What is medical malpractice?

Medical malpractice occurs when a patient is harmed by a doctor (or other medical professional) who fails to competently perform his or her medical duties. Other causes of action, such as battery, breach of contract, and fraud and deceit, may apply in some cases.

Malpractice includes failure to diagnose conditions, failure to properly treat conditions, and failure to properly warn patient of risks of treatment or drug (“informed consent”). Lawsuits commonly involve prenatal care and childbirth injuries; medication errors; anesthesia errors; and errors during surgery and post-operative care.

How do I prove medical malpractice?

To prove medical malpractice, a plaintiff must show:

- There was a physician-patient relationship giving rise to a duty of care;
- The physician was negligent (breached the duty of care);
- The negligence caused plaintiff’s resultant injury; and
- The negligence caused actual damages, such as pain, mental anguish, additional medical bills, and lost work and lost earning capacity.

In most cases you are **required to hire an expert witness** to establish the duty of care and causation.

The Role of the Expert Witness

Almost all medical malpractice cases require expert witness testimony. If the plaintiff does not present expert testimony, the judge will usually dismiss the case or grant summary judgment for the defendant.

Expert witnesses are required to:

- Define the standard of care applying to the particular situation;
- Offer a professional opinion whether the defendant met that standard of care; and

- Testify how the defendant's failure caused the plaintiff's injuries.

Experts often use medical publications, medical board guidelines, trade journals, textbooks, and similar materials to help them prepare their opinions and form the basis of their research.

Finding an Expert Witness

Expert witnesses can be found in directories organized by specialty and geographic region; referral services or professional associations; by researching jury verdicts in similar cases; and by reviewing articles on relevant topics.

Short Time Limits and Intent to Sue Notice

What is the Statute of Limitations for Medical Malpractice?

Medical malpractice has a short statute of limitations: the earlier of 1 year after the plaintiff discovers (or should have discovered) the injury, or 3 years after the date of injury. Cal. Code of Civil Proc. (CCP) § 340.5. (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=340.5.&lawCode=CCP)

Since lawyers need time to evaluate a case before deciding whether to take it, if you wait until the last month to look for a lawyer, it will be difficult to find one.

What is the Intent to Sue Notice?

The plaintiff in a medical malpractice lawsuit must give the defendants 90 days advance written notice of intent to sue. A letter is fine, but it must contain the legal basis of the claim and the type of loss, including the specific injuries suffered. CCP § 364 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=364.&lawCode=CCP) .

Arbitration

Most large health plans, such as Kaiser Permanente, use arbitration instead of court to settle disputes. The rules can be different in arbitration than in court, and you have no right to a jury trial. Be sure to find out if you are required to arbitrate your case, and read any special rules or requirements that apply.

Where do I find the laws on medical malpractice?

Medical malpractice in California is a complex issue governed by a number of different cases and statutes. Ask your law librarian for help finding statutes, cases and books on medical malpractice.

Getting help with your medical malpractice case

Legal malpractice lawsuits are extremely complicated and have unique requirements. Self-represented people are expected to research and comply with these requirements and can lose their case if they do not. We highly recommend consulting with an attorney. Some ways to find an attorney:

Personal Referrals: Talk to your family or friends for referrals to trusted lawyers.

Online Directories: You can often search these by geographic location and specialty, so you can limit your search to “Sacramento” and “medical malpractice” or “wrongful death.” Two well-known ones are the Martindale-Hubbell Directory (https://www.martindale.com/find-attorneys/) and Nolo’s Lawyer Directory (https://www.nolo.com/attorney-consult) .

Attorney Referral Services: These services are vetted by the State Bar of California. They may be based on geography or topic. You can call 866-44-CA-LAW or visit the California Bar’s website (https://www.calbar.ca.gov) for lists of services.

Advertisements: Yellow Pages, newspaper ads, or the Internet may be a good starting point as well.

Print Resources: The Sacramento County Public Law Library has a range of print directories and friendly reference law librarians available to assist you.

Common Questions

“My case is obviously malpractice because the operation didn’t work (or the doctor clearly made a mistake).”

The simple fact of a bad outcome or mistake does not necessarily prove malpractice. If the patient is not seriously hurt, or if the patient would have been injured even with proper care, there is no viable malpractice claim. Even mistakes may not be malpractice; doctors are not

required to be perfect.

“Why can’t I find a lawyer to take my case?”

Malpractice lawyers are very selective in the cases they accept or even agree to review.

Medical malpractice cases require a large up-front investment (analyzing records and hiring experts) and lots of attorney and staff hours. The amount a lawyer can earn is limited, because non-economic damages (pain and suffering) are capped at $350,000 for injury and $500,000 for death (with annual increases), and contingency fees are limited to a certain percent.

“Why won’t a lawyer even consider my case?”

Before they take a case, lawyers will need time to review records to decide if it has merit. Because of the short statute of limitations, there may not be enough time for a lawyer to do this before the deadline. As a result, even a strong case may not be eligible for review if the statute of limitations is almost up.