

Medical Malpractice

The Art and Science of Case Selection

By Chris Messerly

It has been more than a decade since the Institute of Medicine's landmark report which recognized that as many as 98,000 Americans die each year from preventable malpractice. Then, why is it that only an average of about 125 malpractice cases have been filed per year over the past decade according to Minnesota court statistics? There are probably several reasons for this:

1. Malpractice claims are very expensive to pursue. Costs alone in malpractice cases for plaintiffs' counsel are routinely in the tens of thousands of dollars.
2. Health care providers win the majority of trials (reports range around 85%).
3. Health care providers may be unwilling to settle even the most meritorious cases because all settlements are reported to the National Practitioners' Database and the Minnesota Board of Medical Practice.
4. Some health care providers believe that regardless of their wrongdoing, their presence in their community is such that a jury will not likely find them to have committed malpractice.
5. Some say that malpractice claims in our state are uncommon due to the high quality of health care delivery. This may be true, but according to a Harvard study, most victims (or their next-of-kin) of legitimate malpractice cases never make a claim or even consult with an attorney.
6. Some cases are settled without a lawsuit being filed. However, we know from Minnesota Board of Medical Practice statistics that the number of these cases is not significant.



Given this environment, case selection could not be more critical. Case selection for defense lawyers is often straight forward. A health care provider is sued and you are asked to defend the case. Plaintiffs' lawyers have more choice. However, nearly all plaintiffs' lawyers in their career find some truth in the adage: "The best decision is often not to take a case."

We use a multi-step process to determine whether to take a case. First, a prospective client speaks with one of our legal nurse consultants. The nurse then shares the facts with an attorney who devotes all or most of his or her time to medical malpractice cases. At this point, the decision is made to decline many of the cases. We then call the person back and explain why, in our opinion, the chances of success do not justify the costs of pursuing the claim.

However, for those cases the attorney believes have merit, additional research is performed on subscription-based medical literature services. Because the law allows qualified literature as

evidence at trial, we look hard and deep into the subscription-based medical literature. If the attorney continues to believe in the case's merit, the facts then are presented to the malpractice department's other attorneys and nurses. If the group's general consensus is that the case has merit, the medical records are ordered. (Medical record costs have skyrocketed in the past few years and it is not uncommon to get a bill for thousands of dollars for just one set of records. Consequently, a nurse will often travel to the health care providers' business to personally review the records. This will not avoid the necessity of buying the records for those cases pursued, but it may assist in the decision to decline a case when the records do not match the prospective clients' story.) The records are then reviewed and the decision whether to pursue the case is reevaluated. Many cases are then declined at this point.

For those cases we still believe have merit, we then begin the search for competent and objective experts; recognizing that we may need several experts for standard of care, causation and harm issues. We do not typically use experts who advertise in expert witness services. In all, this process generally takes many weeks.

One hazardous temptation in deciding to pursue as a case is when there appears to be "clear" negligence. Such cases have a tendency to overshadow causation and damages problems. Many attorneys have taken such cases believing they will settle and are surprised to find that the cases do not settle (or at least not before extensive and expensive litigation). For this reason, we do not take what many call "settlement only" cases. Doing so causes serious harm to one's credibility when the case is not pursued after the defendant's insurer declines to settle the case.

The patients who call us to pursue malpractice claims feel as if the health care profession has put them through great misery. We owe it to them to take the time to carefully evaluate their cases so as not to compound their misery. Moreover, we likewise take very seriously the fact that we are making claims against other professionals. Out of respect for those professionals, and our system of justice, we do not want to pursue a case unless we are convinced of its merit.



Along with Partners Kathleen Flynn Peterson, William Maddix, Peter Schmit, Philip Sieff and Terry Wade, Chris Messerly represents families and individuals who have been injured in cases involving medical malpractice, personal injury, products liability and other harm caused by wrongdoers. Many of the group's cases involve failure to diagnose, delayed diagnosis, wrong diagnosis, laboratory mistakes, cardiology, critical care, emergency medicine, gastric bypass surgery, anesthesiology, medication errors, drug overdose, family practice, infectious disease, pediatrics, radiology, and surgery. Chris can be reached at cmesserly@rkmc.com.

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