8 REASONS WHY GOOD ATTORNEYS *LOSE* MEDICAL MALPRACTICE CASES

A Litigation Nurse's Perspective

By: Christina R. Hedges RN, CEN

Serving as a litigation nurse for 24 years has allowed me to gain insight into what can go right and wrong when litigating medical malpractice cases. Medical malpractice cases are some of the most expensive cases to bring and often the most difficult to win. Over the years, I have celebrated victories with talented trial teams and felt the stings of disappointment when juries returned defense verdicts. Looking back on the latter, I believe most of these cases suffered from similar shortcomings – many of which were curable or preventable. I share my experience, with hopes of helping others achieve more victories (and fewer disappointments), here are my Top 8 Reasons Why Good Attorneys Lose Medical Malpractice Cases.

I. Poor Case Selection

Any attorney working with me has undoubtedly heard my mantra: "**good case selection is the key to success.**" In general, case selection includes consideration of the elements of negligence, negative attributes, jurisdiction, and venue. I discuss each in more detail below.

A. Elements of Negligence

All four elements of negligence must be considered when trying to obtain a mutually beneficial outcome for both clients and attorneys. Many attorneys allocate resources to cases with great liability (clear duty and breach of that duty), but have weak or non-existent causation or limited damages. Using a risk stratification analysis, this places the case at a higher risk for net loss and, as such, is not often a smart investment. There are always exceptions, but this should not be the general rule. Ultimately, due diligence in addressing all elements is necessary before filing. One of the best rules-of-thumb to follow, as stated by Chad McGowan of McGowan Hood & Felder, is "it is not what we believe; it is what we can prove in a court of law." While cost control is always a consideration, an early quality medical analysis is worth the investment.

B. Negative Attributes

I cannot stress this one enough! Know your client before you take the case. The best cases can be lost if a client's negative attributes poison the jury. There are three elements to consider:

1. Client Likeability:

Every attorney should ask themselves; do I like this person? If your gut tells you to run, you should run. The best rule of thumb is if you don't like the client, a jury won't either.

2. Injured Person's Behavior (as documented in the medical records):

It is particularly important to note how the medical records portray the injured person's behavior. For example, non-compliant behavior, addiction history, smoking, and elective abortions are hot button issues. While our personal feelings should not play into this analysis, it is essential to consider how a jury will feel about the person once and if these behaviors are exposed.

3. Injured Person's Current Behavior (and/or family members):

Attorneys must investigate the client's actions (and potential public perception) on social media. Off-putting pictures and/or diatribes (whether political or otherwise) on social media can be fatal to a medical malpractice case's success.

In general, a brutally honest perspective by attorneys or their staff about negative attributes may assist in getting a better sense of the client and how they may appear before a jury, how they view authority, follow direction, and how a defendant or its insurance carrier will perceive them. Let's face it; most cases are resolved. If you have a likable client, not only will the jury probably like them, but their likeability will help foster an advantageous pre-trial resolution. Few things are more discouraging than a client who wants to "tell their story" and begins to point and yell at the Defendant while pounding on the banister in the middle of the trial. There are some cases where negative attributes cannot be mitigated. In these cases, you should walk away.

C. Jurisdiction and Venue

Jurisdiction should be a consideration as the proceedings vary between state and federal court. Federal court cases tend to move much faster. In that venue, I have found it is best to have your experts lined up, and their reports prepared or ready to be prepared before you file the case. Entering into a federal court scheduling order without asking for more time, and ensuring your expert reports are submitted on time (if not earlier), puts immense pressure on a defendant. Another potential advantage of federal court is that it is not always necessary to take the defendant expert's deposition. Not doing so effectively limits the expert's subsequent testimony to the "four corners" of his or her report. I've witnessed it firsthand: if the expert's report is shoddy or otherwise favorable to your case, it may be in your best interest to hold your cross for trial.

Certain venues, both federal and state, are more or less accepting of negative attributes, and more favorable for Plaintiffs, which must be a part of case selection.

Acknowledging your client's shortcomings and considering the pros and cons of potential jurisdictions and venue are essential aspects of good case selection.

II. Poor Expert Selection

Selecting an expert witness is arguably the most critical element in pursuing a medical malpractice case. Additionally, many attorneys make the mistake of not meeting the expert face-to-face (or virtually) before any testimony is

undertaken. It is essential to know how the expert will present and be received, with due consideration to the trial venue. For example, a more rural setting may not appreciate an Ivy-league educated expert any more than an expert trained in local schools.

It is also necessary to vet the expert before retaining them. You should Google the expert because you never know what you will find. One must assume a jury will do the same thing even if they are instructed otherwise. Take the time to look at old depositions or ask other attorneys that have previously used the expert about their experiences with the expert. If you have a defense-leaning expert who normally only testifies for physicians agree to testify for you on a plaintiff's case, there is a chance conflicting sworn testimony exists. The same can be said for plaintiff-leaning experts testifying for a defendant. Regardless, if an expert is intellectually honest, they can testify for either side because they will have an opinion about a specific issue and hold true to that opinion in the face of cross-examination.

Once again, as with the client, one must consider the expert's likeability. Is this someone a jury will like and respect? And, can the expert explain in a simple and cohesive matter that your view of the case makes the most sense?

III. Failure to Understand the Medicine

To succeed in a medical malpractice case, an attorney must understand the law and medicine. Medical issues can be incredibly complex, and attorneys that take on the challenge of prosecuting a medical malpractice case must understand the issues relevant to the events underlying the cause of action. This does not mean attorneys have to be thoroughly versed in all medical problems. Still, they must take the time to familiarize themselves with the particular aspect of medicine that is at issue in their case. Only by doing so will the attorney ask the right questions and/or effectively counter when questions are not answered completely or factually in depositions and/or trial. Having a constant medical resource present throughout litigation is a huge boon for attorneys that wish to focus primarily on the law as opposed to medicine. Though it is not always feasible to have an expert present during every phase of depositions, mediations, and trial, there are practical resources available in the form of litigation nurses or legal nurse consultants. Many law firms fail to utilize such resources outside of an initial case review.

IV. Failure to Recognize and Name All Defendants

Medscape reports that nearly 22% of family physicians sued for malpractice claimed they were the only named party in the lawsuit. [i] Although there is an undefinable number of cases where a second or third defendant was inappropriate, the high number of single-defendant lawsuits points to missed opportunities for recovery. Often additional parties beyond the physician share equal or greater responsibility for a patient's damages and injuries. A thorough investigation can aid in eliminating missed opportunities for recovery.

Caps on damages are an added challenge to medical malpractice cases and, as such, it is vital to understand the ever-evolving case law driving caps. Current working knowledge of case law provides attorneys with opportunities to "work-around" the caps to maximize recovery and achieve the goal of holding the tortfeasor responsible for the harm they have caused. This may include naming an individual employee in a charitable immunities case, proving gross negligence or reckless conduct, showing misrepresentation in the medical records, or establishing occurrences as established under *Chastain v. AnMed Health Found.*, 388 S.C. 170, 172, 694 S.E.2d 541, 542 (2010). Another alternative avenue to remove the caps altogether is to consider if the "malpractice" could be defined as ministerial care or ordinary negligence. In South Carolina, our Supreme Court held in *Dawkins v. Union Hospital Dist.*, 408 S.C. 171, 178, 758 S.E.2d 501, 504 (2014) that not every injury sustained by a patient in a hospital results from medical malpractice or requires expert testimony to establish a claim. If the patient only receives nonmedical, administrative, ministerial, or routine care, the case can be brought as an ordinary negligence case, which is not subject to the medical malpractice caps.

V. Failure to Communicate with Medical Experts

Communication with medical experts is essential to understand the medicine and to see the facts from their point-of-view. Not taking time to communicate with experts upfront can lead to missed opportunities in discovery, depositions, and in trial. Let's face it; you are paying experts for their assistance, take advantage of it at every juncture in your case.

VI. Failure to Read the Audience

It is easy to get caught up in what you are saying and forget to pay attention to the audience. In a trial or mediation, an attorney should make every effort to "read the room" and get an idea of what approach will work best for his or her audience. Sometimes, especially in trial, it is not enough for the jury to hear testimony. They must also understand and process it if you expect them to come to a favorable or predictable conclusion. Attorneys need to be able to recognize when their audience needs further explanation, or when additional testimony is needed to make a point clear.

VII. Failure to Demonstrate

In a medical malpractice trial, attorneys are tasked with teaching complex medicine to the jury. It is important to remember that different people process information in different ways and at varying speeds. There are audible learners, visual learners, and kinesthetic. If you ask yourself what kinesthetic is, hopefully, you will benefit from this article.

Kinesthetic learning involves the active manipulation of items. For example, physically giving someone a length of rope when teaching them to tie a knot. This is the least common approach taken by attorneys, and unfortunately, the failure to use it likely results in missed opportunities.

Good demonstratives that cater to all the learning styles are much more effective at persuading an audience than those that hit only one or two types of learners. The creation of demonstratives should be a collaborative effort involving all members of the litigation team, including experts. A team approach yields more creativity and acts as an active sounding board for how a jury may perceive the demonstrative.

Creating a demonstrative early in litigation, can be effective at mediation to assist adjusters and Defense counsel with their understanding of the medicine, your client, and the case as a whole. Having a quality demonstrative as part of your mediation presentation sends a strong message to Defense counsel and the adjuster to advocate for an early resolution.

VIII. Failure to Close

I use the phrase "failure to close," as a light-hearted way of referring to the failure to stop talking (or close one's mouth) after a point is adequately made. At the ABOTA: Masters in Trial 2020 CLE, the Honorable Joseph F. Anderson, Jr. shared that one of the most frequent complaints he hears from jurors is their frustration at attorneys who repeat the same points ad nauseum. When you make your point, move on to the next point. Continuing to beat a dead horse will not help your case and will likely turn jurors against you.

I've listed for you my top 8 reasons why good attorneys lose medical malpractice cases. Heightened chances of success can be obtained through better case selection, resource utilization, and communication. Medical malpractice cases are expensive, complex, and often protracted. However, even given all these challenges, medical malpractice cases can be immeasurably rewarding for clients, attorneys, and the pursuit of justice.

[i] Martin, K. (2020, January 20). *Medscape Family Physician Malpractice Report for 2019.* https://www.medscape.com/slideshow/2019-malpractice-report-fm-6012446 (Martin, 2020)

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Christina R. Hedges, RN, CEN, began her career in healthcare in the late 1980's. Christina is a board-certified emergency nurse. Throughout her career, Christina availed herself of opportunities to strengthen her skills and knowledge in many different care settings. She is a lifelong patient advocate and began fighting for the rights of aggrieved patients through litigation in 1996. Christina obtained a paralegal certificate and worked in both the clinical and legal settings simultaneously before eventually leaving the clinical setting. She has worked directly and indirectly with legal teams for over two decades.