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3S Claim Evaluation

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I[1]. [3S.05] INTRODUCTION

New section:

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 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 only accepting 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 theory 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.

I. CONFLICTS OF INTEREST

B. [3S.3] Indirect Conflicts

The first sentence on p. 3-4 is revised:

See RPC 1.7(b)(1) and Comment [24], RPC 1.7.

II. INITIAL INTERVIEW WITH CLIENT

A. [3S.7] Making a List

Beginning with item 9, the list is revised:

9. the client's chronic health issues;

10. a complete list of treating physicians following the incident that forms the basis for the potential claims;

11. the identity of all health insurers and/or governmental programs providing health insurance coverage; and

12. a list of any and all governmental benefit programs in which the client participates.

C. [3S.9] Assessing the Defendant as a Witness

Add at the end of the last paragraph:

Counsel should also remember that if the defendant is ultimately disclosed as an Illinois Supreme Court Rule 213(f)(3) opinion witness, any literature, research, data, or material reviewed by the defendant will be subject to disclosure. *See Jackson v. Reid,* 402 Ill.App.3d 215, 935 N.E.2d 978, 343 Ill.Dec. 750 (3d Dist.), *appeal denied,* 238 Ill.2d 652 (2010).

III. GATHERING INFORMATION

D. [3S.13] Learning the Medicine

The web link to www.healthscout.com in the bulleted list at the top of p. 3-12 is revised:

www.healthcentral.com

Add at the end of the PRACTICE POINTER at the bottom of p. 3-12:

However, it is important to remember that if you ultimately disclose the defendant as an S.Ct. Rule 213(f)(3) opinion witness, you may be required to list all materials reviewed by the defendant in formulating his or her opinions. *See Jackson v. Reid,* 402 Ill.App.3d 215, 935 N.E.2d 978, 343 Ill.Dec. 750 (3d Dist.), *appeal denied,* 238 Ill.2d 652 (2010). Thus, care should be exercised as to what the defense lawyer elects to send to the client for review and comment if a Rule 213(f)(3) disclosure is contemplated.

IV. ASSESSING THE FACTS GATHERED

A. [3S.14] Elements of a Good/Defensible Case

Except for the PRACTICE POINTER, the section is replaced:

The numbers from the Illinois Department of Insurance's (DOI) *Medical Malpractice Claims Study* (June 2011), http://insurance.illinois.gov/reports/med_mal_report/2011medicalmalpractice claimsreport.pdf, are sobering:

1. For the years covered by the report (2005 – 2008), 13 – 18 percent of claims resulted in an indemnity payment. This means that there was no payment in about 85 percent of claims. DOI, p. 4.

2. The average time from injury to case closure was more than five years. DOI, p. 5.

Let us begin at the end, by identifying the types of cases the plaintiff's attorney wants the evaluation process to select. The only medical malpractice case the practitioner should consider pursuing is one with very good to excellent liability and substantial damages. Given what the attorney will invest in time and expenses and the prevailing sense that the tort system in general and medical malpractice cases in particular are a plague on society, the attorney needs to acknowledge that undertaking any medical malpractice case involves substantial risk. This means that there is no good "little" (*i.e.,* low damages) medical malpractice case.

A good case is built on sound, widely accepted medicine supported by a qualified expert. If an expert seems unsure about whether a particular fact pattern is actionable or contains a deviation from the standard of care, then it is not and does not. Good cases are immediately apparent to qualified experts. Remember to be sure that your expert focuses his or her review on the state of the medicine at the time of the injury — the standard of care can change quickly, and it is what healthcare providers should have known or done at the time the care was rendered that is relevant.

If the attorney is to prevail as counsel for the plaintiff in a medical negligence claim, he or she must convince the jury that the most important element of the case is the person, not the medicine. This means that the attorney must carefully assess each potential client. The attorney should ask himself or herself whether the jury will want to compensate the client not just because of the medical facts but because of the client's persona. The attorney will only rarely be able to overcome a difficult personality with good expert testimony or argument. It is not a good case if the client will not make a favorable jury impression.

D. [3S.17] Evaluation Checklist

On p. 3-18, item 7 and the paragraph following are revised:

7. Is there a causation defense?

In some cases, the most compelling aspect of the plaintiff's case involves the failure to diagnose a life-threatening condition. It may be easy to prove that the caregiver neglected to act on clear symptoms of an emergent, life-threatening condition. One case ultimately dismissed after much discovery is a good example: Though the caregiver undisputedly failed to act when a patient had an obvious brain hemorrhage following clearly documented head trauma, it turned out that the location of the injury was such that surgical intervention was not a realistic option. In that case, there was a clear breach of the standard of care. However, even if the condition had been promptly recognized, there was little that the treating physicians could do to remedy the problem. With or without the obvious breach of the standard of care, the patient was going to have the same outcome.

This can also be true when dealing with a loss of chance, *i.e.*, a claim that, had the physician recognized the problem and reacted earlier, the patient would have had a much better outcome. It is important to promptly assess how significant the delay was in medical terms. A three-month delay in diagnosing certain types of cancer, for example, may not significantly impact the patient's treatment options or odds of recovery. What appears to be an obvious delay may not have medical significance insofar as the claimed damages. See §7.8 of this handbook.

Add at the end of the section:

9. Does your client have a Facebook page, a Twitter account, or participate in other forums of social media?

If your client engages in social media, you need to examine your client's presence on the Internet to make sure that there is nothing inconsistent with your theory of the case or your beliefs about your client. You also need to have a discussion with your client about the incompatibility of posting, tweeting, blogging, or otherwise sharing with the world things relevant to the case or his or her damages.