I. Medical Malpractice – Nuts & Bolts

a. Do you take the case?

Probably the most important decision that you can make is whether to accept or reject a case especially in medical malpractice due to the expense of these cases. Some of your decision making must include asking the following questions:

1. Are there significant damages?
2. Is there good liability?
3. Are you willing to try the case?
4. Are you prepared to fund the case?
5. Does the law allow for recovery?

b. Statute of Limitations

An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. §95.11(4)(b). This is for Florida and each state is different. Be sure to check which statute of limitations applies.

c. Pre-Suit

Is pre-suit notice required?

For the pre-suit requirements of the Medical Malpractice Act to apply to a lawsuit, the claim must be for 1) medical malpractice and 2) the defendant must be a health care provider.

a. Is it Medical Malpractice?
   "Claim for medical negligence" or "claim for medical malpractice" means a claim, arising out of the rendering of, or the failure to render, medical care or services. §766.106(1)(a).
b. Was the Malpractice Caused by a Health Care Provider?
   § 766.202(4) defines "Health care provider".

For example, a trip or fall walking into the emergency room is not a claim for medical malpractice. However, falling out of bed on your own in the hospital would be a claim for medical malpractice and pre-suit notice would be required.

Pre-Suit Notice of Intent

§766.203(2): Pre-suit Investigation By Claimant. Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

(a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

What to include in your Notice of Intent?

1. Certified mail, return receipt requested.
2. A list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence.
3. A list of all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant.
4. Copies of all of the medical records relied upon by the expert in signing the affidavit.
5. Executed authorization form provided in §766.1065 (includes the Authorization for Release of Protected Information).

Pre-Suit Expert Affidavit

Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

Your expert's affidavit should include his/her list of qualifications; an affirmative statement that she meets the qualifications of sections 766.202(6) and 766.102(5) (with details about why); a detailed list of the medical records (including an itemization of scans, if applicable) he/she has reviewed; his/her opinion that the defendant deviated from the acceptable standard of care, and how; his/her opinion that the deviation caused injury or damage to plaintiff; an affirmative statement that all of his/her opinions are held within a reasonable degree of medical probability; and an affirmative statement that he/she has never been disqualified to render opinions in such matters, and has never been convicted of fraud or perjury. Your expert's affidavit should include the required information above, but not give too much away. You don't want to limit yourself in the future as a result of being too specific in your expert's affidavit.

Pre-Suit Discovery
This is an art. Get only what you need, not extra. Be specific. This should not be a mirror of the discovery you plan to send once suit is filed.

1. Documents: As a general rule, if it is in your possession, you have to turn it over within 20 days, unless the document request is specific to medical records, and then you have only 10 days. *See* §766.106(6)(b)(2); §766.204(1)(2); and Rule 1.650 (c)(1) and (2).
2. Interrogatories: §766.106(6)(b)(4) expressly provides for them. The same rules apply as in litigation, except that your time-frame is shortened to 20 days and the responses are not sworn to under oath.
3. Physical/Mental Examinations: A prospective defendant may serve a written notice to have his expert conduct a physical or mental examination of your client.
4. Unsworn Statements: You are required to produce your plaintiff for unsworn statement. Prepare your client for the unsworn statement with the same thorough care you would use to prefer them for a deposition. The transcript cannot be used as impeachment. Whether to take the unsworn statement of the defendant healthcare professionals is a matter of personal preference.

d. Pre-Suit Denial vs. Arbitration

The vast majority of cases result in a denial. However, you should also identify those cases that are the exception to the rule. Such as: Wrongful death of child, Wrongful death of older client retired or nearing retirement, Weak future economic damage cases.

Arbitration is controlled by §§766.201-766.212.

1. Either party can request voluntary binding arbitration after presuit.
2. Once one party has requested voluntary binding arbitration, the other party has 30 days to decide whether to accept.
3. Acceptance is a binding commitment to comply with the decision of the arbitration panel.

It should be noted that damages are limited in arbitration.
Damages in arbitration actions are to be awarded "as provided by general law, including the Wrongful Death Act, subject to the following limitations:
"(a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments."
(c)Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s.766.202(9) and shall be offset by future collateral source payments. (Sec. 766.207(7)).

In regards to collateral sources, this means that there are no setoffs for collateral sources for which a subrogation or reimbursement right exists; and benefits received under Medicare, or any other federal program providing for a Federal Government lien on or right

of reimbursement from the plaintiff's recovery, the Workers' Compensation Law, the Medicaid program of Title XIX of the Social Security Act or from any medical services program administered by the Department of Health shall not be considered a collateral source.

If a plaintiff offers to arbitrate and a defendant refuses, any award to the plaintiff at trial will be reduced by damages recovered in arbitration from any codefendants who accepted the offer to arbitrate. *See*Sec. 766.209(3)(b), Fla. Stat.

e. Filing Suit

Once you receive a pre-suit denial, it is now time to file your case with an initial complaint and discovery.

Discovery in Medical Malpractice is the key to a successful case. Discovery is used to not only help determine the wrongdoers, but to help determine affirmative defenses as well as flushing out your pleadings. It is imperative discovery requests are followed up on.

Types of Discovery

1. Interrogatories (most important form of written discovery)
2. Request for Production (most important form of written discovery)
3. Request for Admissions (most important form of written discovery)
4. Amendment 7(most important form of discovery)
5. Deposition Testimony (most important in-person discovery)
6. Subpoena Duces Tecum (most important written discovery)
7. Physical and Mental Examination (most important in-person discovery)

Using Experts to Prove Your Case

You always, always, always need experts. At the very least you need medical experts for standard of care, causation, and future medicals testimony, as well as, economic experts for damages testimony. These can include physician, nursing, pathology, and radiology experts, and vocational rehabilitations, economists, and life care planners. Be as specific as possible when choosing an expert for a particular field of testimony.

The personal characteristics to seek in an expert are the following:

1. Qualifications — Does the expert have the level of knowledge and expertise necessary to truly be considered "expert" on a particular issue?
2. Thoroughness — Will the physician "roll up their sleeves" and go through a lengthy chart and learn the case in detail?
3. Analytical — Is the expert able to apply their medical knowledge to the broad legal issues of negligence and causation? In other words, to some extent can the doctor "think like a lawyer?"

4. Accessibility — Is the doctor easy to get a hold of when you need to discuss the case with him? Is his response time reasonable?
5. Demeanor — Does the expert "look like an expert," and can he or she "communicate" on direct and "hold up" under cross-examination?
6. Past Cases – Does the expert testify predominantly for the plaintiff or the defendant? What is their success rate? Do a search of past testimony.

Proving Damages

It goes without saying that, given the complexity and expense of malpractice cases, one should generally not consider taking such a case unless the damages in the case are substantial. While the definition of "substantial" is relative to the time and expense needed to pursue the case. The right damages take into consideration both economic and noneconomic damages. The statutes and jury instructions cited below specify the damages which can be recovered.

Determining the value of a case requires placing a dollar amount on each of the relevant damages and summing them up. Obviously, some are much more complicated than others. Medical expenses and lost income are fairly simple, but how would you calculate future lost income? And what about pain and suffering, how can you place a value on that?

It is important to take into consideration the value of any particular case, and weigh it against the cost of prosecuting the lawsuit. Even if a case is strong from a legal standpoint, it may cost more to prosecute the lawsuit than the award or settlement amount would be. This is typically true in cases of the elderly, where there are no lost income damages or damages on behalf of a spouse or minor children.

FL Standard Jury Instructions in Civil Cases:

501.2 PERSONAL INJURY AND PROPERTY DAMAGES: ELEMENTS

a. Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life:

Any bodily injury sustained by (name) and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

b. Medical expenses:

Care and treatment of claimant:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (claimant) in the past [or to be so obtained in the future].

Care and treatment of minor claimant after reaching majority:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably to be obtained by (minor claimant) after [he] [she] reaches the age of (legal age).

c. Lost earnings, lost time, lost earning capacity:

When lost earnings or lost working time shown:

[Any earnings] [Any working time] lost in the past [and any loss of ability to earn money in the future].

When earnings or lost working time not shown:

Any loss of ability to earn money sustained in the past [and any such loss in the future].

d. Spouse's loss of consortium and services:

On the claim brought by (spouse), you should award (spouse) an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (spouse) for any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future] caused by the incident in question.

e. Parental damages for care and treatment of claimant's minor child; parental loss of child's services, earnings, earning capacity:

On the claim[s] of (parent(s)), you should award (parent(s)) an amount of money, which the greater weight of the evidence shows will fairly and adequately compensate (parent(s)) for damages caused by the incident in question. You shall consider the following element[s] of damage:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (parent(s)) for [his] [her] [their] child, (name), in the past [or to be so obtained in the future until (name) reaches the age of (legal age)].

[Any loss by (parent(s)) by reason of [his] [her] [their] child's injury, of the [services] [earnings] [or] [earning ability] of [his] [her] [their] child in the past [and in the future until the child reaches the age of (legal age)].]

[Any economic loss sustained by (parent(s)) [including] [any earnings lost in the past] [and] [any loss of ability to earn money in the future] reasonably resulting from the need to care or provide for the child because of the child's injury [until (name) reaches the age of (legal age)].

f. Parental loss of filial consortium as a result of significant injury resulting in child's permanent disability:

In addition, if the greater weight of the evidence shows that (claimant child) sustained a significant injury resulting in (claimant child's) permanent total disability, you shall consider the following element of damage:

Any loss by (parent(s)), by reason of that injury, of their child's companionship, society, love, affection, and solace in the past [and in the future until the child reaches the age of (legal age)].

If the greater weight of the evidence does not support (parent(s)'s) claim that their child sustained a significant injury resulting in permanent total disability, your verdict should be for (defendant(s)) on this element of damage.

502.2 WRONGFUL DEATH DAMAGES: ELEMENTS FOR ESTATE AND SURVIVORS

ELEMENTS FOR ESTATE:

In determining the damages recoverable on behalf of (decedent's) estate, you shall consider the following elements:

a. Lost earnings:

The estate's loss of earnings of (decedent) from the date of injury to the date of death, [less any amount of monetary support you determine a survivor lost during that period].

b. Lost accumulations:

The estate's loss of net accumulations: "Net accumulations" is the part of (decedent's) net income [from salary or business] after taxes, including pension benefits [but excluding income from investments continuing beyond death], which (decedent), after paying [his] [her] personal expenses and monies for the support of [his] [her] survivors, would have left as part of [his] [her] estate if [he] [she] had lived [his] [her] normal life expectancy.

c. Medical or funeral expenses:

Medical or funeral expenses due to (decedent's) injury or death which [have become a charge against (decedent's) estate] [were paid by or on behalf of (decedent) by one other than a survivor].

ELEMENTS FOR SURVIVING SPOUSE, CHILD OR PARENTS OF CHILD:

In determining any damages to be awarded (decedent's) personal representative for the benefit of (decedent's) surviving [spouse] [children] [or] [parents], you shall consider certain additional elements of damage for which there is no exact standard for fixing the compensation to be awarded. Any such award should be fair and just in the light of the evidence regarding the following elements:

d. Damages of surviving spouse:

The [(wife's) (husband's)] loss of (decedent's) companionship and protection, and [her] [his] mental pain and suffering as a result of (decedent's) injury and death. In determining the duration of the losses, you may consider the [joint life expectancy of (decedent) and (surviving spouse)] [life expectancy of (surviving spouse)] together with the other evidence in the case.

e. Damages by surviving child:

The loss by (name all eligible children) of parental companionship, instruction and guidance, and [his] [her] [their] mental pain and suffering as a result of (decedent's) injury and death. In determining the duration of those losses, you may consider the [joint life expectancy of (decedent) and (surviving child) [each of (surviving children)]] [life expectancy of (surviving children) [each of the surviving children]] together with the other evidence in the case.

f. Damages by surviving parent of child:

The mental pain and suffering of (parents) as a result of the injury and death of (child). In determining the duration of mental pain and suffering, you may consider the life [expectancy] [expectancies] of (surviving parent(s)) together with the other evidence in the case.

**The bracketed material should be given only when warranted by the evidence and requested by a party.*

h. Medical and funeral expenses paid by survivor:

[Medical] [or] [funeral] expenses due to (decedent's) [injury] [or] [death] paid by any survivor.

f. Taking your Case to Trial

Medical malpractice cases are not like other personal injury cases. In medical malpractice cases, insurance companies will fight harder on behalf of defendants, defendants win 90% of cases at trial, and defendants will try to outspend you. So you need to consider if the cost is worth the potential recovery. Things to take into consideration include: expert costs, expert schedules, court schedules, attorney schedules, time prepping clients, time prepping experts, and attorney time. So the question to ask yourself is: "are you prepared to fight for two years and $150k"? Does that number need to be higher to make it worth it? Only take the case if it is worth it!

II. Depositions, Mediations, & Hearings – Continuing Your Trial Path During Covid-19

State courts across the country have significantly altered their operations in response to the coronavirus pandemic. As a result, remote technology might provide good alternate solutions to traditionally in-person discovery and courtroom procedures. While there is already a willingness to adapt traditionally in-person proceedings and processes to a remote setting, it does not come without significant challenges.

In order to move cases along, taking depositions and conducting mediations and hearings by video or telephonically is a must.

a. Depositions

a. Via Telephone

Conducting depositions over the phone can be a good way to cut costs and save travel time, but still move your case along. Phone depositions may even make the most sense based on a witnesses' location and/or ability to travel.

However, be considerate of your court reporter. Since your court reporter will be unable to lip read during a telephonic deposition, there may be more interruptions and pauses. Ask participants to identify themselves every time they begin speaking. Some voices are so similar, it's hard for the court reporter to tell them apart. In addition, non-verbal signals like body language and facial expressions are undetectable during a telephonic deposition. This could be a huge loss depending on the importance of the deponent. As such, a videoconference deposition is likely the better option.

b. Via Videoconference

Attorneys will find that they are at a major disadvantage not being able to see a deponent's body language or facial expressions. Conducting a deposition via videoconference helps eliminate this issue and helps the depositions be closer to a normal in-person experience. Another concern for attorneys considering taking depositions remotely is the ability to share and control documents. However, many of the new videoconference platforms allow the participants to share documents with the other parties in real-time. The documents are uploaded prior to the start of the deposition. Thereafter, during the deposition, the attorney can decide which document to share at what time.

c. Via Videotaped Videoconference

Obviously, there is value to being in the same room with a deponent and in person depositions should be used as often as possible. However, during these times when it makes more sense for a deposition to be taken remotely, use best practices when scheduling, anticipating, and executing a remote deposition. Remember, a remote videoconference deposition is not the same as a videography-based deposition. This point seems simple but could be easily overlooked. Best practice is not to assume that, merely because a remote video deposition was requested, the parties implicitly agreed to a recorded video

deposition, or for use of that video at trial. If your intention is to record the deposition for use of video testimony at trial, indicate your intention to all parties when scheduling the deposition and be sure to make the distinction in your notice of deposition. Finally, consult with your court reporting service to ensure that the assigned court reporter is a certified videographer. The rule of thumb here is that if you would normally videotape the in-person deposition, you should still videotape even if it is by videoconference.

b. Mediations

a. Via Telephone

In-person attendance by a party or party representative with full authority is the standard here. As long as all parties have a telephone, this is sufficient to conduct mediation. If it is necessary to send documents to any party, this can be done prior to mediation or via email during mediation. It should be noted that as the attorney, you should make sure all parties are attending the mediation via the same technology. You don't want to be the only party only appearing by telephone.

b. Via Videoconference

There is nothing about the mediation process itself that precludes doing it over the phone. There are, however, significant advantages to doing it in person. An adept mediator will respond to body language and facial expression in addition to words in the process of sorting out the concerns of the parties and exploring options for agreement. Conducting mediation by phone can substantially limit the effectiveness of the process. As such, video is preferred over telephone, especially for major substantive conversations. This is because videoconferencing has the benefit of allowing everyone to see the other participants' body language. Seeing the other participants may prevent misunderstandings and/or encourage empathy.

c. Hearings

a. Via Telephone vs. Via Videoconference

Courts are holding hearings by phone or video conference in order to continue moving cases along during this time. Typically, the court will notify you if your hearing is remote and will indicate if there is a call-in number or videoconference link. You should comply with whichever preference the court states. It should be noted that a phone hearing has limitations as you cannot see how the judge or other party reacts to what you say. Depending on the importance of the hearing it may be worthwhile to request a videoconference hearing. Regardless, be sure to submit your documents to the court ahead of time. Even though it is a remote hearing, you may still need to give the court documents in advance if you want to be able to discuss them at the hearing. You should also be sure how to mute and unmute your phone line. This is important. During the hearing, you should mute the line when it is not your turn to talk, but you will want to quickly unmute when it is your turn. When you first join,

listen to see what is happening. Some hearings will have multiple people on the line. Your case may not be the only case. The hearing host may be able to identify that you have joined the hearing. Other hearing hosts will ask everyone to identify themselves before the hearing starts.

Rule of thumb: Treat any video or telephonic depositions, mediations, and hearings as if they were in-person.

1. Become familiar with the technology

Test the equipment and connectivity well in advance. Become familiar with the platform. Give yourself extra time in case of any technological issues.

2. Make your client familiar with the technology

Many medical malpractice plaintiffs may not be familiar with Zoom and may not have adequate equipment and connectivity to make it work well. You as the attorney should take responsibility for assuring that the technology works adequately for your client. If the client has a more tech-savvy family member who can assist in the tech setup, get that person involved. You should also work with clients to assure a plain, uncluttered background and proper lighting. Take more time to adequately prepare your client and impress on them the importance and formality of these proceedings.

3. Increase Communication

It has never been more important to confirm with all parties any upcoming depositions, mediations, and hearings. Be sure to exchange cell phone numbers so that in addition to the Zoom chat feature, the lawyers can privately message each other, and the lawyers can privately message their clients when necessary.

4. Prepare documents, exhibits, and presentations for easy access

A lawyer who wants to use PowerPoint, exhibits, or other visual aids should save those in PDF format in a separate folder saved on your desktop for easy access. Practice using them with Zoom Screen Share. Zoom Screen share enables screen share for all participants so that they may share documents, photos, PowerPoint presentations, etc. Be sure to have an appropriate desktop background picture in the event you share your screen. It is also beneficial to send any documents you intend to show in advance to all participants.

5. Dress Appropriately

The professionals should look the part. One Florida court admonished a male attorney who appeared shirtless during a Zoom hearing, while a female lawyer was on camera

while still in bed. You should also carefully consider the backgrounds for your appearances on Zoom. A plain, uncluttered office or conference room background is best. You may also consider the use of appropriate virtual backgrounds, which you may upload to Zoom.

Going forward, courts will need to find a way to balance the need to move cases forward. We are all learning and improving as we go, but as lawyers we must adapt to survive and prosper professionally.