



BEST PRACTICES: SIX CRITICAL TASKS FOR SUCCEEDING IN MEDICAL MALPRACTICE CASES



Most attorneys will think at least twice before taking on a medical malpractice case. The reasons for their hesitation are obvious: such cases are complex and increasingly expensive to litigate, and the outcome is never assured. Even when a decision to proceed is made, attorneys might face uncertainty about whether they have access to the tools needed to fully understand, prepare for and argue a high-stakes case against a hospital or a specialized physician. Those tools are available, and by taking advantage of them while performing six critical tasks, attorneys can create order in their approach to medical malpractice cases and improve their odds of winning.

Misfortune is a venerable teacher. Whenever an accident or mistake occurs, or someone suffers a defeat, those affected by the outcome may be prompted to ask why it happened and what can be done to avoid repeating it.

Those in the legal profession certainly know the merits of questioning how they might achieve different conclusions.

One way is to reduce complex scenarios to discrete and more manageable components that in some cases can also be approached procedurally. Transactional or litigation checklists are common in law firms, for the simple reason that they make it easier to remember what needs to be done in a specific set of circumstances and allow attorneys and their staff to focus on providing value at each step.

In fact, checklists have a well-established connection with avoiding costly oversights. Boeing's legendary B-17 "Flying Fortress" aircraft, for example, might never have achieved its status in the annals of aviation history except for documents that listed critical steps to be followed during takeoff, flight, landing and so on. Those were the result of a lesson that was learned the hard way: an early version of the B-17 crashed during a test flight in 1935, which prompted newspapers to dub the massive four-engine bomber as "too much plane for one man to fly."

Boeing pilots put their heads together following the accident and realized that what was needed was a way of reducing the margin of error for the aircraft's flight crew. The B-17, they were convinced, was not too much for anyone to fly; rather, it was too complex for any one individual to commit all of its components—and their relationships to each other—to memory. The pilots concluded that a checklist was necessary, and developed one to ensure that no crucial step was overlooked.

The same underlying philosophy can be applied to many matters in law. Medical malpractice cases in particular involve many "moving parts," and collectively they can prove highly demanding for those expected to maintain a steady hand on the controls.

That's why, as a starting point, litigation checklists can be valuable. But for those lists to be truly meaningful, attorneys need to ensure that they cover six critical tasks that are essential to successful medical malpractice litigation.

Task #1: Conduct Research to Understand the Medical Condition and/or Procedure Involved

Health-care negligence cases span the breadth of today's increasingly complex worlds of medicine and science. Before accepting a case, attorneys should first acquaint themselves with the specific medical condition, diagnosis and/or procedure involved, including terminology that pertains to a complaint. This acquired understanding will provide a foundation for more in-depth learning later. It can also ultimately translate into greater confidence and better-informed interactions with others who may eventually be involved in a case, such as expert witnesses or consultants.

Access to a comprehensive and reliable database of medical definitions, conditions and treatments is essential from the outset. That access will continue to be important—as a go-to resource, for example, that can provide information that leads to actionable insights during the formulation of a case strategy.

Task #2: Understand the Applicable Medical Guidelines and Standards of Care

With an appreciation of the medical condition or procedure at the heart of an issue, litigators need to understand the medical guidelines and standards of care that apply. The key goal in this task is to arrive at a meticulous and realistic analysis of the elements of negligence, if they exist.

Guidelines and standards may be debatable, while precarious links to causation can further complicate an argument. Guidelines and standards also continually evolve.

Nevertheless, attorneys can and should become well versed in the medical issues involved and keep pace with current best practices. They can also identify potential shortcomings in care before talking to an expert and further developing a case.

Task #3: Research Comparable Verdicts and Settlements to Determine Case Value and Potential Risks

Attorneys can better understand the risks involved in taking on a case when they compare past verdicts and settlements in similar cases. With the right tools, they can quickly estimate the value of proceeding or settling.

Referring to similar cases can also provide valuable insights when weighing appropriate economic damages, which can be difficult to estimate, or when exploring whether a particular injury is likely to exhaust a jurisdiction's caps on non-economic damages.

By looking at comparable verdicts and settlements, attorneys will get a better idea of what their case might be worth.

Task #4: Find Expert Witnesses Pertinent to Your Case and Review Their Previous Testimony

A key element of any medical malpractice case will be the expert witness—or witnesses—called upon to provide guidance or give testimony.

Hiring an “expert” who simply reinforces an attorney's own preconceptions or convictions is a sure road to disaster. With so much at stake, the quality of a truly authoritative expert is one of the most important factors in achieving success.

Finding such an individual can be a challenge. Attorneys will need access to a trusted searchable directory that can point to suitable experts in a given field. It will be helpful, too, if that resource allows attorneys to conduct analysis of a candidate's experience as an expert witness. Visibility into an expert's background, orientation for plaintiff and defense counsel, frequency testifying and so on, can provide valuable insights. Being able to research the background of opposing counsel's experts will also prove beneficial.

The perils of relying on unqualified or unsuitable experts are well documented. Moreover, an unsettling consequence may be that attorneys could be exposed to accusations of legal malpractice as a result. If an expert is shown to be negligent, it could be argued that so, too, is the law firm that hired him or her.

Task #5: Research All Parties Involved in a Case

Gathering factual insights into *all* of the individuals involved in a case—not just experts but also lay witnesses and even opposing counsel, as well as the jurors for cases that go to trial—is essential. It will be helpful, too, to obtain factual discovery reports on businesses involved in a matter. Nursing homes or hospitals, for example, are often parties to a malpractice suit.

Attorneys should also carefully vet their clients, which can result in important insights that might play a critical role in determining whether to take on a malpractice suit.

Task #6: Research Pertinent Legal Issues Involved in a Medical Malpractice Case

Finally, as part of a thorough approach to achieving a better outcome, attorneys should research any pertinent legal issues in a malpractice case. To do that, they'll need access to a robust search tool that can uncover key cases as well as on-point statutes and other relevant material.

Conclusion

Medical malpractice suits have earned their reputation as being complex and increasingly expensive to litigate or settle. That's why access to the right tools is necessary throughout the process of assessing, understanding, preparing for and arguing (or settling) such cases.

Those tools are available, and by taking advantage of them while performing six critical tasks, attorneys can create order in their approach to medical malpractice cases—and improve their odds of winning.

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