Avoiding Legal Malpractice in Prosecuting Medical Malpractice Claims

BY MICHAEL LEVINE

Medical negligence cases present issues distinct from other tort cases. They come with increased costs and require compliance with Florida's pre-suit process. If attorneys representing plaintiffs in medical malpractice cases fail to comply with Florida's pre-suit regime, they may end up committing malpractice and their clients' cases may be forever barred. For these reasons, it is not uncommon for many personal injury attorneys to shy away from prosecuting medical malpractice claims.

Chapter 766 of the Florida Statutes sets forth a pre-suit investigation procedure that must be followed by both claimants and defendants in medical malpractice cases. The purpose of the pre-suit process "is to screen out frivolous claims, give a defendant notice of a potential claim so it can investigate the matter, and if the claim has merit, promote pre-suit settlement." Holmes Reg'l Med. Ctr., Inc. v. Wirth, 49 So. 3d 802, 805 (Fla. 5th DCA 2010).

Section 766.104(1) provides that no medical negligence action shall be filed "unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." As part of that reasonable investigation, the attorney must review the case against potential defendants, consult with a medical expert, and obtain a written opinion from that expert providing "[c]orroboration of reasonable grounds to initiate" litigation. § 766.203(2)(b), Fla. Stat. The type of expert required depends upon the circumstances of the case; your expert must practice in the same specialty of the defendant health care provider.

Once you have your expert opinion in hand, you must then notify each prospective defendant by certified mail, return receipt requested, of your intent to initiate litigation. The mailing of the notice triggers a 90-day period during which the defendant must conduct a review of the claim. Only at the end of that 90-day period may a plaintiff file a lawsuit.

The pre-suit requirements not only require more work and expenses on the front end but can also be a trap for the uninitiated. A recent appellate opinion demonstrates how the failure to comply with Florida's pre-suit process can add insult to a client's injury. In Davis v. Karr, et al., the patient alleged that her doctor, an orthopedic surgeon, was negligent in performing a hip surgery resulting in the fracture of her femur. During pre-suit, the patient provided the defendant with opinions from several experts including an emergency room physician, a radiologist, and a nurse, all stating that the orthopedic surgeon negligently caused the fracture of the patient's femur. The problem is, the patient did not provide a written opinion from an orthopedic surgeon attesting to the mistakes that were made during the surgery.

After the patient filed her lawsuit, the defendant moved to dismiss the case because none of the expert opinions provided during the pre-suit period was from an orthopedic surgeon, which was the defendant's specialty. The trial court ruled that the plaintiff did not comply with the pre-suit requirements and dismissed the case with prejudice, entering judgment for the defendant. The Fifth District affirmed, and the patient's case was forever barred. This is a terribly unfortunate outcome for the patient that left her saddled with damages that could not be recovered from the doctor.

As one might imagine, the pre-suit process is subject to various exceptions and wrinkles. For example, if a defendant fails to provide medical records relevant to any litigation of medical negligence within 10 business days of a request for copies, the defendant "waive[s] the requirement of written medical corroboration by the requesting party." § 766.204(2), Fla. Stat. A reasonable investigation, including consultation with an expert, must still be conducted.

On a number of occasions, defendants have produced records to us that are, on their face, incomplete. Nursing notes from a lengthy hospitalization or radiological imaging will be missing. Accordingly, in those circumstances, some plaintiffs initiate pre-suit without providing the written expert opinion.

Beware, however, that despite the clear language of the statute, and case law applying same, it is not uncommon for a defendant to file a motion to dismiss if the plaintiff does not provide the written opinion. If the defendant did not timely provide the relevant records, such a motion should be denied. See Medina v. Pub. Health Trust, 743 So. 2d 541, 542 (Fla. 3d DCA 1999) (reversing dismissal for failure to comply with pre-suit requirements where the defendant failed to timely produce x-rays and records).

Keep in mind though that while certiorari review of a nonfinal order denying a motion to dismiss is generally unavailable, such review is available "where a medical defendant presents facts demonstrating the plaintiff has not met the pre-suit notice requirements of [Florida law]." Baptist Med. Ctr. of Beaches, Inc. v. Rhodin, 40 So. 3d 112, 114–15 (Fla. 1st DCA 2010).

Given that medical malpractice cases, including those that do not involve wrongful death, have a two-year statute of limitations, timely compliance with the pre-suit requirements is particularly important. Therein of course lies the danger. When you factor in the time required to obtain the records, perform your investigation, initiate pre-suit, file your case, and potentially litigate a motion to dismiss and possibly an appeal, you may be running short on time. The failure to comply with the pre-suit process prior to the running the statute of limitations can result in dismissal of your case rendering it forever barred.

The bottom line is: In a medical malpractice case, compliance with Florida's pre-suit process is critical to the viability of your case and avoiding legal malpractice.

"Once you have your expert opinion in hand, you must then notify each prospective defendant by certified mail, return receipt requested, of your intent to initiate litigation. The mailing of the notice triggers a 90-day period during which the defendant must conduct a review of the claim."

Michael Levine *is an attorney at Stewart Tilghman Fox Bianchi & Cain, P.A. and represents plaintiffs in catastrophic injury and wrongful death cases. Prior to joining the firm, he clerked for the Honorable Paul C. Huck. Michael is a member of the board of directors of the Dade County Bar Association Young Lawyers Section and Jewish Community Services, and serves on the Florida Bar Young Lawyers Division Board of Governors.* ■