

**An Insider's Report on
Medical Malpractice Claims**

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A DIME**

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Bradley Winston, Esq.

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FOREWORD

Who is Behind This Book and Why Should I Listen to Him?

You have done yourself a giant favor by obtaining this book. The information I give you here will help you if you or a loved one has been injured or if you believe that a loved one has been killed by medical malpractice. I personally guarantee it.

There's a lot of misleading information out there about medical malpractice claims. Some folks try to "get rich quick" for every perceived disservice done to them by a doctor, hospital, or other health care provider. Some lawyer advertising makes it sound that easy, doesn't it?

On the other hand, other people couldn't be happier if malpractice lawsuits were simply banned. These folks work to change the laws to make it extremely difficult for even legitimate cases to see the light of day in a courtroom. California and Texas come to mind.

I wrote this book so that you could have good, solid information about malpractice lawsuits, hiring an attorney, or dealing with

an insurance company. Forget the hype. This book is not about hype. It's about the tough, tough world of medical malpractice and what you can do to improve your odds of winning *if* you have a legitimate case.

I can't help you if you are a crybaby who thinks you should get millions because the doctor looked at you wrong. Believe me—I have gotten plenty of *those* calls. Even if the doctor committed malpractice, I can't help you if your case is too small. The way the malpractice laws are written, there simply is no room for small cases.

If the doctor did commit *real* malpractice and you have been seriously or permanently injured—I can help.

My name is Brad Winston, and since 1988 I have been representing individuals against doctors, hospitals, and their insurance companies. I have seen firsthand how heartless and money-driven insurance companies can be. Today I handle only large malpractice and injury cases. If you want a divorce or a will or have a traffic ticket, I can't help you.¹ I am listed in *Super Lawyers*®, and I am board certified in civil trials by the Florida Bar. I am AV rated by Martindale-Hubbell®, and I'm an associate of the American Board of Trial Advocates. For more information about lawyer certifications, ask for my book, *The Truth About Lawyer Advertising*.

I have written numerous articles for lawyers and consumers. My firm's web site has a lot of useful consumer articles and links on a variety of subjects. Visit www.WinstonLaw.com.

1. If you live in Florida, call us anyway. We can usually provide you with the names of other attorneys who may be able to help you with your situation. We do not charge for this service.

INTRODUCTION

Why Did I Write This Book?

Simple.

I am tired of insurance companies taking advantage of people before they have a chance to talk to an attorney. I am also tired of slick and misleading lawyer advertising that dangles dollar signs in front of patients that makes it sound like a malpractice claim is some sort of a lottery. If you or a loved one has been the victim of medical malpractice, what you need is useful information you can trust. Try to deal with the doctor, hospital, or insurance company yourself and they will just slap you again.

I wish I had a dollar for all the people I know who first tried to handle their cases by writing a doctor a letter because they just “knew he would want to settle.”

Respond to some ad paid for by a lawyer who “says” he handles malpractice cases and you may end up in the hands of someone who has never handled a malpractice case in his or her life.

Stop right here! Put this book down and pick up the Yellow Pages. Count up the number of lawyers who advertise that they handle malpractice cases. I promise you that many have not. How can a consumer tell? At page 32, I outline exactly the process you can go through to make an informed decision.

I wrote this one-of-a-kind book so that you could have good, honest, useful information to review and study in the comfort of your own home. No hype. No pressure.

Frankly, this book also saves me time. I get many calls each day from people asking me to represent them in their medical malpractice claims. I've packed a ton of information into this book, and it saves me hours each day by not having to talk to all of the potential clients who call me. I can't accept every case. If I gave a "free consultation" for each new potential case, there simply would not be enough time to get any work done.

Look again in the Yellow Pages at all of the lawyers who offer a "free" initial consultation for all new malpractice cases. Folks, a good initial meeting takes *at least* two to three hours. How busy can these other lawyers really be with their actual cases if they are offering "free consultations" to everyone who calls? Writing this book gives me a chance to talk to you about what you need to know about malpractice claims so that you can make an informed decision about what steps to take with *your* case. Even if I cannot accept your case, I would like you to be educated about the process so that you don't fall victim to the insurance companies.

D I S C L A I M E R

This Book is Not Legal Advice

I know the arguments the insurance company will make—and so should you—even before you start your claim. When you were injured, you entered a war zone. The insurance industry has spent hundreds of millions of dollars to inflame the public against you and me. If I accept your case, we will be in this together. I am not allowed, however, to give legal advice in this book; I can offer suggestions and identify traps, but please do not construe anything in this book to be legal advice about your case until you have agreed to hire me *and* I have agreed, in writing, to accept your case.

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What is a Medical Malpractice Case?

You may have a medical malpractice case if you are injured as a result of preventable error or negligent care while receiving medical treatment. The Harvard Medical Practice Study done in 1999 revealed that over half of all injuries caused by medical management (i.e., those not caused by a patient's initial injury) were preventable, and another quarter of those incidents were caused by negligence.²

Medical malpractice can occur at virtually any stage of treatment, and one-fifth of medical management errors occur outside the hospital and inside a doctor's office.

Interest groups pushing for "tort reform" would like people to believe that "frivolous" lawsuits are increasing the cost of medicine in this country. The cost of medical malpractice insurance is not the problem—medical malpractice is. Contrary to the interest groups' arguments, not every doctor is susceptible to "phan-

2. Institute of Medicine, National Academy of Sciences, "To Err is Human: Building a Safer Health System," 25 (National Academy Press 1999).

tom” lawsuits—only a small fraction of the physician community is responsible for a substantial number of malpractice claims.³

According to the editor of one malpractice study, “the majority [of plaintiffs] lose their jury trials and never receive a dime.”⁴ I write about the “myths” of malpractice lawsuits in almost every issue of my newsletter. If this book was mailed to you from my office, then you are automatically eligible for a free subscription, and one has been started for you. If you got it somewhere else and would like a free subscription, call my office at 954-475-9666 and request one. This offer is limited to residents of Florida.

Even plaintiffs who receive awards that seem extraordinarily large often never see the full amount of the jury reward. In some cases, the Florida “cap” on damages cuts the verdict. Other awards are drastically reduced on appeal to less than half of what was originally awarded, and many awards are overturned. These reduced or overturned awards are almost never reported by the media. In fact, when the “loss to the economy” figures of medical malpractice verdicts are reported, the figures used are almost always the reported initial verdicts and never the reduced or overturned verdicts. This is all a part of the calculated lies of the tort reform groups.

3. Lawrence Messina, “Malpractice Claims Have Decreased; Study’s Findings Run Counter to Medical Association Allegations,” Sunday Gazette Mail, Feb. 25 2001.

4. David Boxwold, Jury Verdict Research, Mar. 20, 2003.

CHAPTER 2

What Must be Proven to Win a Case?

Medical malpractice cases are among the most difficult a lawyer will ever handle. Studies show that patients will win only 23 to 39 percent of cases that go to trial in front of a jury.⁵ For those who do win, the median jury damage award is only \$254,000.⁶

A medical malpractice case requires the patient, the plaintiff, to prove that his or her doctor or hospital, the defendant, deviated so far from what is accepted as standard diagnosis and treatment that the law considers them to have been negligent. The plaintiff is also required to prove that the doctor's negligence was the primary cause of the injury that the plaintiff is claiming.

Because of the tremendous hurdles in obtaining a recovery in a medical malpractice case, most experienced malpractice lawyers agree that the injury suffered by the plaintiff must be significant. The court system is simply not set up to handle "small" medical

5. Jury Verdict Research, *Medical Malpractice: Verdicts, Settlements and Statistical Analysis* (2002); Department of Justice, *Tort Trials and Verdicts in Large Counties*, 1996 (2001).

6. Brian Ostrom & Neal Kauder, National Center for State Courts, *Examining the Work of State Courts*, 1998, 30 (1998). As we have noted, such awards are also frequently reduced or vacated at the appeal stage.

malpractice cases. We believe that either the monetary damages (medical bills and lost wages) must exceed \$300,000, or you must have suffered a significant and permanent disability or disfigurement to warrant the expense and risk of prosecuting a malpractice case.

Your case must be proven by expert testimony. That is, other doctors in the same specialty as the negligent doctor must be willing to say that the conduct of the defendant fell below accepted standards. Simply making a mistake or getting a bad result is not enough—we must prove that it was a really major error that directly led to your injury. Yes, it's true. Doctors sometimes “get away with” malpractice because the injury they have caused is not severe. I can't do anything about that.

Remember, too, that just because serious injury or even death resulted from a doctor's care, this does not mean that *malpractice* occurred. People get sick and die every day from reasons other than malpractice.

CHAPTER 3

How Do You Know You Really Have a Case?

In order to determine whether you have a case, we must first gather all of the pertinent medical records involved in your care. We also must have a complete, honest statement of facts from you—please don't hide anything from your lawyer.

Once all of the records are received and reviewed and you have been interviewed, we will tell you if it looks as though there is a provable case of medical malpractice. If the case *looks* meritorious, experts in the appropriate specialty must be consulted and retained by us. Again, these experts must be of the opinion that the medical care received was substandard and that the substandard care caused major injury or death.

Once we have retained experts who are prepared to testify on your behalf, other records, including employment records and tax returns, must be obtained. These will aid us in proving the damages that have been suffered due to the malpractice. Your financial and unemployment records must be full, complete, and credible in order for us to include them in your claim that you have suffered financial damages as a result of malpractice.

CHAPTER 4

Florida's Artificial Limit on Recovery in Malpractice Cases

The State of Florida imposes an additional limit to recovery for medical malpractice cases. No matter how seriously injured you are, the maximum recovery you can obtain, as of the time this book is written, is \$500,000 for pain and suffering unless there's a "permanent vegetative state" or death involved. Then the cap is \$1,000,000.

If the claim is against an "emergency services or care" provider—then the cap is only \$150,000 per claimant and \$300,000 for *all* claimants! This is true even if your medical expenses alone exceeded that amount. The cap applies per patient, not per doctor. Florida was one of the first states to pass such a law. It protects only health care professionals. This means that if you were to seriously injure a doctor with your car, he could recover millions from you, but if he injures you with his scalpel, your recovery against him is artificially "capped." Does that sound fair?

Each year, Florida doctors argue that the cap should be even *lower*. Frankly, they are being lied to by the insurance companies. I'd be mad too if my insurance rates kept going up for no reason.

The Reasons Most Malpractice Victims Receive Nothing

Despite popular opinion about the “skyrocketing” increase in malpractice suits and awards, the number of suits has not increased since 1996,⁷ and in most cases, plaintiffs receive nothing. There are a variety of reasons why patients do not recover any compensation for injuries suffered while receiving medical care. Most of these issues stem from general misconceptions about medical malpractice. It is important for potential malpractice plaintiffs to understand these issues when they are seeking an experienced medical malpractice attorney.

1. **Patients don’t know they are victims of medical malpractice.** Studies show that roughly 2.9 to 3.7 percent of admitted hospital patients suffer some sort of preventable injury as a result of medical management (i.e., not from the original medical condition). Up to 98,000 patients are *killed* each year as a result of preventable medical error. Medical malpractice is the eighth-leading cause

7. Brian Ostrom et al., Court Statistics Project; Examining the Work of State Courts, 2001 at 31.

of death in the United States, yet only 10,000 cases are filed each year. (Some “epidemic,” huh?) In the vast majority of cases, however, the fact that malpractice occurred is hidden from the patient and the patient’s family.

2. **No autopsy was ever performed.** In a situation in which we claim that the malpractice caused death, we must prove that the carelessness of the health care provider directly resulted in the patient’s death. In a medical malpractice case that results in death, it is almost impossible to prove that the death occurred because of the malpractice without an autopsy. This is because there are so many reasons why a person might have died, but we must prove that the one reason why the person died was because of the negligence of the health care provider.
3. **Even though the doctor committed malpractice, the disease or illness likely would have resulted in death anyway.** Sometimes cancer or other deadly illnesses may go undiagnosed for months or even years. A late diagnosis of cancer does not always mean, however, that a doctor is responsible for a patient’s death. An experienced malpractice attorney can help determine whether the cancer or other serious illness should have been detected “in time” to save the patient.
4. **A physician’s poor bedside manner is not malpractice.** In the vast majority of cases, even egregiously poor bedside manner cannot be considered in determining whether a physician committed malpractice in providing treatment.

We have reviewed many cases in which arrogant physicians provided care and the patient was injured. It just doesn't matter that the doctor was a jerk. (One doctor we know even dared the patient to sue him—we did.) We must prove from a scientific and legal standpoint that it was carelessness, not bad bedside manner, that caused the injury.

5. **The patient suffered no significant damages.** While we understand that every case is important to the patient involved, the legal system is not set up to handle “small” medical malpractice cases. We decline hundreds of cases a year in which it appears that the doctor was careless but that the resulting injury was not significant. A pharmacist may incorrectly fill the prescription, for example. That error may make you violently ill for a week. If you have a good recovery, however, you probably don't have a case to pursue. This is because the costs of pursuing the case will be greater than the expected recovery. Our court system may not be perfect, but it does act as a filter to keep out all but the most serious cases of medical malpractice.

6. **The injury suffered was not necessarily caused by the physician's or hospital's mismanagement.** Because it is often very difficult to prove that medical mismanagement was the reason the patient suffered the injury that he or she did, the insurance companies have many standard defenses including, for example,

- The injury was an unpreventable result of the initial condition/injury. (“If the tumor had been diagnosed six months earlier, it would not have made a difference.”)
- The injury was due to the patient’s noncompliance with medical advice. (“I told him to return to the office if his symptoms did not clear up, but he didn’t.”)
- The risk of the patient’s particular injury was an acceptable one. (“He got infected in surgery, but 2 percent of all patients undergoing that surgery get an infection.”)
- Some other party was responsible for causing the injury.
- The injury was caused by a previous illness or disease. Medical malpractice plaintiffs must show a very clear connection between the defendant’s misconduct and the claimed injury.

7. The plaintiff has not retained an experienced attorney.

Medical malpractice litigation is a world unto its own. It has its own special rules and laws. There are very few lawyers in Florida who specialize in medical malpractice claims. We believe that it is imperative that you be represented by an experienced medical malpractice attorney or an attorney who is “teaming up with” or co-counsel with an experienced malpractice attorney. The malpractice insurance companies and the doctors’ lawyers know who the “real” plaintiffs’ (patients’) malpractice lawyers are. They know who does have the experience and brains to battle them in court and who doesn’t. The insurance lawyers billing by

the hour will string out the inexperienced, poorly prepared lawyers for as long as they can before beating their brains in at court.

In malpractice cases, perhaps more than in any other type of case, experience and prior results do matter. Do not be afraid to check out the experience and the results of your medical malpractice attorney. It's your responsibility to ask. The bar association does not prevent an attorney from advertising for malpractice cases. If you end up in inexperienced hands, it's your fault! For our results, visit www.WinstonLaw.com.

- 8. The statute of limitations has expired.** Each state has its own statute of limitations for filing medical malpractice suits. These are strict time limits! If the statute of limitations has expired, you can't file a case. The Florida statute of limitations for medical malpractice and all wrongful death is *two years*. The important question is "Two years from when?" Florida has something called "tolling" rules, so your actual time to sue *may* be longer than two years from the specific date of the negligence but not more than four years from then. The tolling rules can be tricky and should not be left to novices or inexperienced attorneys.

One reason you should consult an experienced medical malpractice attorney early is to determine when the statute of limitations expires in your case. You may not need to hire an attorney now, but you should get an attorney's advice now as to when your statute of limitations expires!

9. Jurors have been misled by the insurance industry. The insurance industry has spent millions funding “research” to suggest that there is a widespread problem with medical malpractice lawsuits. These studies “prove” that excessive verdicts are causing malpractice insurers to raise their premiums, forcing physicians out of the medical profession. Jurors who hear these messages often award lower verdicts than they would have a decade ago. Far from “runaway” verdicts, Florida is a very conservative state in terms of jury awards. Unfortunately, malpractice victims sometimes receive less from the jury than is necessary to pay their medical bills for treating the injury caused by the malpractice.

10. The plaintiff is unable to hire good, qualified experts. You cannot win most medical malpractice cases without one or more very qualified medical experts, and they can be hard to find. It is becoming increasingly difficult to find doctors who are willing to stand up for what is right. It takes time and money to find the best experts for your case.

This is one area in which the insurance companies have a tremendous advantage. If they have a case that is particularly bad for a doctor, they may show the case to many experts before they find one to support (or simply concoct) the defense. They can afford to hire that many experts, but most patients cannot afford to have ten experts look at their case in order to determine which expert will work “best” for them.

11. **The patient contributed to the injury.** In Florida, any negligence or carelessness on the part of the patient that contributed to the injury will reduce the claim. Sound fair? It's not fair, but it is the law. In most states, any carelessness on the part of the patient is weighed together with the carelessness of the doctor, and damages are apportioned accordingly. It is laws like this that continue to make medical malpractice cases tough to win.

CHAPTER 6

Did You Know Your Own Insurance Company May Claim Your Entire Recovery?

You should be aware that often, if your medical bills were paid by health insurance or an employer's health plan, the health insurance company or plan may want you to reimburse it out of any personal injury recovery. Your "insurance" turns out to be not insurance at all but a "loan." The laws in some states, including Florida, generally prohibit such claims by insurance companies, but they make the claims anyway. We have seen cases where insurance companies hired lawyers to make the claims for them. What they don't tell you is that this area of law, known as "reimbursement" or "subrogation," is actually quite complicated and is sometimes governed by a federal law called ERISA (The Employee Retirement Income Security Act of 1974). Your attorney must understand the implications of ERISA for your case because sometimes your insurance company may be entitled to the entire settlement!

How Do I Find a Qualified Medical Malpractice Attorney?

Choosing an attorney to represent you is obviously an important task. The decision certainly should not be made on the basis of advertising alone. The Yellow Pages are filled with ads—all of which say basically the same thing. You should not hire an attorney based solely on advertising. Any lawyer can buy a slick commercial even if he or she *has never successfully tried a malpractice case in front of a jury*. Heck, you shouldn't even hire me until you trust that I can do a good job for you.

You also cannot rely on the recommendations of friends and family. The fact that Attorney Jones did a good job on Uncle Joe's DUI case or Cousin Sue's divorce does not make him a qualified, experienced medical malpractice attorney. I cannot say it too often: medical malpractice cases are different and difficult.

How Do You Choose?

How do you find out which attorney is the best in Florida for your case? Asking key questions will lead you to the best attorney for

your medical malpractice case. This will involve some time on your part, but that's a fair price to pay.

The world of medical malpractice claims is much too specialized for someone who does not regularly handle these cases. Too many times we have looked at cases that other—inexperienced—attorneys have handled. You should be aware that the insurance companies that defend malpractice cases know the Florida attorneys who actually go into court to try cases and those who do not, and the insurance companies use that information to evaluate their risk. One of the first questions some insurance adjusters will ask when a serious claim comes in is: Who is representing the plaintiff? Since this information is important to *the insurance company*, it should be important to *you*.

How Do You Find Out Who Is Good In Your Area?

10 Keys to Successful Hiring

1. **Do not limit your search geographically.** While your attorney should be licensed in Florida, the number of attorneys in Florida who specialize in malpractice cases is small. Find the best attorney in Florida for your case, and don't concern yourself with where in Florida the attorney's office is located. Our firm handles cases throughout Florida. Our size and small case load allow us to deliver terrific service whether you are ten minutes or six hours from us.
2. **Results matter.** While past results in major malpractice cases do not mean that a similar result will be achieved in your case, the lack of *any* significant verdicts or settlements in malpractice cases ought to be a huge red warning flag. Ask your attorney about results. Don't accept the "It's all confidential—I can't tell you" argument. It is simply not

true that an attorney cannot publish or talk about past results.

3. **Get a referral from an attorney whom you do know.** He or she will probably know someone who specializes in your area of need. If you don't know anyone at all, go to www.floridajusticeassociation.org.
4. **Beware of Internet "directories" promising to get you a qualified lawyer.** We get solicited almost daily from companies who offer to place us in their directories for a hefty fee. Most of these "directories of specialists" are a joke. There is rarely any screening of attorney qualifications at these sites.
5. **The Yellow Pages.** Not everyone advertises in the Yellow Pages. Most of our cases come from referrals from other attorneys or from satisfied clients. Be careful about ads that tout many different specialties; no one can be a master of all. Be careful about full-page ads. This advertising typically attracts a lot of case inquiries, including the small cases that we do not accept. Make sure that the attorney you hire is selective enough with his or her cases that your important case does not become just one more file in the pile.
6. **Your local bar association probably has a lawyer referral service.** Understand that lawyers have signed up *and paid a fee* to be listed in certain specialties. Their names come up on a rotating basis. The bar association is not

making any judgment about who is a good attorney or not. We could sign up our firm as “divorce attorneys” if we wanted to, and no one would check to see if we had ever handled a divorce case! It is your responsibility to ask questions.

7. **Interview several attorneys.** Ask each attorney who else he or she would recommend for your case. If he or she won't give you any names, leave. The names that come up on different lawyer's lists are probably good bets.
8. **Check websites.** Ask each attorney if he or she has a book like this and/or a website so that you can find out more about qualifications and experience *before* you walk in the door.
9. **Forget fancy slogans and hype.** Slogans such as “We are aggressive,” “We care for you,” and “We fight for you” are absolutely meaningless. After all, aren't these the characteristics you would expect from any attorney?
10. **Look for these factors and good points.** Here's what to look for and question your attorney about. Note that not every attorney will meet all of these criteria, but the significant absence of the following should be a big question mark.
 - **Board Certification.** The Florida Bar certifies attorneys in several specialties, including civil trial advocacy. Certification requires proof of significant actual trial experience as well as the *recommendations* of other

attorneys and trial judges. For more information call our office at 954-475-9666 and ask for a copy of *The Truth about Lawyer Advertising*.

- **Experience.** Obviously, the longer a lawyer has been practicing a particular area of the law, the more he or she will know. Experience can be a big factor in many cases and is vital in an area as specialized as medical malpractice. Forget about the ads that brag about “combined experience” such as “Twenty-nine years combined experience in practicing law.” This means they have added up the number of years of experience of each lawyer in the firm. It’s meaningless.
- **Experience actually trying cases.** Ask the attorney how many cases he or she has actually tried. Were any significant verdicts or settlements achieved? The greater the number of cases actually tried and substantial verdicts and settlements achieved, the more likely the insurance companies will respect your attorney. Florida Bar Civil Trial Certification and the American Board of Trial Advocates require attorneys to have actually tried a certain number of cases as lead counsel in actual trials.
- **Respect in the legal community.** Does the attorney teach other lawyers in continuing legal education courses? Is the attorney board certified? Organizations such as Martindale-Hubbell (www.martindale.com) and the ABOTA (www.abota.org) provide names of

lawyers certified by independent groups of peers as highly qualified attorneys who conduct themselves professionally and ethically.

- **Membership in trial lawyer associations.** In our area, you can certainly find a lawyer who is a member of the Florida Justice Association (FJA), the Broward County Justice Association (BCJA), and the American Association for Justice (AAJ). All three organizations provide extensive education and networking for trial lawyers. Why would you hire an attorney who is not a member when there are so many good, experienced attorneys who are?
- **Publications.** Has your attorney written anything that has been accepted for publication in legal journals? This is another sign of respect that the legal community has for his or her skills, experience, and knowledge.
- **Legal malpractice insurance.** Does the attorney hold a legal malpractice insurance policy? Some don't. Having such a policy is a sign of accountability. Anyone can make a mistake, but you should not make the mistake of hiring an attorney who does not have malpractice insurance. Remember, an attorney is not required to carry malpractice insurance. Don't get burned by an attorney who does not think enough of his or her clients to carry malpractice insurance.

- **Professionalism.** Has the attorney been the subject of any disciplinary proceedings by the state bar? In Florida, this information is available at *www.FlaBar.org*.

11. **Ask your attorney if he or she is licensed in Florida.** I used to think this was a “no brainer” until we got lots of calls from out-of-state attorneys not licensed in Florida who were in a panic because they tried to handle a Florida malpractice case and got tripped up by one of Florida’s “quirks.”

An attorney who is not licensed in the state where the case will be filed is at a disadvantage also when it comes to negotiating with the insurance company. The insurance companies know who is not licensed and thus who cannot actually try a case. We recently ran across a horror story involving an out-of-state attorney who evaluated a Florida medical malpractice case. This attorney kept the file for two years and gave it back to the client on the day the statute of limitations was expiring in Florida. The problem was that the attorney told the client that he had one more year to file his case, but this was based on the statute of limitations in his own state. The client was then unable to file his case in Florida.

Once you have decided on an attorney, make sure you both understand your goals and you understand how the relationship between your attorney and you will work.

How will your attorney keep you informed about the progress of the case?

In our practice, we do not send a copy of every piece of correspondence and pleadings in the case to the client. We do take time to explain the “pace” of the case and in what time frames the client can expect activity to take place. We have also developed a unique client communication policy that ensures your questions are answered promptly. Ask us for a copy if we haven’t already given you one.

Find out who will actually be working on your case.

Make sure that you and your attorney have a firm understanding as to who will be handling your case. There are a lot of things that go on with a case that do not require the senior attorney’s attention and in fact are more efficiently handled by younger attorneys or legal assistants.

On the other hand, if you are hiring an attorney because of his or her trial skills, make sure that that person is going to be trying your case for you.

CHAPTER 9

What Do We Do For You In a Medical Malpractice Case?

Here is a more or less complete list of the tasks we may be called upon to perform in your case. Remember that each case is different and that not all of these tasks will be required in every case.

- Interview you.
- Educate you about medical malpractice claims.
- Gather documentary evidence including medical records and hospital documents.
- Interview known witnesses.
- Collect other evidence such as photographs of the injury itself.
- Analyze the legal issues, such as contributory negligence and assumption of the risk.

- Talk to your physicians or obtain written reports from them to fully understand your condition.
- Analyze your health insurance policy or welfare benefit plan to ascertain whether any money they spend to pay your bills must be repaid. (Unbelievable as it may sound, your health insurance company may be entitled to *full* reimbursement of the money it paid on your behalf; some attorneys don't know this.)
- Analyze the validity of any liens on the case. Doctors, insurance companies, welfare benefit plans, and employers may each assert that they are entitled to all or part of your recovery.
- Obtain relevant medical literature to help determine whether malpractice was involved in your injury.
- Recommend whether an attempt should be made to negotiate the case with the insurance company or whether suit should be filed. (However, you should know that it is the rare malpractice case that can be successfully negotiated before filing suit.)
- Obtain nursing and expert review of your claim.
- If suit is filed, prepare the client, witnesses, and health care providers for depositions.
- Prepare written questions and answers and take depositions under oath of the defendant and other witnesses.

- Produce to the defendant all of the pertinent data for the claim, such as medical bills, medical records, and tax returns.
- Go to court to set a trial date.
- Prepare for trial and/or settlement before trial.
- Prepare the client and witnesses for trial.
- Organize the preparation of medical exhibits for trial.
- Organize the preparation of demonstrative exhibits for trial.
- Prepare for mediation and/or arbitration.
- File briefs and motions with the court to eliminate surprises at trial.
- Take the case to trial with a jury or judge.
- Analyze the jury's verdict to determine if either side has good grounds to appeal the case.
- Make recommendations to you as to whether to appeal the case.

The Legal Process in Medical Malpractice Cases

In most cases today, attempting to negotiate with an insurance company before filing suit is not a worthwhile endeavor. Insurance companies use pre-suit negotiation only to find out as much about you, your lawyer, and your experts as they can. Many lawyers waste precious time attempting to negotiate with insurance companies before filing suit.

If I accept your case, it is because I believe it is meritorious and you deserve a trial by jury. We will usually file your suit before negotiating so that if negotiations break down, we will already have a trial date in place.

It is a dangerous practice to wait until the statute of limitations has almost expired to file suit. I have seen other attorneys do this only to find that the defendant is either not the correct defendant or is now blaming someone else. (In one case, the surgeon blamed her assistant for stapling the patient's ureter shut. This was not in the

medical records, and we think she just made it up. Fortunately, there was still enough time to sue the assistant.)

While there are legitimate reasons for delaying filing suit, there is no excuse for the practice that I sometimes see whereby some attorneys routinely wait until the last moment to see if the insurance company will settle. Unfortunately, I have also seen lawyers not licensed in Florida attempt to represent Florida residents. When the claims do not settle, they often panic to find an attorney to file the case on time. (We've received plenty of those last-minute calls. We reject them immediately. Their inaction is not going to become my crisis.) I believe that clients are ill-served by hiring attorneys who are not licensed in Florida for a Florida malpractice case.

In Florida, a medical malpractice case is begun by serving a Notice of Intent to Initiate Medical Negligence Litigation on the prospective defendant, along with an affidavit of a qualified expert and attaching a copy of all of the records the expert has reviewed. Only after three months of pre-suit discovery can a lawsuit be filed in the appropriate court. The patient must have a signed certification of malpractice in the file before serving the lawsuit.

Once the lawsuit is filed, both sides engage in the legal process called "discovery." Each side is allowed to investigate what it is the other side is going to say at the trial. The defendant will be permitted access to your medical, work history, and income records. You must give a deposition under oath and also answer

written questions under oath. You may be required to submit to a medical examination by a physician of the defendant's choosing. In, short, when you file a medical malpractice case, your life becomes an open book.

The defendant is also subject to discovery. The defendant will answer written and oral questions about his or her professional background and qualifications and will have to give testimony about the treatment he or she gave to you. Both sides' experts may also be deposed. Prior to that, each side must disclose to his opponent what it is that the experts are expected to testify to. Other witnesses may be deposed.

In Florida you can expect to go to trial about one to two years after the case is filed.

Why You Should Hire Us

Many attorneys advertise for medical malpractice cases. Unfortunately, some of these attorneys have so many small cases in their offices that no case gets their personal attention. Others have no real intention of trying your case themselves, and if the case cannot be settled with the insurance company, they will try to refer the case to another law firm for trial. There are good, experienced attorneys in this field, but it is very difficult for a consumer to separate the good from the bad. You need to ask your attorney all of the questions we have outlined in this book.

Our clients get personal attention because we are very selective in the cases we take. We decline hundreds of cases a year in order to devote personal, careful attention to legitimate cases with serious damage involved. We do not make money by accepting many small cases, hoping to get a small fee out of each. We do not sue doctors unless the malpractice is bad and the damage is significant.

What Cases Do We Not Accept?

Due to the very high volume of calls and referrals from other attorneys we receive, we have found that the only way to provide personal service is to decline those cases that do not meet our strict acceptance criteria. Our practice focuses on the most serious cases of medical malpractice. Therefore, we generally do not accept the following types of cases:

Cases with no clear, objective evidence of significant injury that was directly caused by the health care provider's malpractice. These cases are expensive and time-consuming. The last thing you want to do is to "win" your case only to have the attorneys' fees and expenses be larger than your personal recovery. We would like to represent everyone who needs a good attorney, but we cannot.

Cases with significant pre-existing injury in the same body part. If you have had three back surgeries in the past and are now claiming that your most recent surgeon is the cause of your chronic back pain, the chances of a jury awarding you a substantial amount of

money in your claim is about zero. Again, I feel that it is not worth the risk to the client to pursue these cases.

Cases in which the statute of limitations will soon run out. We like to have at least four to six months to adequately investigate and evaluate your claim. Because of the complexity of these cases and the extensive review process, we require this lead time. We routinely decline “last minute” calls.

If your case has already been filed, we will not represent you. We like to handle legal matters our way. If you or another attorney has already filed a case, that’s fine, but all we can do is wish you “good luck.”

Well, Are There Any Cases Left?

Yes, there are, and that’s just the point. Just look at our results farther on in this book.

We concentrate our efforts on increasing the value of good cases—not filing and chasing frivolous ones.

We represent many clients with valid claims. When we devote our time and resources to representing only legitimate claimants with good claims, we are able to do our best work—getting “bogged down” in lots of little cases each with a “special problem” is not good for clients with legitimate claims.

What Can You Do From Here?

The most important thing that you can do as a potential medical malpractice plaintiff is to collect and maintain all of your hospital and doctor records. Any attorney who ends up representing you will need to have as extensive a record as possible. Keep a journal of events and note the date, time, and circumstances of your developing situation. Details are *very* important—malpractice cases may involve looking back at years of the patient’s medical history, particularly if the insurance company argues that your injury was a result of a pre-existing medical condition rather than malpractice.

Obviously, by requesting this book, you have begun your search for experienced malpractice counsel. Remember—in Florida, the statute of limitations could expire in as little as two years. The legal process does take time—you should weigh your options for counsel carefully, but you should begin your investigation immediately.

Our Cases and Verdicts

Here is a sampling of malpractice cases and other serious injury cases that we have handled. There are others at our website at *www.WinstonLaw.com*. Remember that each case is different. We've won cases we probably should have lost, and we've lost cases that we expected to win. Once a case is in the hands of the jury, it is out of our control.

We do believe, however, that significant trial experience in big cases is one factor that people may use to choose one attorney over another. Many of our clients have told us that this is true. With these disclaimers in mind, here are some of our cases:

Motorcyclist loses limb and suffers internal injuries in accident; medical providers' negligence during treatment renders motorcyclist quadriplegic—Settlements obtained exceeding \$6 million. –Bradley Winston, Esq.

Claimant was a nineteen-year-old involved in a motorcycle accident on March 29, 2003 when he was struck and then

partially run over by a truck. While being treated for these injuries, Mr. O was given excessive amounts of sedatives, narcotic pain relievers, and anesthesia by his treating physicians that caused him to go into shock and led to permanent brain damage. The insurer for the truck driver tendered its \$1 million policy. The medical providers have also paid an additional \$4.2 million, including having agreed to pass a claims bill in the Florida legislature. The funds recovered have allowed Mr. O to obtain the care he needs for the rest of his life and for his mother to devote herself exclusively to his care.

Security guard at hospital chokes man visiting hospital, causing him brain damage—\$2.3 million settlements obtained. –Bradley Winston, Esq.

John Rowe went to the emergency room at Broward General Medical Center feeling depressed. He was suicidal. After waiting several hours to be seen, he decided to leave to go home with his mother. Two Broward Sheriff's Office deputies, two Fort Lauderdale policemen, and two hospital orderlies physically subdued him and improperly used a choke hold. Mr. Rowe lapsed into a coma and died two years later. The various hospitals, institutions, and agencies ultimately paid \$2.3 million in settlements to resolve the extensive civil rights litigation in both state and federal courts.

Firm obtains settlement of \$200,000 over Doctor's \$250,000 insurance policy. –Bradley Winston, Esq.

A girl was born with rare heart defect—medical malpractice—surgical repair botched—\$450,000 recovered after new trial was affirmed on appeal. She lost this case at trial because the doctor lied, and his own expert pointed that out in trial. The judge ordered a new trial, and the doctor appealed. The doctor's insurance company never offered a penny to settle until the new trial was upheld on appeal. Shortly before the second trial, the insurance company settled with the family. The little girl is now ten years old and doing well.

\$1 million verdict obtained from obstetrician who caused broken collarbone during delivery. –Bradley Winston, Esq.

Girl was born with broken collarbone and stretched nerves between the neck and shoulder. She underwent over ten surgical procedures to increase the range of motion in her arm and shoulder. Following a four-day trial, the jury delivered a \$1 million verdict.

Woman severely injured due to defective motor home when fuel tank fell out on roadway—\$14 million recovered. –Bradley Winston, Esq.

A fifty-six-year-old woman was traveling on an expressway when her motor home suddenly lost its fuel tank. The fuel fire that resulted led to the death of her husband. She was ejected and broke bones throughout her entire body and suffered internal injuries and a head injury. The firm settled

the woman's claims for \$14 million approximately one month prior to trial.

Small business sustains fire loss—Jury verdicts and settlements over \$9.5 million. –Bradley Winston, Esq.

A large shopping mall burned down in September 1997. Mr. Winston represented one of the tenants, a small software development company, and achieved an award on appeal after a jury verdict against the client's insurer, Britamco. The court also ordered Britamco to pay the client's attorneys' fees for the trial and the appeal. After the insurance was exhausted, Mr. Winston continued to pursue the mall's owners and insurers and obtained total court awards and settlements for his client alone in excess of \$1.5 million. The claims against the parties that caused the fire and allowed it to spread and against their insurance company for bad faith and spoliation of evidence were part of approximately \$9.5 million in settlements achieved by Mr. Winston as one of the four attorneys for all of the tenants (the "Plaintiffs' Legal Committee").

\$675,000 jury verdict for landlord defrauded of rent by property manager. –Bradley Winston, Esq.

A major Las Vegas and Biloxi casino owner purchased a large office building in south Florida as an investment. The property manager lied about how many square feet were rented to a tenant, who was eventually evicted for nonpayment of the rent on their extra space. After a hotly contested three-week trial, the jury found that the property manager committed

fraud on the landlord and awarded \$675,000 as damages. The award was affirmed on appeal.

Retired woman slips and falls in parking lot due to improper lighting—Jury verdict of \$348,000 obtained. –Bradley Winston, Esq.

A sixty-eight-year-old woman tripped and fell in the parking lot of a shopping plaza and suffered torn knee cartilage and a broken elbow. The insurer for the owner of the parking lot offered \$75,000 prior to trial. Following trial, the jury awarded \$348,000.

Passenger on motorcycle suffers head injury in accident with automobile—\$1.35 million recovered. –Bradley Winston, Esq.

Jane Doe was riding as a passenger on a motorcycle involved in an accident. Her injuries resulted in several weeks of hospital treatment while she was in a semiconscious state for several fractures and a head injury. The insurer for the automobile driver and the insurers for the young lady paid policy limits totaling \$1.35 million within a few months of the crash.

Child shot in eye by BB gun wielded by another child—Recovery of \$600,000. –Alexander Clark, Esq. and Bradley Winston, Esq.

Johnny Doe, seventeen years old, was at a friend's home when he was shot in the right eye with a BB gun being handled by another minor child. Johnny's eye suffered permanent vision

loss as a result. The insurer for the parents of the BB gun shooter paid \$600,000 to settle Johnny's claim prior to trial.

Victim of slip and fall in home improvement store—Over \$1.25 million recovery. –Bradley Winston, Esq.

A thirty-six-year-old woman slipped and fell on a packing strip left on the ground and jammed her finger into shelving while breaking her fall. As a result of her trauma, she developed reflex sympathetic dystrophy that spread to her other extremities and prevented her from leading a normal life. Home improvement store paid \$1.25 million as settlement prior to trial.

Suit against City of Hollywood, which employed driver of truck causing head-on accident—\$1.2 million verdict obtained. –Bradley Winston, Esq.

Ronald Miller was a forty-year-old man driving his pickup when a city employee crashed a city-owned truck head on into his vehicle. Miller's vehicle was totaled, and he suffered neck injuries and ligament and cartilage tears in both knees. The city offered to settle for \$49,000 prior to trial. After a three-day trial and less than an hour of deliberations, the jury returned a \$1.2 million verdict.

Man suffers injury when foot is crushed by vehicle at auto auction—Jury returns verdict for \$250,000. –Bradley Winston, Esq.

Plaintiff was an owner of a vehicle being sold at an auto auction. An employee for the auction location negligently drove plaintiff's car over his foot, which caused him to fall to the ground and suffer further injury to his shoulder and knee. Plaintiff underwent surgical treatment. Following trial, the jury returned a verdict of \$250,000.

Motorcyclist injured when automobile driver violated right of way—\$1.1 million recovered. –Bradley Winston, Esq.

Adult male plaintiff was driving his motorcycle when another driver caused a violent crash such that the motorcycle collided with the passenger side of the vehicle. The passenger in the vehicle suffered fatal injuries. The motorcyclist suffered a broken hand and multiple severe internal injuries. The insurers for the automobile driver paid their policy limits of \$1.1 million to settle the claim before suit.

Insurer's bad faith results in recovery of \$465,000 where policy limits were \$65,000. –Alexander Clark, Esq. and Bradley Winston, Esq.

Todd Vandenberg was in his early twenties when he was stuck by a car while riding a rented motorcycle. He suffered a badly crushed foot, but the insurance available was only \$65,000.

The insurance company eventually paid \$465,000 to settle the claim.

Insurer's bad faith results in recovery of \$300,000 where policy limits were \$15,000. –Bradley Winston, Esq.

Plaintiff, a victim of a motor vehicle accident, sustained multiple fractures and collapsed lungs following a rollover accident. Plaintiff underwent surgery to his knee and spine. The insurer for the driver of the vehicle that struck the plaintiff failed to tender its \$15,000 policy limits despite having been given ample opportunity to do so. As a result, the firm recovered \$300,000 as settlement from the insurer due to its bad faith in failing to settle the case within its policy limits when it could have and should have done so.

This material taken from the Winston, Clark & Wigand, P.A. website contains information about the firm's past results, testimonials, and statements regarding the firm's quality of services delivered. The information has not been reviewed or approved by The Florida Bar.

You should know that:

- The facts and circumstances of your case may differ from the matters in which results and testimonials have been provided.
- All results of cases handled are not provided, and not all clients have given testimonials.

- The results and testimonials provided are not necessarily representative of all results obtained by the firm or of the experience of all clients or others with the law offices of Winston, Clark & Wigand, P.A. Every case is different, and each client's case must be evaluated and handled on its own merits.

Visit www.WinstonLaw.com for other verdicts and settlements.

CHAPTER 14

Our Services

We are here to represent you at every step of the way in your claim. Sometimes the best advice is that you do not have a claim that can be won. If that is true, we will tell you so. If your case meets our criteria for acceptance, you can be assured that you will receive my personal attention. I will keep you advised as to the status of the case and give you my advice as to whether your case should be settled or whether we should go to trial.

An initial consultation is free. We will fully explain all fees and costs to you before proceeding. Together, as a team, we will decide on the tactics best suited for your case.

–Brad Winston

FREE NEWSLETTERS FROM

Winston, Clark & Wigand, P.A.

Want to know how to best deal with insurance company denials? Want to find out specific steps you can take to find the best lawyer for your case? Want to read the “inside story” about frivolous lawsuits? Would you like some practical advice about buying insurance from someone who does not sell insurance?

These are some of the topics that are covered several times a year in a free newsletter sent to your home by Fort Lauderdale attorney Brad Winston.

Mr. Winston strongly believes that most legal disputes could be avoided if people had a better general knowledge about the legal system, insurance coverage, and the insurance claim process.

There is absolutely no cost or obligation, and from time to time we run contests to give away free stuff!

If you subscribe and later feel that we are wasting your time, there is an 800 number in every issue that you can call to “unsubscribe.”

Don't worry—this is not the boring, “canned” newsletter that most firms buy and slap their names onto. We write it, and we aim to encourage people to pay more attention to their legal affairs.

There is no need to destroy this book. Just photocopy this form, fill it out, and mail or fax it to us at 954-475-2279 or mail to Brad Winston, 8211 West Broward Blvd., #420, Plantation, FL 33324.

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WHY MOST MEDICAL MALPRACTICE VICTIMS NEVER RECOVER A DIME

This book is about the tough world of medical malpractice. Many folks try to “get rich quick” for every perceived disservice done to them by a doctor or hospital. Some lawyer advertising makes it sound that easy, doesn’t it? Insurance companies and medical professionals, on the other hand, might be happier if malpractice lawsuits were simply banned.

I wrote this book to give you the facts on malpractice lawsuits, hiring an attorney, and dealing with the insurance company. Forget the hype. If you have a legitimate case, contact me at www.WinstonLaw.com for more details.

Learn more about the Winston Law Series. Our other books include: *The Truth about Lawyer Advertising*; *Five Deadly Sins*; *Buying Car Insurance*; *Robbery Without a Gun*; and *Making the Right Choice*.



Bradley Winston is a South Florida personal injury attorney who is Board Certified in Civil Trial. He has over two decades of legal experience handling a wide variety of personal injury matters. Throughout his career, Mr. Winston has fought hard to protect the rights of his clients and to ensure that they receive all the financial compensation they are entitled to under the law.

Mr. Winston is recognized by and active in many leading legal organizations, including: Super Lawyers®, 2006-2011; Million Dollar Advocates Forum; American Board of Trial Advocates; American Bar Association; and the American Association for Justice.

Martindale-Hubbell®, a leading U.S. legal publisher, recognizes Mr. Winston with a Preeminent 5.0 out of 5 Peer Review Rating. You may contact Bradley Winston at 954-475-9666.

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