**FLORIDA MEDICAL MALPRACTICE SUITS MUST**

**FOLLOW A PRE-SUIT LABYRINTH**

**BY: WILLIAM G. MORRIS, ESQ.**

Everyone makes mistakes…. even doctors. The legal term for a doctor’s mistake is medical malpractice. In most cases, a doctor’s mistake causes little or no harm. Most cases are not all cases. When the harm is substantial, the injured may sue.

When doctors are sued, they win more than they lose. Recent studies show that nationwide, doctors win more than eighty percent of trials. When only cases with “strong” malpractice evidence are included, doctors still win half. Those statistics do not tell the whole story, as many medical malpractice cases settle before trial. But, results at trial can be expected to affect those settlement discussions.

To win a medical malpractice case, the plaintiff has to establish more than negligence or that the plaintiff’s condition worsened. The plaintiff must establish the doctor owed the plaintiff a duty and that the doctor failed to meet that duty because the doctor’s actions fell below reasonable standard of care action. After passing those tests, the plaintiff must prove the doctor’s conduct actually caused harm that would not have happened absent the doctor’s negligence.

Proving harm from medical negligence can be difficult. A doctor may fail to diagnose an illness. If the plaintiff later has problems with that illness, the plaintiff will have to establish proper diagnosis would have eliminated or limited suffering or harm. That can be hard to prove. Think about cancer. In many patients, earlier diagnosis might not have led to any different result.

If all of the foregoing is established, the plaintiff still has to prove damages. One type of damages is economic. Did the plaintiff spend money on extra medical treatment that could have been avoided or lose time from work? Another type of damages is pain and suffering.

Florida statutes require doctors maintain some type of security for malpractice claims. One option is for doctors to carry malpractice insurance of $100,000.00 per claim and $300,000.00 in the aggregate. As alternatives, doctors can maintain an escrow account with assets valued at that amount or a letter of credit. Surgeons are required to carry triple those amounts.

Malpractice insurance is not cheap, but will not usually drive a doctor to the poor house. Doctors pay between three and four percent of their income for malpractice insurance nationally. Malpractice insurance for surgeons is the most expensive. Surgeons specializing in obstetrics and gynecology with major surgery generally pay the highest premiums.

Florida’s legislature mandates all doctors carry insurance to help protect patients. But, the legislature also tries to satisfy doctors bemoaning insurance costs and unfounded claims by mandating a complicated pre-suit process a plaintiff must pursue before a medical malpractice suit

can be filed.

The statutory mandates started in 1985, when the legislature adopted a statute requiring prospective plaintiffs give every medical provider who would be a defendant in a claim for malpractice be given pre-suit notice. The statutes were amended over time to add a pre-suit investigation requirement and later additional procedures.

The requirements now are quite complicated. The plaintiff must first complete a pre-suit investigation to determine if there are reasonable grounds to believe a doctor’s negligence caused a plaintiff’s injury. That investigation requires opinion of a qualified medical expert. The qualified medical expert must provide an affidavit under oath of reasonable grounds to support a claim of medical negligence.

The plaintiff must then send each prospective defendant a Notice of Intent to Initiate Litigation for Medical Negligence with the medical expert opinion. After receipt of the Notice, each prospective defendant is required to conduct a review to determine liability of that defendant. The review must meet statutory requirements to insure a fair and prompt evaluation of the pending claim.

Once the Notice is received by a prospective defendant, the parties are required to share documents and information about the claim and can take unsworn statement similar to a deposition. The goal of mandatory information sharing is to help each side better evaluate the claim in the hope the claim can be resolved without suit.

Before end of the 90-day investigation period, the prospective defendant is to give a response. The response can reject the claim, make a settlement offer or make an offer to arbitrate in which liability is admitted with arbitration limited to amount of damages (the offer to arbitrate can include a cap on possible damages). If no response is given, it is deemed a complete rejection of the claim.

The legislature figured all of that investigation might be for nothing without making sure the potential plaintiff is fully informed. So, the statute requires the plaintiff’s attorney provide the client with exact nature of the response, terms of any settlement offer, legal and financial consequences of accepting or rejecting the offer, evaluation of time and likelihood of success on the claim and an estimate of the court costs and attorney fees to proceed through trial. All of this has to be given the client within 30 days after receiving the response.

All of this takes time and might extend a claim beyond the 2-year statute of limitations applicable to medical malpractice cases. But, as long as the plaintiff serves the Notice of Intent before the statute of limitations would bar the claim, the limitations period is extended until 60 days after end of the investigation period or, if later, the end of the 2 years.

Medical malpractice cases are some of the most expensive and difficult to take through trial. The legislature has tried to help settlement and avoid suit with these statutory mandates. In so doing, the legislature also set a tarp for a plaintiff who makes a mistake trying to work though the pre-suit requirements. Failure to meet all the requirements can bar a claim.

***William G. Morris is the principal of William G. Morris, P.A. William G. Morris and his firm have represented clients in Collier County for over 30 years. His practice includes litigation and divorce, business law, estate planning, associations and real estate. The information in this column is general in nature and not intended as legal advice.***