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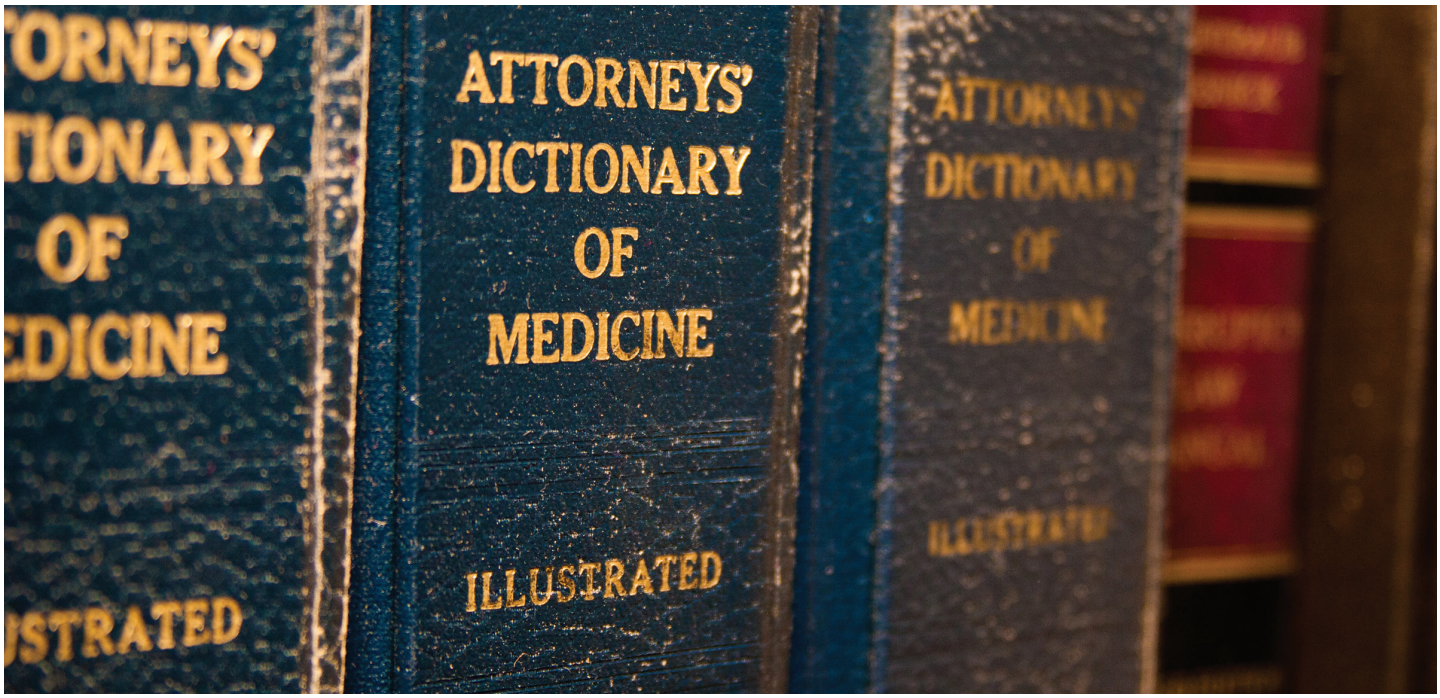

Starting and running a successful medical-malpractice firm

MICRA IS NOT THE ONLY BARRIER TO YOUR SUCCESS IN MEDICAL MALPRACTICE; A LOOK AT THE ECONOMICS OF MED-MAL CASES

The day before writing this article, my bookkeeper went over the 2023 third-quarter numbers with my partner and me. I knew it was one of our weakest quarters, but to say the numbers caused me concern would be an understatement.

Our firm brought in $355,889.70 in revenue. Our total expenditures? $625,672.16. In one quarter alone, our small medical-malpractice firm lost nearly *$270,000!*

This was one of our down quarters, but we have run a successful and lucrative firm. We have been able to expand our firm, hiring three very experienced medical-malpractice attorneys with many years of experience and several paralegals in less than two years.

However, even more than a typical personal-injury law firm, our quarter- to-quarter profits are extremely variable for the reasons outlined below.

Be very careful before selecting a medical-malpractice case

We run a relatively lean practice when it comes to costs. We spend minimal amounts of money on advertising and marketing. In fact, we do not even have a dedicated office and all our employees work from home. So how did this happen? How did we lose over a quarter of a million dollars in one quarter?

One of the big expenses was losing a medical-malpractice case in downtown Los Angeles for nearly $97,000. While we are often very good at selecting the right medical-malpractice case with a high chance of resolution, taking this case was clearly a mistake. However, trying cases sends a message to the defense and insurance carriers that we are willing to take cases all the way to verdict.

What is far more important than the medical-malpractice cases a firm takes are the ones that that firm *does not* take. Taking the wrong medical-malpractice case can easily result in six figures in costs alone, not to mention the hundreds of attorney and staff hours spent on the case. To give you an idea of what case selection looks like, our firm only accepts approximately two percent of medical-malpractice cases involving living patients and three percent of cases involving wrongful death. This is actually a higher percentage of cases than most medical-malpractice firms.

A high-volume medical-malpractice practice is impossible. Medical-malpractice insurance carriers *do not* offer "nuisance value" on cases. Medical-malpractice cases are generally thoroughly litigated and regularly tried. Over my last five trials, there was no offer made by the defense in four of them. In the fifth case, an offer of $35,000 was made five years into the litigation on the eve of trial, which did not even come close to covering our costs on the case.

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All our attorneys worked in medical-malpractice defense for many years before becoming plaintiffs' attorneys. There are only a small handful of medical-malpractice insurance carriers. We were told specifically that the insurance companies did not make any offers on defensible cases for two reasons: 1) to dissuade plaintiff firms from taking medical-malpractice cases in the future; and 2) to ensure that plaintiff firms were not using settlement proceeds from one med-mal case to fund the costs in another.

Also, the medical-malpractice insurance companies know that these cases are usually won by the healthcare provider. In California, the statistical likelihood that a plaintiff will win a medical malpractice trial is only about 15%. But why is that?

Society respects doctors

Jurors respect doctors and want to believe that if they go to a doctor they will be helped, not harmed. This results in a tendency to "forgive" doctors, nurses, and hospitals, who generally do not intend to cause an injury, even though "intent" is not a factor in negligence cases.

Jurors often view doctors and nurses as heroes. Unlike an employment action or personal-injury case against a big corporation, jurors tend to hold favorable impressions of physicians and nurses. Accordingly, jurors often choose to assume that the injury could not be helped and occurred even in the absence of negligence, so that they can convince themselves that it is not something that would happen to them or their family. The jury is not allowed to learn that the doctors and hospitals carry medical-malpractice insurance.

Jurors feel qualified to judge a bad driver or a bad employer. However, jurors do not feel qualified to judge the performance of a surgery or medical procedure that they have never even heard of, much less performed. When combined with the favorable view jurors have of healthcare providers, there is a large disadvantage even before stepping into the courtroom.

What types of cases should a med-mal firm take?

In our third quarter, a staggering $182,545.80 was spent on experts. To prevail in a medical-malpractice case, every element must be supported by expert testimony. This includes both standard of care and causation. This means that you will often need more than one expert on a case.

Frankly, only cases where there is significant injury or death are worth considering. Even with the recent increase in the MICRA cap under Civil Code section 3333.2, smaller-value cases are just not viable because an expert is required to establish standard of care and causation. Economically, it does not make sense to spend $10,000 on expert testimony for a case where the settlement value is only $50,000 given the time and risk associated with medical-malpractice cases.

Furthermore, the insurance companies *know* of the worst-case scenario in such small-value cases and will often force the plaintiff's attorney to spend many tens of thousands of dollars to dissuade that attorney from ever taking a similar case in the future.

For example, a case that we are often referred is an intestinal perforation resulting from surgery such as a hysterectomy or colonoscopy. The patient often has a difficult course, including peritonitis, sepsis, resection surgery, a lengthy hospital stay, and/or a colostomy bag. Sometimes, the patient will be on the verge of death before recovering. To many personal-injury attorneys, this sounds like a good case with large damages.

However, these are cases that almost never settle and the patient's attorney will be stuck spending many hundreds of hours and tens of thousands of dollars litigating. Since the patient ultimately recovered, the economic damages are often limited to several months out of work. Collateral sources, such as amounts paid by health insurance for the stay, are *admissible* in such cases under MICRA's Civil Code section 3333.1. Therefore, despite the plaintiff's terrible course, her damages are largely limited to the MICRA cap.

In addition, while such perforations really should not occur, the defense will have no problem finding an expert to support a colleague in their field. These hired-gun experts will have impeccable qualifications and their background and will be impressive to jurors.

These experts will explain to the jury that such a perforation is a "recognized risk" of surgery. Combined with CACI 505, titled "Success Not Required" that essentially states that healthcare errors are not necessarily unreasonable, such a case is extremely difficult to win at trial. Jurors, faced with their natural bias in favor of doctors and against people who sue, will often accept the defense expert's opinion and reject that of the plaintiff's expert in order to find for the defendant doctor or hospital. Especially with complicated medical procedures, the jurors may be unable to decide which expert to believe. Of course, since we have the burden of proof, we lose these cases.

Therefore, do not even consider cases unless there are significant economic damages, such as a substantial amount of future care needs due to a permanent condition or a large loss of future income. However, even in these cases, it is essential that the attorney hire an expert to review the case *before* filing. Filing a case before an expert is supportive on standard of care is an invitation to lose a bunch of time and money. Even on the most egregious cases, the defense may cycle through at least three or four experts in an attempt to find a supportive expert. The defense will then file a motion for summary judgment. For the defense, at a minimum, the motion is a discovery tool to flush out the identity and qualifications of the plaintiff's expert before trial. However, for the unprepared plaintiff attorney this motion may be dispositive if the attorney fails to provide a sufficient declaration as to the issues of standard of care and causation.

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Be sure to hire the right experts

Medical-malpractice cases hinge on the quality of the experts retained. This is because the defense will always be able to find a hired gun to testify that the standard of care was met, which means that it may come down to a battle of the experts at trial. It is extremely important to make sure that that expert is eminently qualified against the wrongdoing healthcare provider. For example, do not hire a diagnostic radiologist if the case involves interventional radiology issues. Do not hire a general surgeon if the case is against a colorectal surgeon. Do a careful background check of your expert both with litigation history and with the California Medical Board. Do not hire retired physicians.

An expert is competent to testify only "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Therefore, "a person must have enough knowledge, learning and skill with the relevant subject to speak with authority, and he or she must be familiar with the standard of care to which the defendant was held." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.)

A witness who is eminently qualified to express an opinion in a particular field may be unqualified to express an opinion in some other related field. (*Putensen v. Clay Adams, Inc*. (1970) 12 Cal.App.3d 1062, 1080-81.) Specifically, against emergency room physicians, your expert is not qualified as a matter of law unless she has "substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department." (Health & Saf. Code, § 1799.110.)

Hiring the right experts is critical. "Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims." (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.) Dumping money into the wrong experts is a death sentence for any medical-malpractice case. In fact, there are some medical-malpractice insurance carriers that re-set their reserves based on the quality of plaintiff's experts retained that are disclosed in the declarations in opposition to summary judgment.

Obtain the entirety of that expert's opinions to ensure that you are filing suit against the correct culpable healthcare provider. Meet with your experts in person to make sure that you have every angle of the case covered. Most importantly, make sure you understand the medicine before you decide to file the case. In conjunction with speaking with your experts, you should conduct research into the specific area of medicine that is at issue in your case. You need to understand the medicine at least as well as the defendant in order to obtain useful testimony from the defendant. If you do not understand the medicine, you cannot take an effective deposition of the defendant, which is crucial in medical-malpractice cases, which often rise and fall on the testimony of the defendant.

Lastly, do not forget about causation. This is particularly true in failure-to-diagnose cancer cases. In medical-malpractice cases, it is not just enough to show that the plaintiff has a "worse chance." Instead, "causation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a 50-50 possibility." (*Bromme, supra*, 5 Cal.App.4th at p. 1504; see also *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 701 ["A less than 50-50 possibility that defendant's omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause"].)

Even with good medical-malpractice cases, be prepared to spend a substantial amount of money on experts. In our birth-injury cases, it is not uncommon for us to spend well over $100,000 even before expert designations. We will routinely retain medical experts in obstetrics, neonatology, perinatology, neuroradiology, neurology, physiatry as well as life care planners and economists. We will have the child seen by multiple providers for independent medical examinations. The retention of multiple experts is necessary to establish standard of care, causation and damages.

Of note, MICRA's attorney-fee provision under Business and Professions Code section 6146 punishes the plaintiff's attorney from spending money on experts as attorney fees are limited to 33% of the *net* recovery after costs are deducted. However, failing to properly work up a medical-malpractice case with expert testimony on standard of care, causation, and damages is a surefire way to lose that case.

Therefore, without a qualified and strong causation expert (such as an oncologist in a cancer case), the case is likely doomed from the start. Again, hire such experts *before* you file the case.

Nearly every medical-malpractice case is in litigation

It is extremely important that you have a strong staff, including paralegals and assistants, with knowledge of how to handle medical-malpractice litigation. For the same reasons described above, medical-malpractice cases *do not* settle pre-lit. Approximately 98% of our cases are resolved only after the filing of a lawsuit.

Our firm describes the medical-malpractice case that settles pre-litigation as a "unicorn." Our firm's attorneys have decades of experience on both the plaintiff and defense side litigating medical-malpractice matters and have handled many hundreds of cases. Yet, over these decades, the total number of cases that have settled prior to litigation is fewer than 10. We have seen insurance companies refuse to entertain pre-litigation settlement in indefensible cases, such as retained forceps and sponges, operating on the incorrect leg, pouring acid instead of solution in an ear, and

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administering medication meant for a different patient.

There are several reasons for this. Unlike in general litigation, even the most egregious cases in medical malpractice are defensible given most juror's positive views of healthcare providers, the complexity of the cases, and the willingness of defense experts to support their own colleagues. The physician reporting requirements to the medical board of settlements under Business and Professions Code section 801.01 makes pre-litigation settlement very difficult. Of course, the MICRA cap on general damages also disincentivizes insurance companies and hospitals to settle pre-litigation.

In fact, at least one major medical-malpractice insurance carrier permits settlements only after a lengthy and protracted claims-review process, which only occur quarterly and by their own policy do not occur prior to litigation. The Regents of the University of California (which operates UCLA, UCI, UC Davis and various other hospitals) also require presentation to various boards due to its public nature. There is just not enough time to get these cases evaluated and approved for settlement before the expiration of MICRA's short one-year statute under Code of Civil Procedure section 340.5.

And when in litigation, you will be faced with a defense firm that is hungry for billable hours. Expect to spend a substantial amount of attorney and staff time handling written discovery, depositions, and other discovery.

How we did it

Despite our weak third quarter of 2023, we have settled for tens of millions of dollars over the past two years. It *is* possible to make a handsome profit in medical malpractice. This starts by thoroughly vetting cases before accepting them. The vetting process often means getting all the medical records and having those records reviewed by an expert before accepting the case. If we are uncertain about liability in a case, we speak with the potential client about our reservations and ask the potential client to pay for the initial review by an expert. There are some potential clients that are turned off by this practice. But we are not afraid to lose a potential case to another firm. We want clients that will be invested in their case. If the expert provides a positive review, we will often refund the client the initial retainer to show our commitment to their case.

In addition to client and case selection, we have not been afraid to spend the money to send a message to the insurance carriers and defense firms that we are willing to take these cases all of the way through trial. Finally, we have made a commitment to researching and learning the medicine in each and every case. A solid understanding of the medicine at issue in each and every case is necessary to go toe to toe against the experienced medical-malpractice defense firms.

Michelle Hemesath is a partner at Ikuta Hemesath LLP *in Santa Ana, where she concentrates her practice almost exclusively on medical malpractice.*