3 Claim Evaluation

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I. [3.1] INTRODUCTION

The most important decision that you make with any medical malpractice case is whether you will represent the client. Take a good case, and you can use the information in this guide to maximize your chances for success. If you are plaintiff, a good case rests on a solid medical and scientific platform, is supported on both liability and causation by the best experts you can find, has damage potential large enough to support the necessary costs and attorneys' fees, and is readily explainable to a jury.

If, however, you take a bad case, none of the excellent advice in the rest of this handbook will save you or the case — the weaknesses will eventually be exposed, the case will not likely settle, and you will be in for a long, expensive, and painful lesson in the importance of choosing your cases carefully.

From the defense lawyer's perspective, the decision to take a case is typically driven only by a conflict of interest analysis. Few defense lawyers would last long in the competitive legal marketplace by accepting only cases that appear to be winners. Like a skilled plaintiff's lawyer, however, early assessment of the pertinent scientific and medical issues is essential. If you have taken on a bad case, early settlement opportunities may be something to seriously explore. If you have been assigned a good case, it is important to learn early whether the plaintiff's liability theory is flawed. Armed with this information, strategies can be developed that make it easier to capitalize on oversights or flawed assumptions that can cause the plaintiff's liability theory to collapse as the case proceeds toward trial.

It is also important to remember that most skilled plaintiffs' lawyers have a huge head start on the defense because they will have analyzed the records in detail, consulted with experts, and developed a cohesive and well-supported liability and causation theories before filing the lawsuit and serving the defendant with a court summons. In some cases, the plaintiff's lawyer has been working on the case for months or years before the lawsuit is first filed. One way to level the playing field is to engage in a prompt and thorough initial case assessment.

II. [3.2] CONFLICTS OF INTEREST

That attorneys should avoid representing clients whose interests are adverse to one another is a foundational ethical tenant. See Rule 1.7 of the Illinois Rules of Professional Conduct of 2010 (RPC). Each attorney has a system in place in his or her office by which to avoid taking a case when there is a conflict. There are certain thoughts to keep in mind when reviewing a conflict check system. Some of these are discussed in §§3.3 – 3.7 below.

A. [3.3] Memory Is Not Enough

No matter how small the law office, the attorney needs a system that incorporates something more than memory to avoid conflicts. Case management computer software almost always includes a feature that will permit running a conflict check when considering a case. If the

attorney is technophobic or the office is not large enough for this kind of software, an alphabetized card filing system that tracks the names of both plaintiffs and defendants works fine as long as it is used religiously.

Every law firm should have regular meetings to discuss new cases. Others in the office should be informed about the new cases the attorneys are considering by means of an oral or written summary of each case that includes the identity of the prospective parties. The collective memory of those in the firm is better than each attorney's individual memory, and others may remember or know something that will help in avoiding a forgotten conflict. Even solo practitioners can hold meetings with support staff. The practitioner will be surprised how much explaining a potential case out loud helps in making good intake decisions while avoiding conflicts. While staff or attorney meetings cannot safely serve as a primary conflict check system, they are great backup with added benefits.

B. [3.4] Indirect Conflicts

All attorneys know that caution is warranted when they are asked to represent multiple parties injured in the same occurrence or to consider cases involving former clients as adverse parties. Attorneys sometimes give less careful consideration to other ways the interests of one client might conflict with another. One of the most common conflicts is taking a medical malpractice case that does or might involve claims against a physician whose testimony is needed in another case. The reverse — taking a case in which the treating physician is someone the practitioner has sued or otherwise angered in the past — also deserves careful consideration.

If a conflict develops during representation of a client, the attorney should disclose it immediately. There is no doubt that it is difficult to go to a client and explain that the defense has chosen counsel's personal physician as his or her independent medical examiner or that some other conflict that was unforeseeable at the beginning of the case has developed and put at issue the attorney's duty of undivided loyalty to the client. Having done significant work on the file, attorneys are understandably concerned about being compensated for their diligence. There is no gray to this area: conflicts and potential conflicts should be disclosed as soon as they arise. Counsel should err on the side of caution when deciding whether to continue to represent a client. See RPC 1.7(b)(1) and Comment [24], RPC 1.7. If a case does not turn out as the client would have liked, the client will immediately look to assign blame, and an attorney with a conflict of interest is the most convenient target.

A common consideration for defense counsel is taking a case that involves a physician who has been represented by the firm in past litigation. Various settings include multiple defendants, including a codefendant whom you represented in past litigation; a treating physician previously represented but not a party to the subject litigation; or an opinion witness disclosed by the plaintiff whom you represented in past litigation. All of the foregoing scenarios are fact specific, and all require an analysis guided by the Rules of Professional Conduct. The most critical consideration is whether the defense of the client requires criticism of the care or opinions delivered by a former or existing client. In most settings, the defense attorney knows early on whether this is a potential problem. In general, most defense lawyers engage in an early inquiry with both the client and consultants about whether other caregivers or codefendants may be subject to criticism as part of the defense of the client.