

First Interview on a Medical Malpractice Case

by Paul M. Mann

The initial interview in a potential new medical malpractice case is usually exhaustive. During the interview, I take no notes, but merely "eyeball" the potential clients. I believe that body language and eye contact are exceptionally important, and I like to see how the client (together with his or her spouse) interact when telling the "story" or the "factual situation" to me.

After all, I must be comfortable with the client and the client must be comfortable with me. Only after the interview is done do I reduce the discussion to dictated material with my client still present. That way I don't get the dates, times, or the names of doctors mixed up, etc.

Also during the first interview, I advise regarding the law, the burden of proof on liability, standard of care, negligence, failure to refer, causation, damages, applicable limitations, etc.

I always follow up the first interview with either a note to the persons I met that I am too busy to take on the case (if in fact I don't think their case is worthy of merit even out of their own mouths), or I will write them a letter and indicate that they should remember that at the end of the first interview, I had asked them to go home, take two weeks (assuming that a limitation period is not running very quickly), and write down a concise, but accurate statement as to what they recall, including the names of any nurses or medical attendant personnel or doctors who may be responsible for the ultimate negligence.

I ask them to outline the damages and to forward to me any video tape materials, educational records of the infant or the person so compromised, their last 5 years of tax returns (i.e. the parents or the victim), etc.

If they provide instructions to go forward in writing (that will be included in the memo from them that follows two weeks after the first interview), I assure them that their retainer (usually somewhere between \$10,000.00 and \$25,000.00) will be used for the purpose of hiring experts to prove their case, ordering of hospital records, medical records, clinical notes and records, doctors' records, lab notes and everything that will be needed to form a foundation for our case. I also ask them to indicate to me who the potential "target" is in their own minds. Very often they are wrong, but I want to get their perception in this matter.

Specific instructions *in writing* are a must.

If they are impecunious, on the second interview I will have them execute a Contingent Fee Agreement indicating that while the retainer is still required, a Contingent Fee Agreement relates to the rest of the action and to my fees which will be paid following the trial, based upon the percentage that we agree to, and subject to what the Court will allow me to charge them.

In order to properly interview a potential new client, the following points are necessary to keep in mind:

- Be sure to obtain proper names, addresses and telephone num-

bers of all members of the family so that you don't miss *Family Law Act* claimants.

- Obtain statements from all potential Family Law claimants.
- Ask the client to provide details as to what they perceive to be the grounds of negligence, whether or not they have been advised by previous lawyers, or have consulted any written periodicals or texts in their possession, contributing to their knowledge of what went on during the case. Have them produce such materials to you.
- Ask whether or not they have complained to the College of Physicians & Surgeons, and whether they have received a response.
- Remember that if they have complained to the College of Physicians & Surgeons and it is still "under review", the time limitation starts from the date that they first contacted the College of Physicians & Surgeons and not from some other date. Case law indicates that they knew or ought to have known of the negligence of the offending doctor or medical attendant personnel as of the date of the writing of their letter to the College. This maybe highly prejudicial if the results of

the College of Physicians & Surgeons come about as they often do, a year and a half after the clients have written their initial letter—thereby taking your client out of the one-year limitation period as it now stands under the regulated *Health Professions Act*.

- If the case is one of nursing **negligence there are two years** under the *Public Hospitals Act* within which to sue.

Make sure you know the limitation period which you are facing.

- Make sure you have **authorizations and directions** duly executed so that you can request records of all hospitals, doctors, medical attendant personnel, follow-up doctors, GPs, etc.
- Make sure that you educate the clients during the first interview about "the law" as it pertains to **medical malpractice cases**, including standard of care, **causation, damages, burden of proof** etc.

Follow up your first interview with a detailed reporting letter of the details of that interview.

- I make it a practice to follow up my first interview with a letter if the clients themselves have raised medical malpractice as a **concern (i.e. in a motor vehicle, slip and fall, or other negligence scenario)**.
- Ensure that you obtain a detailed written analysis (often two weeks after the initial interview) from the clients to apprise you of their points, so that you can have it devolved down to writing, and **obtain "written instructions"** from them to proceed.

Require a retainer that not only "emotionally" but also "financially", invests them in their case - anywhere from \$10,000.00 to \$25,000.00.

- Where necessary and prudent, have the clients in for a second **interview to discuss and enter into a Contingent Fee Agreement**.
- Advise them that the average **medical malpractice case may take as many as 7 years to come to fruition**.
- Be certain you advise the clients

that the defence will always put up a vigorous contest unless the case is absolutely obvious, and even if it is "absolutely obvious to the Plaintiffs", they will still have to prove their case to the satisfaction of the court.

- Make sure that you advise them of the initial steps that will be required. including issuing a Statement of Claim, ordering all records, and obtaining expert reports. Provide at least a ballpark figure as to the cost of **obtaining initial expert reports**, and point out the fact that you may have a clerk assist you in bringing together all of their initial **information**.
- Make sure that you make them **aware, in your first interview, of the litigation process in general**, and more particularly that **following receipt of a Statement of Defence** there will be **Examinations for Discovery**. then either a mediation or a pre-trial, and then a trial. Advise the clients further that all during this time they will have to come up with viable proof, through experts, which is very costly, to proceed on with their case, and that they **are going to have to comply with undertakings given on Examinations for Discovery**.
- **These initial interviews are often** long and tedious, but very, very necessary. If there are any **areas of disagreement between** the client and his or her spouse in providing the details, have the discrepancies clarified by way of the two-week waiting period during which time they will be asked to put together for you a conjoint statement of fact.

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