy the attorney's legal obligation to obtain an expert review, it will not assist the client in developing a case of liability. Also, in more complex cases where multiple specialties are involved in the care and potential negligence, the attorney needs to be prepared for an expert to find liability but then state that the negligent doctor was in a different specialty than the retained expert. In such cases, it would be appropriate for the attorney to get a referral to the appropriate expert from the expert with such an opinion.

### Probability, not medical certainty

Often the most difficult but important decision an attorney can make is deciding to continue the pursuit of a medical negligence case after a negative, or at least not a sufficiently positive, review. Since most successful medical malpractice cases are fact driven, with specific facts and timing of events being



more important than vague standard-of-care issues, it is important to find out from any expert what facts would cause them to find a violation in the standard of care or what timing of events would lead to a preventable injury or death. Also, when an expert is not convinced about causation in the case, the expert may be viewing causation from a medical perspective which requires a level of proof similar to that required for a medical study or publication in the medical literature, which is a 95 percent confidence level.

Many experts, especially academics or new medical-legal experts, assume that their opinion on causation requires medical certainty rather than probability. When an expert expresses such an opinion the attorney should engage the expert in a discussion about the difference between medical and legal levels of proof. Since additional facts are not likely to change an expert's opinion on causation, it is important to get an expert properly focused on causation at the outset of the case. Many experts assume that they are assisting an attorney when they agree that there was negligence, but then agree with the defense analysis on causation, which they may first discuss at their deposition.

### Discovery

While the medical records often form the most important information in many medical malpractice cases and certainly are the main focus for any expert, depositions of the involved treating doctors and nurses are often just as critical.

Unfortunately, many attorneys use the deposition process to simply have witnesses read or explain what they wrote in the medical records. The more important role of depositions in medical malpractice cases is the exploration of the thought process or communications between health-care providers that are not documented in the medical records. All doctors learn a basic process of obtaining information from a patient, examining a patient, considering possible diagnoses,

and formulating a plan for further evaluation or treatment. However, after years in practice, most physicians will shortcut this process and their documentation in medical records will rarely show their complete thought process. The deposition is the opportunity to take the doctor through this process and demonstrate where they simply made assumptions that have no medical or factual basis.

Defense attorneys will often instruct their clients only to respond to questions if they have a specific recollection about the patient or the events in their care, and it is far too easy for doctors or nurses to testify that they have no memory of the patient and can only base their testimony on what was written in the record.

This often results in the attorney being forced to ask the witness about their customs and practices. Such questions allow the witness to present their defense to the case without ever having to answer for their actions or inactions that resulted in the injury or death of the patient. Deposition questions should instead focus on the specifics of the case and not let the defendant talk about what they would usually do under similar circumstances. It is better to get an "I don't remember" response that limits the opportunity for the defendant to provide an alternate explanation at trial, rather than a custom-and-practice response which implies that the witness has faced the situation numerous times before and never encountered any problem.

### Countering the defense of clinical judgment

In addition to causation, almost all medical negligence cases will defend the actions of the defendant health-care provider by claiming that clinical judgment was used to make decisions about the patient. A reference to clinical judgment allows the defendant to use the jury instructions to show that their actions did not fit the legal definition of negligence. Many attorneys will attempt to counter this defense by showing that the defendant

did not have the proper training or experience, but that requires proving a negative, which is legally impossible. Any defendant can testify that they have extensive experience (even if they don't) and a "custom and practice" that can never be disproven. However, the proper exercise of clinical judgment is a two-step process and experience is only the first part. That provides the basis for comparison of a large group of patients or conditions based on training or data in the medical literature to a specific patient. But without sufficient knowledge or data about a specific patient, clinical judgment becomes an assumption that a specific patient will respond to treatment similarly to other patients.

It is far easier, and more often the case, to show that a doctor did not have sufficient information about a specific patient, or change in a patient's condition, to be able to compare that patient to some larger population base. With such an analysis, discovery should focus on what a physician or nurse knew about the specifics of a patient's condition rather than the experience of the physician or nurse. Many attorneys incorrectly believe that an adverse outcome or death is usually caused by an incompetent doctor or nurse, but the reality is that most negligent doctors and nurses are well-trained, experienced, and caring individuals.

Communication problems have been shown by the Joint Commission to be the most common cause of medical errors causing injuries or deaths in hospitals. Medical records rarely show the full nature and extent of communications between nurses and doctors, and the deposition of doctors and nurses should focus on the extent of communication, or lack thereof, beyond what is written in the medical records or nurses' notes. In most cases of an adverse event/bad outcome, an attorney can show that incorrect assumptions or simply lack of sufficient information to make a proper decision is both the focus of the negligence and the cause of the ultimate injury or death.





The deposition process is the only way to develop such a theory of liability.

Also, all doctors are trained to get information about a patient and then to develop a plan for management of their condition. By asking about the doctor's plan, or thought process that is not necessarily reflected in the patient's medical chart, the answers to such questions can show that the doctor did not use any judgment in their management plan for the patient.

### Conclusion

Regardless of the outcome of this month's ballot measure on raising the MICRA cap, the public debate about this issue will likely increase the number of

patients seeking an attorney to investigate and pursue a medical negligence claim. If the MICRA cap is increased, plaintiff attorneys will need to avoid the lure of jumping into a case simply because the potential fee is bigger. If the MICRA cap is not increased, it will be even more important for attorneys to be able to correctly evaluate a case and prosecute the claim in a cost-effective manner.

*Bruce G. Fagel, M.D., graduated from the University of Illinois (1972), and was licensed to practice medicine: Illinois, 1973; California 1975. He received his JD at Whittier College (1982). Dr. Fagel is a regularly invited speaker before organizations of attorneys, physicians, and hospitals internationally,*



Fagel

*and has been interviewed by CBS, ABC, NBC and various media affiliates. Featured in "The Best Lawyers in America, 2007." He has been an eight-time nominee by Consumer Attorneys Association for Trial Lawyer of the Year and recently featured in the National Law Journal as "The 10 Best Trial Attorneys in the Nation". Dr. Fagel has authored various articles on medical malpractice issues and served as a consultant on medical malpractice law to the California Judicial Counsel Committee, which wrote the new CACI jury instructions (California Approved Civil Instructions).*