Gerry's 2009 Law Guide for New Yorkers

By Gerry Oginski, Esq.

Before You Hire An Injury Lawyer

Read This Book!

I personally guarantee you'll learn things you didn't know before that will make you a better, informed consumer.

Author Info:

Gerry Oginski has been in practice since 1988 as a trial lawyer exclusively in the State of New York. While in law school he worked for a defense medical malpractice insurance company, and began working full time at an aggressive Wall Street law firm handling defense injury and medical malpractice cases. Four years of experience later, he began representing injured victims in injury cases and medical malpractice. Four years after that, he joined forces with a large law firm in Queens, N.Y. where he was the senior trial attorney handling all of the firms' medical malpractice cases. Six years later, Gerry decided he could best serve his clients by opening his own office for the practice of law.

As of September 1, 2002, Gerry has been a solo practitioner, and the name of his firm is: The Law Office of Gerald M. Oginski, LLC. Having his own law firm, he is able to provide the personalized, individualized attention to each and every client. “In our office, a client is never a file number. Client's are always treated with the respect they deserve and expect from a professional.” Mr. Oginski is always aware of every aspect of a client's case from start to finish.

Gerry participates in continuing legal education every year on wide ranges of topics including trial practice, jury selection, cross-examination, evidence, wrongful death, negligence and medical malpractice.

Published by: The Law Office of Gerald M. Oginski, LLC
Author: Gerald M. Oginski
25 Great Neck Rd., Suite 4
Great Neck, NY 11021
516-487-8207

Email: lawmed1@optonline.net

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"WHAT IS THIS GUIDE
&
HOW CAN IT HELP ME?"

"This guide is an easy-to-understand explanation of how lawsuits, like yours, works. It's a perfect guide for consumers and injured victims to become better informed about the law, how lawyers handle cases, and how your case gets through the Court system."

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Here's how it all starts-

A car accident, a medical mishap in the operating room, a misread x-ray, a misdiagnosis, a slip and fall on ice and on and on it goes. Only days or weeks later when you're staring at your bedroom ceiling or hospital room do you or your family start to ask questions like "Why did this happen?" "Could this have been prevented?" "What could have been done differently?" "Who's to blame here?"

The questions are simple to ask. The answers are not always that clear-cut. If they are, anger becomes a common theme I see. Anger toward another for the injuries, the hurt, the pain, the cure, and the time spent away from your ordinary routine and your family is understandable.

Unless you've been in this situation before, how do you know where to turn for answers? So many questions…so many bills…so much time lost from work…who to ask? Who could possibly know the answers to these questions? Ahh! A lawyer, of course! But which one, how do I choose?

PICKING A LAWYER-

That's the 1st challenge! Picking a lawyer out of a sea of thousands is a daunting task. Who's the best? Who can I trust? What's their record? Who has the most experience with my type of case? What do they charge? Why can't I just go to the guy down the street at his little storefront office? Selecting the right attorney is never easy. But, with the information you're going to get in a few moments, you might just make your search a bit easier.

The question of fees, looking in the yellow pages, and whether you even need an attorney, are very common questions. The better informed you are about your choices, the better decisions you'll be able to make about your legal case. Start reading these questions and answers to start your journey to being the best informed person you can. After you've read these, we'll move on from there…

Q: Is there a fee to call you about my case?

A: There is absolutely no fee to call me and discuss your case. Nor is there any fee to meet with me in

my office or your home.

As an injury attorney, I work on contingency. That means that I only accept a case if there is merit, and only if we believe, after a thorough investigation of the case, that you are entitled to compensation. I earn a fee only if I am able to obtain compensation for you.

If I am not able to obtain compensation for you, then I receive no fee. This is standard in New York for cases involving injury claims and medical malpractice matters. In a case where we are unable to get you compensated for your injuries, the law says that the client is ultimately responsible for any litigation expenses related to the prosecution of the lawsuit.

It has been my practice that I do not ask the client to repay my litigation expenses in the event their case is lost. It's bad enough to lose a case that you truly believed had merit. It would make it even worse to then compound that devastation with a bill from the attorney asking to be repaid for all the trial and litigation expenses. In my opinion it's simply bad business. I don't do it. However, I know attorneys who do. So, before hiring an attorney, please make sure you ask them whether they require repayment of their expenses in the event you lose your case.

Q: Why do some lawyers advertise?

A: To get business. It's the same with many businesses. A member of the public who is injured may have no idea who to turn to when an injury has disabled them. They are inundated by daytime lawyer ads on TV. We see the ads on billboards, in the yellow pages, even in the newspapers, and also on the radio.

If you take a look at your yellow pages, look under "Lawyers." You are bound to see 30 to 40 pages of lawyer ads. Just think about all the money the phone books make from lawyer advertising. Why? Because most people don't know a lawyer, and they've been conditioned over time to look to the yellow pages for someone when they need a service. (This is true for plumbers, electricians and many trades).

Just because someone has a full page ad in the yellow pages doesn't mean that person is qualified to handle your case. Look at my free special report in the 'Library' section of my website www.oginski-law.com that discusses lawyer advertising, and how to choose an attorney. It gives plenty of important information about what you need to know **before** hiring an attorney.

Q: I was looking in the yellow pages for an attorney-I'm so confused! There are so many ads and they all say the same thing. How do I choose the right one for me?

A: When you look in the yellow pages for an attorney, keep in mind that not all lawyers advertise. Of those that do, remember that the lawyer that pays the most for the biggest ad is placed at the front of the lawyers section. Does that mean that he or she is the best lawyer for you? Not always.

Look critically at the ad. Is the ad telling you how great the lawyers and the firm are? Or are they explaining to you how they can help you and answer all your questions? Is the ad filled with corny photos and cartoons showing injured people and crashed-up cars? Or how about a person in a wheelchair

holding up a really large check for a lot of money? Did you know that the New York State Bar Association frowns on lawyers with ads that show injured people holding up checks, or even sitting with a pile of cash? In fact, it's not even ethical to have such an ad in New York, since it would imply that the lawyer can get this type of result for every client.

While that might be nice to do, in reality it doesn't happen all the time. The State Bar doesn't want unsuspecting and unknowing members of the public to be lured into such an ad with misleading advertising.

Lawyer advertising must abide by specific State rules that govern them. Remember, it's not always the largest ad that's going to catch your eye. Many lawyers think if they have a larger ad, the consumer probably thinks that he (or she) is the best because they have the largest ad. Not true. It simply means that they paid for the biggest ad, and got the first placement. What about those other full page ads for lawyers that come after the first one? Aren't they just as good (or bad) as the others?

Could be. But you shouldn't judge how good an attorney is just by the size or graphics in an ad. There are ads in many yellow pages that fill not one, but two full size pages! It costs an absolute fortune to do this. But some consumers may think that if a lawyer can afford to pay such extravagant amounts of money to the yellow pages to attract clients, then he (or she) must be doing something right. Again, this is not necessarily true.

There is a school of thought that says, "I only need one good case to pay for my ad for the year. If I bring in a minimum of two cases, then the ad has already paid for itself." Interesting thought. But what if the ad doesn't pull in any clients? Then the investment didn't pay off.

To answer your question: What to look for? An ad that gives you answers; that explains the process to you; that tells you the firm won't hesitate to explain everything you ask; and gives you the information *for free*. See if they offer you free reports filled with useful information ***BEFORE*** you ever step into the lawyer's office. Take a look at their website and see what type of special free reports they give you; or what types of questions and answers they provide.

Then make your own informed decision and call the attorney you feel will provide you with the best assistance- not just how big the ad is.

Q: Why Shouldn't I Let My Family Lawyer Handle My New York Medical Malpractice Case?

A: Have you ever wondered why there's so many lawyer advertisements?

It's because lawyers think that injured victims don't know how to choose an attorney on their own. Guess what? They're right! If you've got a billboard in front of you after you've been injured that says something like "Is your car totaled? Did you break your bones? Call our law firm..." Isn't this a call to action? Sure it is. But is this the best firm for you? Let's see.

Your family lawyer is great to have general legal issues taken care of; preparing your will, maybe some business matters, parking tickets, small claims court, or maybe even some personal injury. When you've

been injured by a doctor or a hospital, your family lawyer is probably the first one you're going to turn to for advice.

But, is he the right person for the job? Maybe, maybe not. Medical negligence, or medical malpractice is a very specialized area of law. Extensive knowledge of medicine, while not required, is often helpful in prosecuting a malpractice case. The defense lawyers who represent the doctors and hospitals are usually a sophisticated group of trial lawyers.

You want your attorney to be familiar with the defense attorneys, and you want your attorney to have experience handling, prosecuting and trying malpractice cases.

It'll do you no good if the biggest case your family lawyer has had involved a minor injury or a 'soft-tissue' case. Ask your family lawyer if he handles malpractice cases regularly. Having a few personal injury cases, does not make him an expert trial attorney in a malpractice case.

Nor should you let your family lawyer put your case into suit to try and 'squeeze' a few dollars out of the malpractice insurance company for a quick settlement. Why? Because it doesn't work with malpractice claims. The insurance company will quickly realize that your lawyer doesn't have the ability to take your case to trial, and your case will suffer because of it.

A law firm that has taken cases to verdict and is not afraid to try a case stands a better chance of getting a good result, than a lawyer just looking for a quick settlement.

Just remember- your family lawyer may be a great lawyer- but think long and hard whether you want him (or her) to handle your malpractice case. Ask lots of questions, and choose wisely.

Learn Why Some People Need a Big City New York Law Firm for Their Malpractice Case

The answer is simple.

The reason some people seek out a big city law firm for their malpractice case is because they feel that only a New York City law firm can handle their type of case. Or, the injured victim feels that a certain firm has a stellar reputation that other, smaller firms just don't have.

Why go into the City when you don't have to?

This brings us back to the question of why someone would seek out a lawyer in the City. People have impressions of lawyers and doctors and professionals. There are some very good large malpractice firms in New York City. There are some excellent small malpractice firms on Long Island. Where you choose to go should **not** rest on your impression of an office at a fancy address in the City.

Rather, your decision about what lawyer or firm you choose should be based on what the lawyer can do for you.

1. What is the lawyer's experience handling your type of case?

2. Is the lawyer a solo practitioner who can give you undivided personal attention, with a track record of successfully helping his clients?

3. Is the firm you're going to a 'mill' where you're just another file number?

4. How many attorneys in a big firm will work on your case?

In all probability, even solo practitioners have the same access to electronic, online legal research that big firms do. So what's the difference? Personalized, individualized attention.

In a big firm, the lawyer who you meet with at your first meeting, most probably will not be the one who tries your case. In fact, that trial attorney may never have met you before getting your case ready for trial.

When you call the office, how many secretaries, paralegals, associates and junior partners do you need to go through to finally reach the senior partner handling your case?

With a solo practitioner, one call does it all.

So, to answer the question, why do some people need a big city New York malpractice firm?

They don't. They just think they do. Wherever you choose to go, just make sure your attorney is right for you.

4 Things Your New York Injury Lawyer Looks

For When You Show Up In His Office

When you need to find an injury lawyer, you need to ask lots of questions. You might meet with more than one attorney before you feel comfortable with your choice of lawyer.

When you arrive in his (or her) office, you look around, look at the diplomas on the wall, look at how the office is run, and look at the furnishings. What does this tell you? Does a messy office reveal a lawyer who can handle your case? Does a clean office mean your lawyer has no other clients? You don't know from the looks of it. Use your gut instinct to tell yourself whether you can put your trust and your case in his or her hands.

At the same time you are deciding whether this lawyer is the right one for you, the lawyer is also looking at you to see if you are the right client for him. Here's what a lawyer, practicing in New York will look for in a client.

1. Honesty.

The client must be straightforward and honest about what happened to them. They must let the attorney decide what facts and information are important. We don't want a client who is selective about what they say. We also need to know a client's past history; were there any skeletons in the closet? Any convictions? Any prior lawsuits? We need to know in order to better help you.

2. Presentation.

How does the client present themselves when they talk to you? Are they quiet? Are they loud? Are they well dressed? Do they look at you when they respond? Are they comfortable telling what happened?

This is very important, because your lawyer is looking to see what type of witness you will make if your case has merit and ultimately goes to trial.

3. A Desire To Seek Help- Not Vengeance

There are some clients who come into a lawyer's office so outraged that they were harmed by someone else that all they want is revenge. That's a normal, healthy feeling. There are other clients who come to us asking for help because they can't pay their medical bills or their mortgage because they can't work from their injuries.

A client who seeks revenge is volatile and unpredictable on the witness stand. That doesn't mean they don't have a valid case. It simply means that it's going to be tougher to help this type of client, because no matter what the lawyer does, it probably will never be enough.

A client who genuinely seeks help and compensation to right a wrong is the perfect type of client a lawyer seeks.

4. A Desire To Get Better, and Improve Themselves.

There are some clients who want to 'milk the system'. They're waiting for their payday and will simply sit home and wait until their settlement comes. For those folks, they live for their lawsuit.

For many others, the lawsuit is a means of support to pay their expenses, to be able to afford surgery to correct their problem, and as compensation for their suffering. The client who is doing everything possible to get their life back to normal, is the ideal type of client. Some people want to return to work, even if they're in pain. Others are content to stay at home and watch TV while recuperating.

As with all types of cases, each one is different, and each case has it's ups and downs. Next time you're deciding upon what lawyer to use, keep in mind that your lawyer is deciding whether he'll choose you too.

Top Ten Things To Look For In A Medical Malpractice & Personal Injury Attorney

Being injured is no fun. Not knowing where to turn, who to trust, and what to do about your medical bills is frustrating.

Most people will never need a malpractice lawyer. That's good. Most people will never need a personal injury lawyer, and that's good too. But there are folks who do get injured because of someone else's fault, and they're the ones who DO need an attorney.

Maybe you know of a friend of a cousin who was related to someone who knew an attorney. You could call him to ask him questions about your accident. Maybe you could look in the Yellow Pages and call someone who has a big ad. Maybe you could walk into a storefront lawyer's office, right off the street. Maybe you could call the 800 number on a billboard you saw. You could do all of these things and maybe you'd be ok. Then again, maybe not.

The purpose of this article is to provide you, the consumer, with information about what you need to know BEFORE you ever step into a lawyer's office. I know some lawyers who want to wait till the client gets into their office to explain to them their options. This way they can show off how brilliant they are- and maybe they are. But why not give the client information about how to choose an attorney, and let the client make their choice about who to use.

But, how do you choose among the many lawyers who advertise for your attention? The answer is not an easy one. Remember, not every lawyer advertises. Of those that do, not all of them are trial lawyers. You must ask.

So, here are the top ten most important things you need to look for in a medical malpractice or personal injury lawyer:

1. **Experience**

How many years has the lawyer been in practice? The greater experience, the greater likelihood this lawyer has seen cases like yours, and knows how to handle your case.

2. **What type of firm does the lawyer have?**

Is he part of a big law firm, or is he a solo practitioner? Just because the lawyer works in a big firm doesn't necessarily mean it's better for you. Likewise, just because an attorney is a solo practitioner doesn't mean he's not capable of successfully handling your case.

There are many advantages to using a solo practitioner- you get individual, personalized attention; an attorney who knows everything about your case; an attorney who returns your calls promptly; and someone who doesn't take on more cases than he can manage.

With a large firm you might have multiple attorneys handling different aspects of your case; different attorneys appearing in Court for conferences; your phone calls may not be returned as quickly as you'd like- but at the same time a large firm might have more resources than a solo practitioner such as paralegals and associates.

Ask your prospective lawyer whether he delegates his work to his junior people, or does he do it all himself? Does he return your calls, or does the junior lawyer call you instead? Does the paralegal do all the paperwork, or does a lawyer do it?

3. **Where is the lawyer's office?**

This is important only for people who are solely concerned about convenience. Some lawyers have multiple offices. If you're concerned about going to someone whose office is in the City, and you live in the Suburbs, keep in mind that most likely, you will not need to physically go to his office more than a few times. He should be readily available by phone or email.

If traveling to an attorney's office is still a concern, ask whether the lawyer can travel to your home. Most attorneys will accommodate a client, if they are physically unable to travel. However, if the client is simply reluctant to travel, then there is a very important reason to have the prospective client come to the lawyer's office: (1) To see how the lawyer operates, and (2) So the lawyer can see how the client adjusts to being in an unfamiliar setting. This last part is vitally important to an attorney who evaluates you as a potential witness at trial.

4. **Do you email clients?**

Do you send regular updates by letter or email? If I have a quick question, can I email you instead of calling you on the phone?

5. **"When my case comes up for a deposition (a question and answer session with your lawyer and the lawyers for the people you have sued) will you be there with me, or will I have one of your junior associates?"**

This is very important. You're hiring a lawyer. Some people hire a law firm and don't care who works on their case. An injured victim SHOULD care, because they want to be treated with respect and attention they deserve. In some firms, the lawyer you meet with will not be the one who appears at your deposition with you. In fact, depending on how busy the law firm is, it's possible that the lawyer you meet with may not even try your case!

That's why you've got to ask: "Will you be there at my deposition?"

6. **"When my case comes up for trial, will you be there with me, or will I have one of your junior associates?"**

Again, this is a very important question. The lawyer you get to know at your first office visit may not be the lawyer who tries your case. You may only get to meet your trial lawyer a few months before your trial starts. I know many people who don't like that approach to lawyering, and others simply don't care. As an injured victim looking for a lawyer to represent their interests, I can only suggest that you should care.

However, keep in mind that there are law firms in New York, and elsewhere, that have dedicated trial lawyers. Their job is ONLY to try cases. Their other partners or associates handle the other parts of your case. In some other firms, you get one attorney and he (or she) handles your case from start to finish. Find out from your prospective attorney which one you can expect.

7. **ASK THIS QUESTION TO EVERY ATTORNEY YOU SPEAK TO: How much is my case worth?**

Why? Because there are some attorneys who will claim, on your very first visit that your case is worth a ton of money- some even say "Millions!" Others are not so cavalier, and take a more cautious approach.

If a lawyer tells you your case is worth Millions, ask him to put that in writing. Why? Because no lawyer can promise or guarantee any outcome to a client. Watch what happens when you ask that lawyer to put his 'guarantee' in writing. He'll quickly backtrack and make some excuse for not putting it in writing. Be careful of an attorney who makes such promises without thoroughly knowing all the facts of your case, and without having reviewed your records.

8. **What are your success stories? What's your record?**

It's important to know how an attorney has done in the past on other types of cases. What results has he achieved recently?

Obviously every case is different. But you still need to know whether he's ever achieved large settlements or verdicts. If the biggest case he ever handled was small claims court, then maybe this attorney isn't right for your type of case.

9. **Does he have a web site? Does he advertise?**

Does he have a presence on the internet? Why is this important? You want to know what type of material he has on his website. Is it a basic information card with bland material, or does he provide a reader with important information they need to know to educate them, BEFORE, they ever call him or walk into his office.

10. **Does the lawyer offer a prospective client free reports to educate them about their options BEFORE they ever call?**

Ask if they have free reports about your type of case. Not some canned brochure that anyone can stamp their name on, but a real substantial report that discusses your type of case. Can the reports be obtained directly from the lawyer's website, or by calling his office for a copy?

Knowing this information will make you a better informed consumer. Hiring a lawyer is an important part of learning about your legal rights. Ask lots of questions and trust your instincts about any lawyer you speak to. Good luck.

Why You Shouldn't Rely on a Lawyer Who Tells You Your Case Is Worth Millions

"I went to two other lawyers before coming to you. Each of them told me my case was worth millions. Why aren't you telling me the same thing?"

A: Simple. What those lawyers did was tell you something they could never guarantee.

There is no way for them to know how much money they could obtain for you, especially before any case is started on your behalf. Even if I were to give you a number that I believe you are entitled to, it would be absolutely wrong. I could give you a wildly outrageous number or a very small number. Both would be wrong.

At the beginning there is so much information to obtain about your injuries, your medical records and how your injuries have affected you that it is impossible to tell you what your case is really worth at the outset.

It's true that there are similar cases that we may know the value of, but remember, each case is different, and each case has different facts that can make it difficult to compare with yours.

The job of a good lawyer is to gather ALL of your information, and then formulate the chances and likelihood of success of your case. A lawyer who does that stands a much better chance of explaining to a client the approximate value of their case.

I'll let you in on a little secret. I suspect that those other attorneys who told you your case was worth millions did so primarily to have you sign up with them as opposed to going to another attorney.

No matter what any lawyer says, it is impossible to guarantee such a result. If you don't believe me, just ask the lawyer to put that promise in WRITING. See how quickly they backtrack when you ask them to do that!

Autopsies - Do I Need An Autopsy To Prove Our Death Case?

Q: What is an autopsy, and why would it help my case?

A: An autopsy is an in-depth examination of a dead person, by a doctor. The doctor who performs the examination is usually a pathologist who looks to find the precise cause of death. They do this by looking at all of the internal organs, including the brain, heart, lungs, liver, kidneys, and spleen. Each area of the body is examined for evidence that contributed or caused that person's death.

In a case involving claims of wrongful death (where a person or family has claimed that their loved one died because of someone else's carelessness) having an autopsy is crucial to proving your case. While an autopsy is vital to support such a case, it can also shed light on the possibility that your loved one did not die as a result of wrongdoing.

It's a double edged sword. The autopsy could help your claim by showing that your loved one died from wrongdoing, or it could show that the treatment or actions that happened before death did not play a role in causing the death.

There are some religions that prohibit autopsies, and in those cases, it becomes extremely difficult to prove, with a reasonable degree of probability, that wrongdoing (such as malpractice) caused their death. In those cases, we must rely on other evidence to support our claim.

I am often called upon by grieving families to ask whether an autopsy should be performed on their loved one. As in life, there are no set answers to this crucial question. Emotions run high following a family death; questions about improper treatment may cloud a family's judgment; uncertainty about the cause of death may also add to a feeling of helplessness.

The most common case where an autopsy is performed is in a traumatic accident. In murder or homicide cases autopsies are always performed as the police want to know exactly what caused the person's death. They can usually use this information to track the perpetrator.

In New York, if a person dies suspiciously, or within 24 hours of having had surgery, an autopsy will usually be performed to determine the precise cause of death.

For example, I had a case where a man on dialysis came home one day, and was found later by his family in his bathroom having bled to death. The walls were covered with blood and there were open bandages all over the floor. An autopsy was able to confirm that the man's shunt (the place where the dialysis needle was put into his arm each session) had gotten infected and progressively larger with each session. Nobody recognized that he was starting to bleed when he left the dialysis center. Unfortunately, when he arrived home, the shunt ruptured and since it was connected to an artery, blood shot out all over the bathroom, creating what looked like a murder scene. It was only through the autopsy that we were able to prove our case successfully.

Autopsies are usually performed by the County Medical Examiner. In the five boroughs of New York City, Brooklyn, Bronx, Queens, Manhattan and Staten Island, autopsies are performed by the New York City Medical Examiner's Office. In Nassau, it's the Nassau County Medical Examiner, and in Suffolk, it's the Suffolk County Medical Examiner.

Depositions- Can I Be In the Room When You Question The Doctor Who Botched My Surgery?

Q: When you question my doctor at a deposition, can I be present? Can I ask questions too?

A: During a lawsuit, each side gets to question the other side during a procedure called a deposition. (It's also called an examination before trial- EBT). During a deposition, it's an opportunity for me to get specific answers about what happened to you or your loved one. There are important strategies used by experienced trial lawyers when questioning a doctor in your case.

Not only are we trying to establish facts, as the doctor recalls them, but are also attempting to lock the doctor into a position about what was done for you, and why. I will always ask the doctor to read his treatment record, and then have him or her explain the reasons for treating you the way he did.

As a victim or family member of a loved one involved in the case, you are always welcome to be present when I question the doctor at his deposition. However, I must caution you that sitting across from the person whom you believe caused you or your family serious harm is very unsettling. The urge to reach across the table and do something physical is ever-present. The urge to verbally respond to a comment by the doctor is also very strong. Please remember, if you wish to be present, you can. BUT, the focus and emphasis is on questioning the doctor, NOT your desire to give him or her a piece of your mind.

If you have certain questions you feel are important to your case, by all means discuss them with me before the deposition. You will not be permitted to ask questions yourself.

Importantly, if you choose not to be present when I question the doctor...not to worry. I can send you a copy of the transcript so you can read it at your leisure. In my experience, 99 times out of 100, my client will choose not to be present during a doctor's deposition.

Plastic Surgery - Can I bring a lawsuit against my surgeon if he destroyed my breasts?

Q: I just had a breast implants put in and I don't like the way they came out. Can I bring a lawsuit against my plastic surgeon if he won't fix them for free?

A: There are two issues here. The first is your unhappiness with the result of the breast implants. The second is whether you can sue if he does not repair the first result for free.

First- the fact that you had breast implants suggests that you were not satisfied with your physical appearance to begin with. Breast implant and plastic surgery cases are inherently bad cases for me to take because they involve subjective feelings, opinions and impressions by the patient. Specifically, the patient is not happy with how they appear initially, and after the procedure, they are still not happy with the result. Just because you are unsatisfied with the breast surgery results does not mean that there was evidence of malpractice.

There are always risks associated with any surgery. I am positive that your plastic surgeon gave you a detailed form called an Informed Consent sheet that described the procedure. You may have also been given brochures or reading material describing the risks, benefits and alternatives to this breast surgery you were going to have. Again, I assume that since you went forward with the surgery, you signed this consent and recognized that there was a possibility the outcome might not be perfect.

The second point is that you must address your displeasure with your plastic surgeon. There are times when the doctor will agree to revise the procedure at no cost to you. At other times the doctor believes he or she did a good job, but other factors contributed to the poor outcome, and he may not be agreeable to revise the procedure for free.

Remember, you are free to bring a lawsuit, but the question is whether your case really has merit, and whether it is financially beneficial for you and your attorney to proceed.

In my opinion, I do not accept plastic surgery cases unless it is clear, based upon expert medical review, that there are departures from good care (not just that the patient is unhappy with the outcome of their boob job, or nose job), that the departures were a substantial factor in causing injury, and that the injury is permanent.

Slip & Fall On Snow Or Ice - Can You Get Money For Your Injuries?

SNOW & ICE INJURIES

Winter time inevitably causes people to slip on snow and ice. They don't wear the right shoes or boots, the driveway wasn't plowed and the street wasn't sanded. If you fall and injure yourself while slipping on snow or ice, can you be compensated (get money) for your injuries?

The short answer is maybe. In any snow and ice case we look to see what the condition was like at the time you fell. If it was the middle of a blizzard and nobody had time to clear the parking lot in the middle of the night, it's not looking good to be able to prove that the owner of the property should have taken steps to clear the lot of snow and ice. The key to proving liability in a snow and ice case is whether the owner of the property knew of a dangerous condition and failed to timely act to correct it. This is called 'notice'. If the owner didn't know about a dangerous condition, how can he be held responsible for your injuries? He won't be. But, what if the icy condition existed for a few days or weeks? Everybody who lived nearby always saw the ice and nobody ever salted or sanded the ice. In that situation we would argue that the owner of the property knew, or should have known, that there was a dangerous and icy condition on his property.

What if someone actually tells the owner of the property about an icy area of his lot and he doesn't do anything to fix the problem? Well, as long as nobody gets hurt, he's avoided a lawsuit. However, if someone does get injured at that location, after someone has specifically notified him of a dangerous

condition, and he fails to correct the danger, then in all probability he will be held responsible for failing to prevent injuries at that location.

Sometimes, the owner hires a snow removal company (a snow plow) to plow the driveway, street, sidewalk or parking lot. In some cases, these snow plow companies don't do a good job and leave piles of snow in areas where they will melt, re-freeze, and then create sheets of ice throughout the property. If the snow plow or property owner knew that putting all that snow at the top of the hill wasn't a good location, there are some cases where the owner or snow plow operator will be held responsible for your injuries.

If you fall and are injured during the winter months it is very important that you do three things:

(1) Look around to see what you slipped on. Take a mental note about the conditions where you fell and the surrounding conditions.

(2) When possible, get photographs of the condition as soon as possible after you fell. This will preserve evidence of what the area looked like when you fell. Make sure you take at least an entire roll of film, from all different angles. Don't just take a picture of the ice. Look for a street sign, a building, and an address that can also get in the picture. This way you can positively identify the location where you fell, at a later date. If you use a digital camera do not ever make any changes or alterations to your photos when you provide them to your attorney.

(3) If you don't go to the hospital or a doctor immediately, you should report your accident to the owner of the property to put them on notice of your accident.

Injuries from slipping on ice or snow can be very serious and can include broken bones and the need for surgery. Take time to think whether this could have been prevented. Or was your fall simple carelessness that could have been prevented if you were paying attention to where you were walking? The answer is sometimes difficult to answer. That's why an experienced injury attorney can help guide you and advise you about your legal rights. The longer you wait to speak to an attorney, the greater chance you have of forgetting important information that could help you in a potential case.

The best advice is to be careful while outside and to make sure you're wearing the right winter gear. But even that doesn't always prevent an injury.

Ice skating injuries - They happen. It's a fact. Even to experienced skaters. You will always see big signs posted at every entrance to every skating rink in New York that ice skating is a dangerous sport. The warning will say that you "Skate at your own risk." That is the same as saying buyer beware!

We know that many sports are inherently dangerous, yet millions of people aren't going to stop participating in dangerous sports just because of the obvious dangers. Just the other day, Newsday reported on a tragedy involving a 15 year old girl who died while snow tubing at Killington Ski Resort in Vermont. Importantly, this girl and her teenage friends were on a skiing slope that had already closed for the day. The incident happened at 7:00 p.m., and the key fact here is that the slopes closed at 4:00 p.m. There were signs posted all across the ski resort that slopes were off limits after 4:00 p.m. because of snowmaking and snow grooming activities. Also, there was no snow tubing allowed on any ski slope.

What happened? The girl could not control the snow tube and went off the trail, tragically causing her death. Is the resort responsible for her untimely death? In all likelihood the answer is no. She engaged in a dangerous activity, in a prohibited and restricted area. The snow tube is uncontrollable- which is what makes it so much fun. However, snow tubes are typically used in special areas or chutes designed to keep the tubes in a runway style area, so that there is no way to run off a trail.

Many people have tried to sue skating rinks and ski resorts for injuries they suffered while engaging in these fun filled but dangerous activities. Most have failed. On occasion there have been successes, but those are the exceptions. Where you actively choose to engage in a dangerous activity and disregard the hazards and dangers associated with that activity (rock climbing, water skiing, sky diving), you run the risk of injury and the chance that you will not be able to bring a successful lawsuit for your injuries. But remember, every case is different. Let an experienced injury attorney evaluate your own case.

Be careful out there this winter, and have fun while you can.

CAMP INJURIES- 7 Things You Must Know

WHEN AN INJURY HAPPENS AT CAMP, HERE'S WHAT YOU NEED TO KNOW:

The call you never want to hear is made to your home…

"Your son was injured in the dining room…he fell through a window…"
"Your daughter was burned with hot coffee in the dining area…"
"Your child was hit in the head with a baseball…"
"Some kids were horsing around and your son broke his leg…"

Where do you turn? What do you do? Here's a checklist of what you need to do immediately:

1. Find out exactly where your child is now. Make sure he or she is receiving the appropriate emergency medical care. This is no time for accusations or recriminations…that's for later. DO NOT YELL, KICK OR SCREAM AT THE JUNIOR COUNSELLORS who may have been involved in your child's injury. This will get you nowhere. They will become defensive as they are young and inexperienced, and most often do not yet know how to accept responsibility for bad outcomes while on their watch.

2. Find out what happened from the Head Counselor, not the junior counselor who should have been watching the kids. Make notes of your conversation with whomever you speak to.

3. Demand that this incident be investigated immediately, and that an incident report and witness statements be obtained right away.

4. Demand that you receive a call back later that day from the head of the camp or the Head Counselor with all the details of the incident.

5. If your child is at sleep-away camp, find out if your child is being admitted to a hospital; if so, make arrangements to get there as soon as possible. Ask for the name of the specialist who will treat him.

6. Make sure you keep all medical and hospital bills. In many cases, depending on the facts, you will be submitting them to the camp later for reimbursement.

7. Once your child's health is stabilized, then start to focus on why this accident happened; why the counselors were not paying attention; why the kids were permitted to horse around; why there was loose glass in the dining area; and importantly, could this have been prevented?

As parents we know that accidents do happen. However, there are many times where the accident was foreseeable and steps should have been taken to prevent these accidents from happening. We send our children to camp to have an enjoyable, safe, friendly environment where their memories will last a lifetime. We don't want them to have nightmares about something that should never have happened.

When an accident happens, you need to ask lots of questions. Then you need to speak to an attorney with experience handling accident cases in order to protect your child's rights.

15 Key Deposition Techniques in a Medical Malpractice Case

QUESTIONS TO ASK THE DEFENDANT DOCTOR

WARNING:
Preparation is the entire key to a doctor's deposition. You must spend countless hours reviewing the entire file, reviewing all the medical records, notes and entries in the chart. You must know and review your theory of liability, causation and damages before you begin to review the file. You must keep track of anything in the chart that will help you in your quest to prove each element of liability, causation and damages.

1. Most lawyers ask the same boring questions at the beginning of every deposition:

a. State your name and address
b. State your qualifications, pedigree, schooling, etc.

Comment: OK, this is fine, but very boring and very expected by defense counsel and the doctor. Mix it up a bit. I advocate never starting a doctor's deposition this way. Why not go right to the heart of the case with the very first question? You can always get the doctor's credentials later or at the end. Besides, the credentials are usually found online or in a curriculum vitae, and don't help except to establish where he went to school and whether he's board certified in any specialty. On more than one occasion the doctor has been disoriented by this approach. They are usually prepared for questions in a lock-step

manner and do not expect something so unusual, but legally permissible set of questions right off the bat.

2. Go ahead- ask why they operated on the wrong side of the brain as your first question. "Objection, no foundation," says the defense attorney. "So where does it say in the CPLR I need to lay a foundation question?" Despite this exchange of 'ideas', if you get such an objection, then simply ask:

a. "Didn't you operate on my client on this date?"
b. "Isn't it true you operated on the wrong leg?"
c. "Why?"

3. I always advocate asking the 'why' question at deposition. It is much better to know the reasons why a doctor did or didn't so something now, rather than save the question for trial. At trial, the reason may be devastating to our case, and if so, I want to know about it now. Besides, when you question a doctor at trial, as an adverse witness, you never want to ask a question in which you don't know the answer. If you do, you subject yourself, your client and your case to inherent risks that could jeopardize the case.

4. Make the doctor read his notes into the record. This is important for anyone who is trying to decipher the doctor's handwriting later on. Your expert will definitely need to know whether the scribble is important, and the only way to do that is if the doctor explains, on the record, what his scribble means.

5. Be polite. At all times. You can't imagine how many lawyers don't listen to this recommendation. They think they know it all, are sarcastic, belligerent, annoying, and really annoy everybody in the room. The doctor's attitude in responding changes as well. No longer is the doctor as verbose. No longer does the doctor look like the perpetrator. Rather, he might begin to look like a victim if attacks against him and his credibility are kept up.

6. You can still make all your points without being hostile, angry, yelling or screaming. The old saying 'you get more with honey than with vinegar' speaks volumes. Naturally, you're not going to bend over and sweet talk your way to getting the doctor's admissions about how he screwed up. But, the key is being professional and knowledgeable. You gain more respect from your adversary- (don't worry about respect or lack of it from the doctor) by being respectful than you do if you are antagonistic.

7. There are times when you want to rile the physician. You want to know if you can push his buttons. You want to know how easily it is to rankle his composure. If it's easy to do at deposition, your trial strategy toward this witness just got that much easier.

8. Find out about conversations the doctor had with the patient, family members and other doctors. Remember, conversations are rarely recorded in a hospital record. Make sure you ask the doctor to confirm or deny comments that your client has testified about. Most often, the doctor will claim they no longer recall the conversation. But, if your client does, it's much more possible that the conversation occurred. If the doctor denies making certain comments, then you know you have different facts about the same conversation, and a jury will have to ultimately decide who is telling the truth.

9. Ask whether the doctor has ever had his license to practice medicine suspended and/or revoked.

a. Ask whether their hospital privileges have ever been suspended or provoked.

b. Always ask whether the doctor has given testimony before.

i. Ask whether it was an expert for plaintiff or defendant
ii. Ask whether they were a treating physician
iii. Ask what type of case it was, and the name of the case
iv. Ask whether they were paid for their time in Court to testify in that matter

10. In New York, in a medical malpractice deposition, you must ask opinion questions. The doctor- as a defendant is required to answer 'expert' questions and give answers about his medical opinions.

a. Do you have an opinion, with a reasonable degree of medical probability whether the treatment rendered to Mrs. X was appropriate and within the standard of care?

b. If you have an opinion, what is that opinion?

c. Confront the doctor with other opinions in the medical community that disagree with his school of thought and ask what he thinks of those opinions.

d. Ask the doctor to admit to certain facts- Here's an example:

i. Isn't it true the patient got Ex-lax at 10 p.m.?

ii. Isn't it true that patients with colon tumors shouldn't get ex-lax?

iii. Are there any circumstances when you would prescribe this medication for a patient who had this tumor?

iv. Would you agree that if the patient got ex-lax at 10 pm that would be a departure from good care?

v. Would you agree that the only reason the patient suffered injury was because she got ex-lax at 10 pm?

vi. Would you agree that had she not gotten the ex-lax at 10 pm, she wouldn't have suffered the bowel perforation?

11. Make sure you rule out other potential causes of injury besides the malpractice that you are claiming occurred here. The reason you do this is to learn the potential defense to your case. The defense will always come up with some explanation as to why your argument is not valid. Better you should learn it during the deposition than to head to trial without knowing what their defense will be.

12. Ask many open ended questions. Ask who/ what/ where/ when/ why/ how. By doing this, you will get the doctor to talk and explain. If the doctor's is going on and on without directly answering the question- and his attorney is letting him- that's ok. Let him keep talking; you might actually get some useful information. When he stops talking simply say "Maybe my question wasn't clear doctor. What I was looking for was….can you answer that question?" Always take the blame if the doctor says the

question is not clear. Don't respond to him by asking "What didn't you understand about my English language question?"

13. Ask about medical definitions.

a. What is an endocervical curettage?
b. What is a myocardial infarction?
c. What is hypoxia?
d. Ask whether these definitions are commonly accepted within the medical community, or whether there are other schools of accepted definitions.

14. Ask whether they've reviewed any medical literature or textbooks prior to coming to the deposition.

a. Did you bring any with you?
b. Which ones did you review?
c. What did you learn from the article? Did it support your position here, or was it contrary to your position?

15. Finally, but not last, ask about credentials, schooling, licensing, board certification- but you should already have this information before your deposition when you research the defendant doctor. I always advocate doing a Google search on the physician to see if they've authored anything or if there's anything out there online that's worthwhile knowing. I recently learned from an online search where the defendant doctor was fired from his residency and sued the chairman of his department. Needless to say, this information proved very useful at deposition.

There have been many books written about how to conduct depositions. The most important factor about taking a doctor's deposition has, in my opinion, been the experience of the attorney doing the questioning. Anyone can read from a list of prepared questions. It takes an experienced attorney to listen to the answers and know where you want to go and then develop a strategy on how to get there while protecting your client's rights to the best of your ability.

Medical Malpractice: 10 Reasons Why Most Victims Won't Recover a Dime

Despite popular opinion about the "skyrocketing" increase in malpractice suits and awards, the number of suits has not increased since 1996, 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 victims to understand these issues while seeking counsel to represent their case.

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). Even more management-related injuries occur outside of the hospital. These injuries are a result of a physician /administrator's affirmative mistake, or that person's failure to act in a particular situation. Types of mistakes include errors in diagnosis, use of automated materials, and inappropriate delay of treatment.

However, one of the most common errors occurs with administering medication. The Massachusetts State Board of Registration in Pharmacy estimates that in Massachusetts alone 2.4 million prescriptions are filled improperly each year, the majority of which involve providing the wrong strength drug, or the wrong drug altogether. Each layer of communication introduces another opportunity for error. Improper diagnoses and negligent supervision of trainees are other common errors, and both have led to disastrous results in many cases. Up to 98,000 patients are killed each year as a result of preventable medical errors, the eighth leading cause of death in the U.S., yet only 10,000 cases of malpractice are filed each year. In the vast majority of cases, however, the fact that a poor medical outcome was caused by malpractice is hidden from the patient.

2. No autopsy was ever performed.

Remember that we must prove both carelessness on the part of the doctor or hospital and that the carelessness resulted in death or injury. In a medical malpractice case that results in death, it is extremely difficult 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 at least one of the reasons for the death was the negligence of the doctor or hospital.

3. A physician's poor bedside manner does not constitute negligence.

In the vast majority of cases, even egregiously poor bedside manner cannot be considered in determining whether a physician was legally negligent in providing treatment. We have reviewed many cases where arrogant doctors provided care and the patient was injured. It just doesn't matter legally that the doctor was a jerk. We must prove, with expert medical opinion that the treatment departed from good and accepted medical care, and not bad bedside manners, that caused injury.

4. The patient suffered no significant damages.

As we noted above, the legal system is not set up to handle small medical malpractice cases. We decline hundreds of cases a year where it appears that the doctor was careless but the resulting injury is not significant. A pharmacist may incorrectly fill your prescription, and you might get sick for a few days. If you have a good recovery, however, you probably don't have the basis for a case. That's 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.

5. The physician or hospital's mismanagement did not necessarily cause the injury suffered.

As discussed earlier, it is very difficult to prove that medical wrongdoing was the reason why the patient suffered the injury that he or she received. The insurance companies have many standard defenses including, for example, that (1)The injury was an unforeseeable consequence of the initial condition/injury, (2)The injury was due to the patient's non-compliance with prior medical advice, (3)The risk of the patient's particular injury was a known, recognized, acceptable risk (acceptable to whom?), (4)Some other party was responsible for causing the injury, or (5)The injury was caused by a previous illness or disease.

Medical malpractice claims must show that the doctor's substandard care, more likely than not, was a substantial factor in causing injury.

6. The injured patient has not retained an experienced attorney.

The world of medical malpractice claims is a world unto its' own. It has its' own special rules and laws. We believe that it is imperative that an experienced medical malpractice attorney or an attorney that is 'teaming up with' an experienced malpractice attorney represent you.

7. The statute of limitations has expired.

This is the time a person has to start a lawsuit. The time limit is very different for a city, state or municipal hospital than it is for a private hospital or doctor. One reason that you should consult an experienced medical malpractice attorney early is to determine when the statute of limitations expires in your case! DON'T LET YOUR TIME RUN OUT without knowing your legal options!

8. Jurors have been biased by the insurance industry.

The insurance industry has spent millions of dollars funding research to suggest that there is a widespread problem with respect to medical malpractice suits. These studies claim that excessive verdicts are causing malpractice insurers to raise their premiums, forcing physicians out of the medical profession. It has been proven that increased medical malpractice premiums have nothing to do with lawsuit verdicts! Even the American Insurance Association has said that lawmakers who enact "tort reform" should not expect insurance rates to drop! Jurors who hear the insurance company propaganda then award less of a verdict than they would normally have deemed appropriate. Unfortunately, after the verdict is reduced on appeal, malpractice victims often receive less than is necessary to pay their medical bills for treating the subsequent injury that was caused by the malpractice. Even your doctor probably believes that by capping, or reducing damage awards, this will cure all that is ill with the legal system.

Nothing is further from the truth. The medical malpractice insurance companies are in business to make money. Not to pay out money. The more they pay out in claims, the less profit they and their shareholders take home. I have always asserted that if the doctors wanted satisfaction in reducing their inflated premiums, they should look no further than their own malpractice insurance companies. By demanding rate reductions and by threatening to obtain coverage elsewhere, the insurance companies have to realize that their rates must be re-evaluated. Also troubling is why physicians have not banded together to open competing insurance companies in order to obtain reduced rates.

9. The injured patient is unable to hire good qualified medical experts.

You cannot win a malpractice case without a medical expert. A good expert who is willing to testify can be hard to find. It is becoming increasingly difficult to find doctors who are willing to stand up for what is right and to right a wrong. It takes time and money to find the best experts for your case. This is one area where insurance companies have an advantage. If they have a case that is particularly bad for their doctor, they may show the case to many experts before they find one to support the defense (or concoct a defense). They can afford to hire many experts. Most plaintiffs cannot afford to have ten experts look at their case in order to determine which expert will work 'best' for them.

Increasingly, doctor's professional groups are now attempting to bring claims against doctors who testify against other doctors. These claims seek to revoke the doctor's board certification or punish the expert doctor for testifying for a patient. This has happened recently in the field of neurosurgery and obstetrics and gynecology. The potential threat of professional repercussions for testifying on behalf of a patient will significantly inhibit many doctors from helping injured victims in seeking justice and proper compensation.

10. Juries like doctors.

Folks sitting on juries rely on doctors when they're sick. They trust their doctor. Their family uses the doctor. The doctor has trained for many years to learn their specialty. How can the doctor be faulted for something that would have happened even if good care were rendered? Fighting a malpractice case is an uphill battle. But, with proper information, the right facts, the right experts and an experienced attorney, you stand a much better chance of knowing the risks of taking your case to trial.

Accidents: 5 Deadly Sins That Could Wreck Your Injury Claim

Issues that Can Sink Your Case

Here are what I consider to be the Five Deadly Sins that can wreck your personal injury claim. These sins are based upon my experience and discussions with many judges and jurors.

1. The Client is Referred by the Lawyer to a Doctor

Local judges call this "service" the kiss of death to a claim. The problem is that jurors are highly suspicious of lawyers and doctors who have a referral relationship. While the client may not know how many of that lawyer's clients have been referred in the last 12 months to a particular doctor, you can bet that the insurance company knows it or will find out about it. How credible do you think that doctor's testimony will be when the jury finds out that he treated 50 patients from the same lawyer last year? Are there exceptions to this rule? Yes, there are. You may have a very special need for a doctor with a special expertise. It is perfectly legitimate for the attorney to make a suggestion or recommendation. If every client though, is getting referred to the same chiropractor or the same orthopedist, then that is a

huge problem. (So beware of the attorney who has a stack of doctor/chiropractor cards in his office. You need to ask the right questions and fully understand the business relationship, if any, between that attorney and the doctor.)

2. Hiding Past Accidents From Your Lawyer

Once you begin a case, the other side will be interested in knowing how many past accidents you have been in. The reality is that they probably already know the answer or have easy access to that information. All insurance companies subscribe to insurance databases and often the only reason they ask you this question is to test your credibility. If you have been in other accidents, your lawyer can investigate this and make a determination as to whether this is a valid problem in your case or not. If you do not tell your lawyer, however and you misrepresent your accident history to this insurance company, then it is almost guaranteed that you will lose your case.

3. Hiding Other Injuries

It goes without saying that you should be upfront and honest with your attorney about any injuries that occurred before or after this accident. Again, if you saw a doctor or other healthcare provider, then there is a record in existence that the insurance company will find. Your lawyer can deal with this if he knows about it. If you lie about it, and the insurance company finds out, then your case is over.

4. Not Having Accurate Tax Returns

In most cases, a claimant will have lost income. You will only be able to claim that lost income if your past tax returns are pristine. Again, being honest with your attorney is the only way to be, because he or she can deal with the problem if they know about it.

5. Misrepresenting Your Activity Level

Insurance companies routinely hire private investigators to conduct videotape surveillance. If you claim that you cannot run, climb or stoop, and you get caught on videotape, you can forget about your claim. There is no explanation (other than “You got my brother, not me!”) that can overcome the eye of the camera.

Q: Why can't lawyers in New York use testimonials in their marketing or advertising?

A: Each State has their own specific rules on what lawyers can and cannot do. If you go on vacation and look through the yellow pages under 'lawyers' you might find ads that have statements by former clients saying things like "My lawyer was the best one in the world! He got me millions, and I know he can do the same for you too!"

In New York, lawyers are not permitted to say things like this. Why? Mainly because every case is different. If we obtained a great result for our last client, doesn't necessarily mean that our next case will be a good one, or that we'd win your case at trial. The Bar Association doesn't want to give the public a false impression that a lawyer can guarantee a result, when he can't. Nor do they want potential clients to hire an attorney solely on puffery or self-laudation (showing what a great lawyer he or she is).

The same thinking applies to an ad that has a person smiling, holding a poster-sized check, with a lot of zeros after some number, giving the appearance that this person got a lot of money, and so can you.

Q: Are lawyers allowed to call themselves 'specialists?'

A: No. The ethical regulations prevent a lawyer who handles injury and malpractice cases from describing themselves as a 'specialist'. The lawyer can say that they handle only a certain type of case, and have handled those types of matters for 'x' number of years, but saying that "I'm a specialist in accident cases," is a no-no.

Q: My mother was in a car accident last week, and already she's gotten letters from lawyers asking if she's ok, and if she wants a lawyer? Is it ethical for a lawyer to send such a letter?

A: First, I hope she is feeling better. Second, in limited circumstances in New York, it may be 'acceptable' for an attorney to send such a letter to a victim of an accident. However, new ethical rules say that a lawyer may not send an unsolicited letter to a victim's family within the first 30 days of the incident.

In any event, the majority of lawyers feel such a letter to a victims' home is demeaning and degrading. Some lawyers feel this is nothing but a solicitation, which is clearly not permitted in New York. Other attorneys (the ones who send these letters) feel that it may be their only chance to entice the injured victim to come to them as a client.

The letter is supposed to only offer them legal assistance and guidance- should they want it. Again, how do you choose which attorney to use when you're inundated with a flood of letters from different lawyers promising to help you with your accident claim?

The answer is simpler than you think. Ask yourself why an attorney would even bother to send such a letter. Are they really that desperate to need to send such a letter? How did they get your name anyway? I'll tell you how- maybe it came from the tow truck operator who took your car away. Maybe it was from an ambulance technician. Maybe it was from a police blotter at the police station. (That's public information that many investigators working for lawyers troll for in various police stations).

Ask yourself another question. Do you let a stranger into your house simply because he says he saw you need a paint job, and amazingly, he's a painter who is willing to paint your house for a great price? Did you call him? No. Did you seek out other customers of his to determine if he's reliable and professional? No. He just showed up while trolling through the neighborhood. Is this the type of painter you want working on and in your house? I don't think so.

The same rationale holds true for a lawyer that sends you an unsolicited letter following an accident. What do you know about that lawyer? Probably nothing. Does that mean that he (or she) isn't a good lawyer? No. But, again, think who you want for your attorney. Does it help knowing that your lawyer gets many cases this way, by sending out unsolicited lawyer letters hoping that a few unknowing people will answer the letter? The choice, as always is yours. Make an informed choice.

Q: Are all injury and malpractice lawyers trial lawyers?

A: No. There are many lawyers who handle accident and malpractice cases and never try a case. In the trade these lawyers are sometimes called 'inside lawyers' or 'paper lawyers'. They handle the file and any paperwork associated with the case. When it comes time to appear in Court for trial conferences or for trial, that same attorney may not handle your case. Instead, there may be a 'trial man' or 'trial woman' or a 'trial attorney' in that law firm who handles the trials that come up.

When you speak to an attorney about handling your case, please ask them whether they are the one who will be trying your case if your case goes all the way to trial. You might be surprised at the answer.

Q: Do I even need an attorney to represent me in my claim with the insurance company?

A: No you don't. Some claims, and some injuries don't even warrant an attorney's involvement. But...many do. How will you know the true value of your injuries? How will you know whether the insurance adjuster who makes you a first offer is doing the right thing? How do you know whether the insurance adjuster is simply trying to save his company money by low-balling you and giving you a take-it-or-leave-it offer? How will you know what your options are if you choose not to accept the insurance company's offer? What can you do to maximize the amount the insurance company offers you for your injuries? Do you need further medical care for your injuries in the future? Have you considered who will pay for future medical expenses for injuries caused in this particular accident?

What happens if you have a recurrence of your injury weeks, months or years from now? Will the insurance company re-open this case and agree to pay me more later? Why is the insurance adjuster so willing to settle my case now? Why did they just send me a check for my injuries? Should I cash it? What will happen if I cash this check? Can I go back to them for more if needed, or is this it?

The bottom line is that you may not need an attorney at all. If you have experience with insurance adjusters, and you know the true value and extent of your injuries, then you just might be better off negotiating directly with the adjuster. BUT, if you don't...then I'd strongly recommend speaking with an injury attorney who has many years of experience dealing with these exact types of cases.

For example, if you needed eye surgery, you wouldn't go see your family doctor for treatment. If you need brain surgery, you don't rely on a skin doctor to treat your condition. Many attorneys have focused and limited their practice to just a few areas of the law. Lawyers in New York are not permitted to say they are "specialists" in any particular field of law. However, we are permitted to tell you how extensive our experience is in the areas of law that we do practice. We can also tell you how we have helped other similar clients, even though their experiences may not reflect what we can do for you. Again, beware of attorneys who claim they practice many different areas of law. It's very difficult to be good at everything.

The best thing you can do when faced with an injury caused by someone's carelessness is to become informed. Find out as much as possible about the attorney, the law firm, the facts of your case, your medical condition, the procedures you need to go through to process your claim, and what your legal options are. Only by becoming fully informed about your options will you be able to make an informed decision about which legal road you will take. Beware of the legal minefields when handling your own

case. In case you need it, find an attorney who can guide you through those legal minefields and avoid the traps that experienced attorneys commonly see.

Q: How are you different from any other attorney who handles injury cases and medical malpractice cases?

A: To answer this question, simply click on one of my free reports that can be viewed and even downloaded from my website (www.oginski-law.com). Within the different reports, I detail what I do for my clients, and why their cases are so important to me. Being a solo practitioner has many advantages to working in a large firm. I am able to give my clients the attention and dedication they need. I know every aspect of their case. When a client calls to find out what's going on with their case, I don't have to run to the file and find out what three other attorneys did on the case in the last month. I know immediately. That is one of the main reasons why I opened my own office for the practice of law.

In my office I use computers to help with the paperwork. I have staff to help with scheduling and with the phones. When you call my office, you'll get to know my secretary/paralegal. There's no voicemail here. I answer my phones when my secretary is out. My calls are forwarded to my cell phone when I'm out of the office, to make sure that my client's questions are answered immediately and promptly.

Naturally, we all get busy during the day, and if I'm in Court, or at a deposition, or on trial, I always get back to you as soon as possible. Being a good attorney to me means responding to my clients concerns, keeping the lines of communication open, and knowing as much, if not more, about their case than they do!

Q: If I can't come to your office, can you meet me in my home?

A: Sure. I try and accommodate clients as much as possible. We offer this service as most attorneys do, to relieve you of making any unnecessary trips when you are recuperating from your injuries.

There is however a very important psychological reason for asking you to come into our office to discuss your case, if you are physically able. When you enter our office, you see how we work, and what type of office we have. You get a sense of how we handle our cases, and we start to build a professional relationship. It's important for us to get to know each other since we'll be together for a while as your case winds its' way through the legal system.

More importantly, being in our office puts you in a new and strange environment. This is similar to putting you in Court on the witness chair. It allows us the opportunity to evaluate you as a potential witness in your own case. Believe it or not, but an attorney evaluates your demeanor, your dress, and your behavior when you meet with them the first time. (This even happens with attorneys who represent defendants who are sued.) They will usually determine what type of witness they think you will make at trial...even if you're a few years away from any trial.

The bottom line is that, yes, we can come to you. At some point though you also need to come to us. If you can't travel we can arrange for you to meet us in an attorney's office or bar association office near your home. Come see for yourself. There's no charge, no fee, and remember, there's never an obligation.

Q: Why do some people go from one lawyer to the next to see who is going to give them the best deal, or offer them their best chance of winning?

A: People often like to price shop. We're always taught to look for the lowest price when comparing the same items. That's perfectly fine. But with an injury or malpractice case, the attorney fee is the same whether you go to me or anyone else in New York State.

You will find that if you speak to enough attorneys about a potential case, some lawyers will tell you their 'record of successes' and the likelihood that you'll win your case. Other attorneys will not be so cavalier and be more reserved in coming to a conclusion about the merits of your case in your initial meeting. Who you choose depends a lot on what you think of the lawyer when you meet him or her.

Also, there are many people who have been rejected by one attorney and are now looking for another and another and another. Usually if a case has merit and damages, it will be accepted and prosecuted. If it doesn't have merit, that person might seek multiple consultations with other lawyers- and that's ok too.

THE INVESTIGATION

Ok, let's move on now…

We're up to the 2nd challenge. You've now searched high and low, and done your homework about which attorney is right for you. You've met the lawyer and visited his firm. You have an initial impression about whether you can trust him or her. You lawyer has told you he thinks you have a case. What happens now?

The investigation starts.

Details, leaning facts, paperwork, phone calls, trips to the accident scene, getting witness statements, getting medical records, speaking to doctors, and speaking to family members are only the beginning. Before any lawsuit can be started, a lawyer must make a full investigation into the merits of your case. Let's take a look and see what exactly happens during this investigation…

Q: Why does my lawyer have to investigate my case? Isn't it enough to simply tell him what happened?

A: No, it isn't enough.

An investigation is required to confirm that your case has merit. You've certainly heard of 'frivolous lawsuits'? Well, if a lawyer takes a case where he hasn't done his homework and files suit knowing that there's no legal basis to bring a case, you are in for a shock. In most Courts in New York, Federal Court included, you and your lawyer can be fined and sanctioned for bringing a case without merit. That's very bad, for both you and the lawyer. By performing a thorough investigation you learn the good parts of your case, and you also learn the bad parts of your case. Only by doing a complete evaluation of your case can your attorney accurately judge the likelihood of success of your case. Obviously, there are no

guarantees. However, a proper analysis means that your lawyer has done everything possible to see whether your case has merit. If so, you're off to the races to start your lawsuit.

Q: What is medical malpractice?

A: It's a departure from good and accepted medical care in the community in which the doctor practices.

Negligence is lack of ordinary reasonable care.
Medical negligence is the lack of reasonable care of a physician. The term 'medical negligence' is usually equated with 'medical malpractice'.

In a case involving medical malpractice, your attorney must do the following things:

1. Get a detailed history from you,
2. Get all of your medical records, x-rays, MRI scans and CAT scans, employment records, income tax records,
3. Try and speak to your current treating doctors (some will help and some won't),
4. Review each and every medical record, page by page, and then,
5. Take all your medical records and send them to medical experts who review and give their opinions about the treatment you had,
6. Review the expert's opinions with you,
7. Discuss your legal options, such as starting a lawsuit, or if there is no merit to your case, advising you to seek the opinion of another attorney immediately.

Q: What is "Lack of Informed Consent?

A: When you have a procedure such as surgery, your physician is obligated to inform you about the risks, benefits and alternatives to the procedure. This way you become informed about your medical options available to you.

In many instances, the physician fails to advise the patient about specific risks or alternatives to the procedure, or the patient has a bad outcome where one or more risks was not disclosed to the patient.

The key issue in this type of claim is whether the patient would still have proceeded forward with the procedure, had they, as a reasonable person, known of the risks of the procedure. If the answer is no, then there is likely a basis for a claim. If the patient would have gone ahead regardless of the risks, even though the physician may not have told them of that specific risk, then in all likelihood they would not have a viable basis for such a claim.

As you know, each case is fact-specific. Please call an experienced attorney to get an informed answer.

Q: What is "continuous treatment" and why is it important to my case?

A: This is a legal term used to describe the length of time you have continued to treat with your doctor. In many cases, after a patient has been injured by a doctor, patients unwittingly continue to see their doctor for follow-up care related to the injuries that the doctor caused. Generally, the time in which you

have to start your lawsuit starts from the date of the malpractice. However, in some cases, the time in which you might be able to start your case could run from the date of the last treatment in which you were treated by the same doctor (or hospital) for the same condition or complaint as you originally went to him about.

The specific facts must be investigated, as well as the specific timing of visits. It is also very important to know whether the doctor or their office initiated the visit, or whether it was the patient who requested the appointment. This will help to establish whether there was in fact "continuous treatment."

Q: How much time do I have to start a lawsuit?

A: The answer depends on many different facts. Medical malpractice cases have different and shorter time periods than general negligence cases.

Cases against City hospitals and clinics and State hospitals have very limited time periods in which to file a claim, and then file a lawsuit.

There is something known as continuous treatment in malpractice cases which may extend the time you have to file your lawsuit. Each case is different and must be examined in detail to see where your facts fit.

In cases involving birth injuries, you generally have ten years from the date of birth within which to start a lawsuit for your child.

There are many more...but the best thing you can do is speak to an experienced attorney to answer your question "How much time do I have to start a lawsuit?"

Q: My treating doctor says I have a valid lawsuit and he's willing to testify. Isn't this enough to start a case?

A: Maybe. The interesting thing is that doctors sometimes say the strangest things. Often, when an attorney contacts a treating doctor about the injured client, the responses are typically "Yeah, she suffered an injury, but I don't want to get involved," or "I don't have time for this," or "I'll come into Court for the patient but I'm not giving expert testimony against another doctor. Instead, I'll be happy to talk about what treatment I gave her."

When we get responses like this, we know that we have to obtain our own expert to confirm evidence of malpractice.

Q: If I start a lawsuit for my injuries, why do I have to give personal information to my attorney?

A: When you bring a lawsuit for your injuries, the law is clear.

Your injuries and your medical condition become an open book. Not only will your attorney want to know whether you've had any similar injuries in the past, but so will the defense attorneys. Any embarrassing medical condition should be handled in a non-threatening, professional manner. If that

condition was unrelated to your current injuries, it shouldn't be an issue. *But you must be honest with your attorney*. Let your attorney know of any potential problems with any medical care you've had. This way the attorney can develop a strategy to work around these dilemmas and issues. The last thing you want to do is to hide things like this from your own lawyer. You can bet that the defense attorneys will learn about the condition through a process called discovery, and you definitely do not want your attorney to be surprised at your deposition (a question and answer session in your lawyer's office, where the opposing lawyer gets to question you) when he hears about it for the first time.

Q: Why do I need to sign authorization forms for my case?

A: An authorization is a permission slip that allows us and defense counsel to obtain your medical records. Without it, we are not permitted to obtain your records. Also, your physicians are not allowed to release your records without your permission.

In the past, a client used to have to sign many authorizations. Not so anymore. Now there is a new authorization called HIPPA authorization. This allows us to send a photocopy of your original document.

Q: Why do I need to tell my lawyer about my most personal things? Some things are private and embarrassing and I don't want anyone to know about them.

A: Your lawyer is supposed to keep all discussions with you totally confidential. When you bring a lawsuit for injuries you suffered, your medical condition becomes an open book.

It is extremely important for your lawyer to know if you have any skeletons lurking in your medical history. He (or she) needs to know whether you had any prior medical problems that are similar to, or relate to the condition you are now complaining about.

While there are many personal things we do not like to discuss with others, your attorney must know about these personal things in order to properly guide you and come up with a legal strategy to best suit your needs, while at the same time protecting your rights.

If you do not tell your lawyer about past medical conditions, it could come back to haunt you and seriously jeopardize or impair your case. Credibility is key in any case. If you hide a medical condition you can be sure the defense will find it and exploit it at a deposition or trial.

Q: If I bring a lawsuit against my doctor, is he going to lose his license to practice medicine?

A: No. A medical malpractice lawsuit is a civil lawsuit which seeks money as a means to compensate you for your injuries and loss. We never seek, nor can we seek a doctor's license.

If the actions of the doctor are so horrendous, or even intentional, the New York State Department of Health is likely to be involved. They would undertake their own separate investigation of the doctor, and the Dept. of Health is the only agency that could revoke a doctor's license.

TO PROVE YOUR CASE…

Q: What are the 3 things I need to prove to show I have a valid case?

A: First, we need to prove that there was wrongdoing (also known as a departure from good and accepted medical care).

Second, we need to prove that the wrongdoing was a substantial cause of your injuries (also known as causation).

Third, we need to prove that your injuries are significant and permanent.

*IMPORTANT: All three of these elements must be confirmed by a doctor who has reviewed your case and your records. If any one of the elements listed above are missing, we cannot proceed with a case for you.

Many times a potential client will ask whether they have a case because they suffered an injury, but there is no wrongdoing- rather a bad outcome. I have had potential clients ask whether they had a valid case when there is wrongdoing, and causation, but no permanent damages. Again, it becomes impossible to accept a case without all three elements being present.

Q: In a malpractice case, why do we need an expert to review my case?

A: The law in New York requires that an expert physician review the records in order to confirm the validity of a meritorious case. In fact, your attorney must submit an affirmation to the Court at the start of your lawsuit confirming that he has consulted with a physician who has reviewed the relevant facts, and reasonably believes there is a valid basis for proceeding forward with a case.

Despite many efforts by defense counsel to compel disclosure of the name of the expert who reviews the case initially, the Courts have refused to order such disclosure.

Five Reasons Why Your Malpractice Case Won't Be Accepted By A New York Malpractice Lawyer

1. We can't prove the doctor did something wrong.

What do I mean? In order to prove a malpractice case in New York, your lawyer must prove that your doctor or hospital departed from good medical care. Well, how do you prove that? By having a medical expert review your records and determine that there were departures from good care.

2. We can't prove that the wrongdoing caused injury.

In New York, we must show not only that there was wrongdoing (departures from good care) but also that the wrongdoing caused injury. Again, this must be proven by a medical expert who has reviewed all of your medical records. If this element is missing, we cannot successfully prove your case.

3. We can't prove that you suffered significant and permanent injury as a result of wrongdoing by a doctor or hospital.

What constitutes significant and permanent injury? An injury that disables you from doing your daily activities. Something that is permanent and is expected to last for a long time, like a scar. A fracture is considered significant. There are many other significant injuries and obviously injuries affect different people different ways. Your lawyer needs to see how your injuries have affected you and what the future holds for you.

4. You have lied about important facts in your case or your past.

If you lie to your attorney, and he finds out about it, in all likelihood, he will not accept your case. Honesty is the utmost of importance. If you feel you have certain information you don't want to disclose to him that's one thing. But to actively lie about past lawsuits or events that happened is a big no-no. Your attorney is obligated to keep your information confidential. Hold him to that obligation.

5. You insist on running the show and tying the attorney's hands by insisting what he can and cannot do.

This is the 'kiss of death' for a case. Where the client believes they know more than the attorney and knows best how to develop strategy in their case. In a lawsuit, your attorney is your legal advisor. He provides you with the best legal options available to you, and together you should be able to make the best choices for your case.

There are instances where the client will demand that the attorney do things that either are not proper, or unfounded, that if done would ruin your case. Remember, you must have faith and trust in your attorney. If not, then you might want to look for another lawyer to represent you.

These are five of the main reasons why your malpractice case will be rejected by a New York Medical Malpractice Attorney.

Why Won't You Take My Small Medical Malpractice Case?

1. Brenda D'Client comes into my office with many problems.

"My doctor did my plastic surgery wrong. I can see my scar. See, look close, it's a line right below my belly. He promised me I wouldn't have any scars."

"I was given the wrong medication by the pharmacy and I have bruising all over my body."

"I had a terrible reaction to the anesthesia and now have to get follow-up treatment including a blood patch, and medications."

2. Each of these scenarios represent someone who strongly believes that they have been wronged by a doctor, pharmacy or hospital.

Unfortunately for each of them, they don't have all of the required elements needed to bring a successful malpractice case in New York.

In a malpractice action, I have to prove not only that there was wrongdoing, but the wrongdoing has to have caused injury, and the injury has to have been significant and/or permanent. If any one of those aspects are missing, there's no case. Oh yes, all of those three elements must be confirmed by a medical expert, before I can go ahead and start a lawsuit for you in the State of New York.

3. So, why are these cases too small for most New York Medical Malpractice attorneys?

In the first scenario, Brenda's injuries are minimal. It becomes financially impossible to bring a lawsuit for someone where the injuries are so small as to be virtually unnoticeable to the average person.

In the second scenario, Brenda appears to have been injured by the pharmacy's dispensing the wrong medicine. But in this case, the damages are limited, and Brenda is expected to make a full recovery shortly. Again, it becomes financially impossible to bring a malpractice/negligence lawsuit where the injuries are temporary (such as bruising).

In the third scenario, Brenda experienced a well-known side effect of anesthesia. For her, there's no malpractice here. There was no way to prevent this condition from occurring, and no alternatives to the procedure she had. Unfortunately, she had a bad outcome to a procedure, without any evidence of wrongdoing. Again, it becomes impossible to accept such a case to prosecute.

Conclusion

Since a New York medical malpractice attorney takes a case on contingency (this means that he only gets paid if he is successful in obtaining money for you), he must lay out a considerable amount of money to prosecute your case.

Not only does he have to make sure you have a valid and meritorious case, but has to determine whether your injuries rise to the level where you will receive sufficient money after all of his expenses and legal fee are taken out. What good does it do you, if most of the money is used for expenses and legal fees and you are left with a small amount of money?

It is for this reason that most New York Medical Malpractice lawyers can only accept cases that have a certain value.

What Does Speed, Time and Distance Have to Do with My Car Accident Case?

Everything. In order to evaluate liability, a trial lawyer must be able to figure out your speed, the time it took to arrive at the accident point and the distance you traveled from one point to another.

We only need two out of the three elements to figure out the third. For example, if you traveled 100 feet in 10 seconds, we can easily calculate your speed. If you were traveling at 50 miles per hour, and you drove 1/4 mile, we can calculate exactly how long it took for you to travel that distance.

Speed, time and distance are crucial in determining liability in your case. What do you think the outcome would be in a case if you didn't exactly know your speed, and you testified that you were traveling at 10 miles per hour, and it took you 2 minutes to travel 100 feet. Obviously, the numbers you recall or estimate are not accurate because they are totally inconsistent with physics.

Keep in mind that it's not always crucial for you to know exactly all the details involved in your accident. There are usually other witnesses involved who can add to whatever information you have. Anyway, when your credibility is at stake, you must tell the truth, and understand that while driving you are not looking to calculate speed, time and distance in anticipation of a pending accident or lawsuit.

ALTERING MEDICAL RECORDS- what it means...

Q: What happens if a doctor or a hospital removes or alters medical records from my file?

A: If a doctor alters your medical record they can lose their New York State medical license. The New York State Department of Health, and the Office of Professional Medical Conduct take those charges very seriously. If we are able to prove through the course of your case that the physician altered records, then that doctor is in for a very rough ride.

If a hospital alters a record, they can be fined or sanctioned by those two agencies mentioned above. In addition, if a hospital or doctor cannot locate important relevant documents and records in your case, there are instances where Courts in New York have granted judgment to the injured victim simply because the hospital or doctor could not provide a valid explanation of where those records are now. In most cases, those records would be needed to prove plaintiff's case.

Without those records, the victim is at a distinct disadvantage in being able to prove their case. If the Court agrees that those documents have been lost, misplaced, or intentionally misplaced, then they have the ability to find in favor of the plaintiff, and direct that a trial be held solely on the damages the victim has suffered.

Q: If the hospital lost my baby's fetal monitoring strips, what happens at trial in a case involving allegations of brain damage from a botched delivery?

A: If the hospital has no reasonable explanation to account for what happened to the fetal monitoring strips, and there is no other way to show evidence of distress during the course of labor, your attorney can ask the Court to dismiss the hospital's answer to your allegations of wrongdoing. This means that, if granted, you would win your case by default. The only issue would then be to determine the value of your child's injuries.

A recent Second Department case called Baglio v. St. John's Queens Hospital held that where the hospital could not account for the fetal strips- and they had an absolute obligation to maintain them for many years- then judgment would be granted for the injured victim. Without these crucial documents, the injured victim had no way to conclusively prove that there was, or was not wrongdoing that caused the baby's injuries.

WHEN DO YOU NEED TO FILE YOUR LAWSUIT?

Q: If a doctor left an object that wasn't supposed to remain inside of me during surgery, how much time do I have to start a lawsuit?

A: In New York, you generally have only one year from the date of discovery of this foreign object in which to start a lawsuit.

Importantly, if the foreign object was intentionally left inside of you during the procedure, you will probably not be able to start a lawsuit, even though you just learned about this foreign object now.

There are recent New York cases that have held if the object was NOT supposed to remain inside of you then you would have only one year from the date of discovery of the foreign object within which to file suit.

ATTORNEY'S FEES

Q: What are your fees to handle an injury case?

A: Take a look at any of my free reports on this site (www.oginski-law.com). I discuss them in detail.

The bottom line is that in any injury case that I handle, the expenses that my firm has laid out during the course of the litigation comes back to us off the top. Of that remaining amount, the attorney's fee is calculated.

In a medical malpractice action, the attorney's fee is less than in a standard 'negligence' action. In a negligence case, the attorney's fee is 1/3 of the remaining amount. The client receives the remaining 2/3, minus any liens they have to pay to a health care provider or insurance company.

In a medical malpractice matter, the lawyer's fee is set by law in the form of a sliding scale. It only starts out at 30%, then 25%, then 20%, etc., depending upon how much money we are able to obtain for you.

Q: Why do lawyers charge a fee?

A: Good question. Lawyers must run a business. They have overhead, salaries, insurance expenses, and litigation expenses just like anybody else. It's rare that you will find an attorney that does not charge a fee for his or her services.

In malpractice and injury cases, the lawyer's fee is contingent upon winning and obtaining money for you. If you get nothing, your lawyer gets no fee. There's a real incentive for him (or her) to work hard to get you the compensation you deserve. The lawyer who believes you have a valid case will lay out a great deal of money to prosecute your case, with the expectation that he will recoup that money once your case is settled or taken to verdict.

It is unrealistic to expect that a lawyer will spend thousands of hours of his time and money to prosecute a case on a client's behalf without receiving a fee.

Having said that, keep in mind that there are instances where a lawyer will take on a case 'pro bono'. This means that he and his firm will pay all expenses on the case regardless of the outcome, and have chosen not to accept a fee.

STARTING YOUR LAWSUIT

Now, hold on to your hats for a wild ride…in a medical malpractice case, if your medical expert feels that your case has merit, your attorney will start the paperwork needed to start a lawsuit.

Q: How long does that take?

A: Not long. It can usually be done in a few days, depending on whether all the doctors and nurses involved can be easily identified from the medical records.

What happens then? Your lawyer prepares a document called a "Summons and Complaint." This is a list of general allegations of wrongdoing you are going to be sending to the doctors and hospital, asking them to answer the allegations. This legal document must be filed in Court, and shortly afterward, this must be given to the doctors and hospital in a special way. This is called 'serving' the papers. Your lawyer will hire someone called a 'process server' to hand deliver these legal papers to the doctors. The process server must give these papers in person, or to someone who is authorized to accept these legal papers. After he does that, the process server must prepare a legal paper called an affidavit, swearing that he gave the papers to the correct people. He then sends it to your lawyer, letting him know that the lawsuit is on.

Q: How long does a case take from start to finish?

A: The simple answer is "a few years."
The longer answer is "it depends."
In a medical malpractice case in New York, the average time from start to finish is approximately 2-3 years. Cases vary depending upon whether a case may settle during the litigation process. There may be settlement discussions at any stage of the lawsuit, even during a trial.

However, our experience has been to let our clients know that we prepare all of our cases as if we are going to trial. I tell them this so they know full well the potential likelihood that their case will take 2-3 years to come to a conclusion.

At the end of that time period, is the case really over?
"Yes, and no." - How's that for a double sided legal answer?

If your case went to trial, and a verdict was rendered, the defense may appeal. Or, if your case was lost at trial, you might consider appealing. An appeal can last approximately 1-2 years in addition to the original lawsuit. Even after the appeal, a Court could send the case back to the trial court to re-try your case. That could take more time to get a new trial date, and then to retry your entire case.

With an appeal, many different outcomes can occur. The appellate court could decide to leave the trial court's decision alone. They could order a new trial, throw the case out, reverse the lower court decision, and even alter or modify the amount of money you were awarded. As in life, there are no guarantees about the outcome of your case or an appeal. But with an experienced attorney at your side you will be better informed about your legal options, and someone trusted to guide you through the legal minefields.

In a personal injury case in New York, such as a car accident, it could also take approximately 2-3 years to complete. However, many factors come into play here. It depends on which County your case is in. Some counties have bigger backlogs of cases than others. If you have a case against the City of New York, those cases typically take longer than most, because of the number of times they conference the case, and not having attorneys available to try all their cases.

Q: How much am I suing for?

A: In a medical malpractice case in New York, we are not permitted to set a specific amount of money that you are suing for. That function is left to a jury to decide during a trial. During the trial we can suggest a number that we believe you are entitled to and a jury can accept that number, reject it, award less, or even award more.

In a negligence case, such as a car accident, we are permitted to place a number in the papers that start the lawsuit, called the complaint. Often, the number that one sues for is not a realistic number, and is not yet based on the actual damages you may have incurred. It is a prospective guesstimate of what your potential injuries and damages may be.

When we read in the paper about people suing for many millions of dollars for small injuries, you can easily see why so many people think that their cases are worth that claimed amount. "Did you hear? I'm suing for $5 Million Dollars!"

The reality is that cases are valued not by what people claim in the complaint. It is common knowledge that those numbers are unrealistic. The only people who appear to rely on those numbers are the news media who like to blow this information out of proportion.

Q: Are my out of pocket medical expenses repaid to me if I go all the way to trial?

A: The quick answer is yes...if a jury sides in your favor, and a jury believes that you paid money out of your own pocket for your medical bills that were not repaid or reimbursed by another source like health insurance.

Q: How do I prove future medical expenses?

A: If you require future medical care, and need medical equipment such as wheelchairs, walkers, prostheses or other medical-related devices, we often will have your treating doctor explain to a jury why these items are needed. Your treating doctor may not know how much money each of these items will cost now or even years from now. In that case we bring in an expert to talk to the jury about the actual costs these items have today, and what they can be expected to cost in years to come. We would also need to bring in an economist to talk about inflation and the value of a dollar today and how that value changes as the years go on.

The economist would then project how today's dollars would not be sufficient to purchase your medical equipment years from now, and why additional dollars are needed in the future.

Q: I've heard the phrase 'loss of enjoyment of life' - what does it mean?

A: That is a concept that lawyers use to explain that your injuries caused you pain, suffering, and literally the loss of enjoyment of your daily life. This allegation of loss of enjoyment of life is included within any claim for pain and suffering you may have.

We would point out to a jury how your injuries have affected your daily lifestyle, how you are physically disabled from doing those daily tasks that were once simple and easy, and how you no longer enjoy your life- as you once did, because of your debilitating injuries.

Q: What does it mean when a lawyer is suing for 'damages'?

A: Damages means your injuries. Your injuries include those which are 'visible'- that you can see; those that are invisible- those you cannot see; physical pain and anguish; emotional pain, sorrow, anxiety, humiliation, anger, fear, frustration; an inability to do those physical activities you used to do (sports, gardening, music, cooking, etc.); an inability to socialize with friends and family; an inability to interact with your family; changes in your daily lifestyle; the need for medical treatment and visits to doctors; the need for future medical care; medical expenses; prescription medications; household help, and similar types of 'damages'.

Q: What is 'vicarious liability'?

A: This means that someone is responsible for your actions. It typically comes up when an employee has done something wrong during the course of his employment. The company he or she works for is naturally responsible for any of his actions done improperly, as long as the wrongdoing was done in the course and scope of his employment.

For example, a nurse in a hospital that gave wrong medication to a patient would be held responsible for any injuries that resulted from that wrongdoing. At the same time, the hospital is 'vicariously liable' for the nurse's actions. This means that an injured victim would be able to recover money from the hospital and need not worry whether the nurse had the ability or insurance to pay those damages.

THE PAPER CHASE- Starting your lawsuit

Q: What happens once the summons and complaint is served?

A: The people that are being sued take that legal paper and send it on to their liability insurance company. The insurance company then selects which law firm (out of many on their roster) is going to handle your case. Once the insurance lawyers get your summons and complaint, they prepare an answer to your allegations. Usually they deny all the allegations listed in your complaint, and then ask your lawyer for lots of papers including:

- Copies of all medical records,
- Copies of any x-rays, CAT scans and MRI scans, or photographs,
- Permission slips (known as authorizations) to get these records directly from your doctors and treating hospitals,
- Employment records,
- Any other documents needed to find out every allegation of wrongdoing and every injury you're claiming.

Q: What happens then?

A: Once we've given the insurance lawyers all of the paperwork they've asked for, we let the Court know what's going on. We do this by requesting a 'scheduling conference' before the Judge assigned to your case.

Because of the backlog that most New York Courts have, it will take a few months to have this court conference. At that conference, your lawyer and the lawyer(s) representing the people you have sued will appear and set up a schedule to make sure that all 'discovery' is completed at certain times during your lawsuit.

Discovery is a word used to describe the process where each side discovers what the other has up their sleeve. There are not supposed to be any surprises in a civil lawsuit. Each side is entitled to obtain all information about the parties involved, ***before*** the case ever gets to trial. Trial by ambush is long gone in New York.

Q: Can I check the status of my case online?

A: Absolutely. If you have a lawsuit in progress, and it's been filed with the Court, your case will then be in the Court computer system.

I have found the easiest and simplest way is to use a service called e-law.com. This is an attorney service to monitor cases in the Court system. e-law allows you to do free searches. Simply sign up for free, then put in your name where it says "Plaintiff" and press enter. Your case should come up with all the accompanying information and upcoming court dates.

This online information only tells you what is going on in Court. It doesn't tell you many other things about the details of your actual case such as depositions or discovery documents. For that, you need to call the attorney and ask.

DURING A LAWSUIT...

Q: What is a deposition, and will I have to testify at a deposition?

A: First, a deposition is a question and answer session where you will swear (or affirm) to tell the truth. The questions and answers are recorded by a Court stenographer, who will later transcribe all of the questions and answers into a booklet.

If you are bringing a lawsuit for injuries you or your loved one suffered then you will be required to testify about your knowledge of the events and your knowledge of the injuries. You will also be asked questions about how those injuries have affected you (or your loved one) and what treatment you've received to treat those injuries.

The attorney(s) for the people you have sued will be questioning you, usually in my office. Sometimes, because of an inability to travel, we can accommodate the injured victim and conduct the deposition closer to their home. Naturally, I will be there with you every step of the way.

Prior to your 'deposition' you will meet with me, either on the day you are scheduled to be asked questions, or on a scheduled day before the deposition. During that meeting, I will prepare you extensively about what you can expect will be asked of you by the other attorney(s). By the time we have finished our meeting, you will be aware of practically all the types of questions you will likely be asked by our adversaries.

During the deposition, if you have any questions or concerns, we can take a break and discuss them in the privacy of my office.

Once your deposition session is finished, you can expect to receive a copy of the booklet that contains all of the questions and answers asked and given. You will also receive special instructions about how you must review the transcript for any errors, and what to do if you find factual or typographical errors.

On another date, I will have an opportunity to then question the 'defendant' (the person that you have

sued) to determine from them what happened and why. You are welcome to attend the defendant's deposition with me, however there are some instances where I will advise against being there, and in some instances I will encourage the client to accompany me.

Q: When you question my doctor at a deposition, can I be present? Can I ask questions too?

A: During a lawsuit, each side gets to question the other side during a procedure called a deposition. (It's also called an examination before trial- EBT). During a deposition, it's an opportunity for me to get specific answers about what happened to you or your loved one. There are important strategies used by experienced trial lawyers when questioning a doctor in your case.

Not only are we trying to establish facts, as the doctor recalls them, but are also attempting to lock the doctor into a position about what was done for you, and why. I will always ask the doctor to read his treatment record, and then have him or her explain the reasons for treating you the way he did.

As a victim or family member of a loved one involved in the case, you are always welcome to be present when I question the doctor at his deposition. However, I must caution you that sitting across from the person whom you believe caused you or your family serious harm is very unsettling. The urge to reach across the table and do something physical is ever-present. The urge to verbally respond to a comment by the doctor is also very strong. Please remember, if you wish to be present, you can. BUT, the focus and emphasis is on questioning the doctor, NOT your desire to give him or her a piece of your mind.

If you have certain questions you feel are important to your case, by all means discuss them with me before the deposition. You will not be permitted to ask questions yourself.

Importantly, if you choose not to be present when I question the doctor...not to worry. I can send you a copy of the transcript so you can read it at your leisure. In my experience, 99 times out of 100, my client will choose not to be present during a doctor's deposition.

Q: During my case will I have to be examined by a doctor for the defense?

A: In almost every type of injury case the answer is yes. When you put your medical condition in issue, and you claim you were injured because of another's wrongdoing, the defense has a right to have you examined by a doctor of their choosing. This allegedly (at least in theory) allows them to evaluate your current medical condition to see for themselves whether you are truly as disabled as you claim to be.

The reality is that there are many doctors who are routinely used by various insurance companies to perform "Independent medical exams." This term is really a farce, since there is nothing "Independent" about this exam. The defense insurance company selects this doctor. They send him your records. They pay his fee for the exam. In some cases, the referrals to doctors for these types of exams will make up the bulk of a doctor's practice. In that instance don't you think that the doctor is more likely to MINIMIZE your injuries, and make the defendant's position better, so as to encourage the insurance company to keep sending patients to the doctor to examine?

If the doctor gave an unbiased, totally objective medical opinion in every instance, I am pretty sure that many of the monetary offers by insurance companies would be much fairer and higher than they

currently are. Remember, insurance companies are in business to MAKE MONEY. Not to give it away. Also, these doctors who are doing these exams see the patient only one time; and not for treatment. They don't have the benefit of seeing the patient many times, over a period of weeks, months or even years. There is no real relationship that develops during this solitary exam. How can a physician realistically evaluate someone's medical condition without the benefit of seeing and evaluating them over time?

LITIGATION EXPENSES

also known as 'disbursements'

Q: What kind of litigation expenses can I expect on my case?

A: In any case that proceeds to trial there can be multiple types of litigation expenses. Remember, I will only spend money on things you and your case need. There is absolutely no benefit to me or my firm to spend money on things you do not need. All expenses that my firm lays out during the course of the litigation is detailed at the end of the case.

Generally they include:

Medical records, court fees (purchase of a Court file number-known as an index number, motion practice), use of attorney services to forward documents to/from court, expert witness fees, copying fees, conference calls with experts, meeting with expert, deposition transcript fees, service of legal papers, investigators, electronic searches online, legal research, purchase of anatomical models, photographs for use at trial, enlargements of exhibits, and similar items.

TO TRIAL WE GO!

If settlement negotiation fails, we've prepared your case from the outset for trial. Here are some of the key points you need to know about trials-

Q: When my case goes to trial, can I accompany you to pick a jury?

A: Technically, yes. However, I do not suggest or encourage this. Jurors tend to be reluctant to discuss personal matters to begin with. Knowing that the party involved is in the room can make them even more reluctant to provide useful information during jury selection. It is very important to learn as much as possible about potential jurors given the strict time limitations we have during jury selection. We try as best as we can to maximize that time. Having the client present, may not be advantageous for their particular case.

Q: Why do we need jurors to hear our case?

A: The quick answer is: we don't. There are some cases where the parties will agree to have their dispute

resolved by a single judge. For the most part, an injured victim will want to have their 'peers' in the community evaluate their case and determine the compensation they should be entitled to.

With a jury, there are members of the community who bring various life experiences to the jury room, and these can have an impact on their ability to understand the suffering each injured victim has sustained.

Would You Allow A Trial Judge To Sit As A Juror On Your Malpractice Case?

As a plaintiff's attorney representing injured victims, the answer is no.

Why then did a female trial lawyer in Mineola, Long Island agree to accept a trial judge onto her jury panel in a medical malpractice case?

According to the New York Law Journal, this female lawyer was quoted as saying "I selected this judge because I figured he'd be able to explain the defense's shenanigans to the other jurors."

The defense attorney however was quoted as saying, "I have a different point of view. I like intelligent and smart jurors. That's why I chose this particular judge."

Interestingly, the day after this article appeared in the New York Law Journal, I was participating in a continuing legal education program, judging a national law student mock trial competition. The judge assigned to our courtroom was the one who sat on the recent malpractice case that resulted in...(can you guess?), a defense verdict.

I learned that this judge was a conservative republican judge assigned to a criminal trial part. My only thought was, "What was the plaintiff's attorney thinking?"

Now- that doesn't mean that even if this person was not on that jury, and someone else was, that the outcome of that malpractice case would be different. But the purpose of selecting a jury is to try and select the best possible jury for your client's case. In my opinion, putting a republican judge on a jury in a malpractice case against a doctor and a hospital, in a conservative county is not a good choice. **In New York, lawyers, doctors, judges and other professionals must serve jury duty.**

That doesn't mean, of course, that they must serve as a juror on your case. Find out more information about your prospective juror. Ask yourself, "Is this really the person I want judging my client's case?"

Q: In a catastrophic injury case, what types of experts will we need to prove our case?

A: Doctors, economists, life care planners, and vocational rehabilitation experts. Each of these experts will bring a specialty to the case to prove different damages. In addition, we will make every effort to bring in your treating physicians to testify about your current physical condition and your ongoing disabilities.

Q: In a medical malpractice case, why aren't there only doctors sitting on the jury?

A: Our system of justice requires that a 'jury of one's peers' sit in judgment. This phrase has come to mean people of the community, and not people who have the same jobs or same backgrounds.

We'd never really know if 6 doctors sitting in judgment against another doctor would find in favor of the doctor just because they sympathized with the poor guy. If a truck driver caused a car accident, should he be entitled to a jury of all truck drivers? Don't you think they'd be sympathetic to a fellow truck driver?

What if the injured person bringing the lawsuit was a banker, and the person who caused the accident worked in a fast food restaurant? Which jurors should sit in judgment of such a case? The answer is that anyone in the community who is over 18 years of age can sit on a jury.

SETTLEMENT OFFERS

Q: When a settlement offer is made, how do I know things are on the 'up-and-up'?

A: It is every attorney's obligation (certainly in New York) that when a settlement offer is made, it is the lawyers OBLIGATION to convey that offer to the client. There are no ifs, ands, or buts here. The offer must be conveyed. The lawyer should certainly advise the client about the merits, risks and benefits of accepting such an offer. Discussion must be held between client and lawyer about an offer. Based upon this discussion, the lawyer will then be able to properly negotiate your case. The lines of communication between client and lawyer must always be open.

An attorney cannot knowingly or falsely represent to a client that an offer has been made, when in fact it has not. Nor can an attorney ethically withhold information about an offer from the client. It is the client's ultimate responsibility to accept or reject a settlement offer; not the attorney's. The attorney offers wise and experienced counsel to the client. The client has the final say.

Q: When a settlement check is sent by the insurance company, why is the law firm name and my name on it together?

A: First, when an insurance company sends a settlement check to an attorney, the insurance company is obligated by law to notify the plaintiff (our client) that they are sending the check to the lawyer. The attorney receives the check soon afterward, and asks the client to come into the office to endorse (sign) the check.

In some cases, it is not possible for the client to travel to the attorney's office. In that instance, an attorney can ask the client for permission to endorse the check so that it can then be deposited.

That settlement check must be deposited into an attorney trust account (also called an 'escrow' account). Once the check clears, the attorney's fee is paid from that amount. If there are any liens or outstanding medical bills against the proceeds of the lawsuit, they are paid from the client's share of the settlement which is still sitting in the escrow account. All remaining money is then given to the client, with a check from the lawyer's trust (escrow) account. At the time the client is given the final amount of the

settlement, they are also given an itemized listing showing what expenses were incurred during the course of their litigation. A copy of this document is filed with the Office of Court Administration.

Q: Why are some settlements confidential?

A: In some cases, insurance companies may offer a settlement before trial. Sometimes, in an effort to resolve the case, as an incentive they will offer an amount of money that is acceptable to the injured victim. But, in some instances, the insurance company wants an assurance that the terms of the settlement are not revealed.

They do this for two reasons. Neither one of which is out of the goodness of their heart. The first reason is that they don't want publicity associated with a settlement. Publicity about an insurance company paying money to an injured victim is never good for them especially since they earn their money by KEEPING their money, not giving it away.

Second, are other attorneys with similar cases will never learn that the insurance company paid out a certain amount in a specific type of case. So, when the next lawyer tries to negotiate a case with the insurance company, he or she won't be able to say "You paid 'x' dollars on the Jones case, so therefore you have to pay at least that amount on this case."

Sometimes, the only way an insurance company will offer such a settlement is on the condition that the terms of the agreement be confidential. Otherwise, there might be no settlement, and the case would proceed to trial.

A client might be willing to agree to this restriction if it were in their best interests. Some clients want to publicize the damage and injuries they suffered as well as any compensation they received for their injuries. In that instance a confidential settlement agreement would not be advisable.

GET PAID IN A LUMP SUM OR IN SMALL FREQUENT PAYMENTS? THE CHOICE MAY BE YOURS

A structured settlement is an amount of money that is given to the injured victim in payments every month or every year. There are advantages and disadvantages to structured settlements.

Advantage: You don't receive the money all at once, so there's no urge to spend it all at once. Nor do you need to decide how to invest your money since you've only received part of your award.

Disadvantage: You must wait for your remaining money and can't use it all at once to make purchases or investments. You might also be restricted in the amount or type of investment it might sit in until you get all of your payments.

Q: When would I need to structure a settlement? In other words, why would I want to receive periodic payments instead of one lump sum in a settlement?

A: This is useful for a baby injured at birth, or a child who is under the age of 14. In New York, the law will not permit a child to take possession of settlement monies until they turn 18 years of age. The Courts are naturally wary of parents as well who claim they will not squander their child's money away while waiting for them to turn 18. So, rather than have a child's settlement monies sitting in a savings account earning a few pennies every month, they will usually require that an annuity be purchased to make payments over a long period of time. This way, the capital amount of money is preserved, and the child gets the benefit of having more money at a later date, to be used for many things including schooling.

An annuity is a contract where an insurance company promises to make periodic payments over a number of years.

MONEY-WHO DECIDES HOW MUCH TO AWARD?

Q: How much can I sue for?

A: The short and unrealistic answer is anything.

The reality is that you can sue to obtain compensation for your past pain and suffering, your future pain and suffering, and economic losses including health and medical expenses, (funeral expenses, if any), lost income, future loss of income, loss of services of a spouse, money to pay for specialized medical and educational services and schooling.

In a negligence case (car accident, slip & fall, dog bite case, etc.) we are permitted to put a number down to claim an amount you are suing for. Typically, this number is unrealistic. However, if you don't ask for more than your injuries are worth, you will never be able to obtain the true value of your injuries.

In a malpractice case in New York State, we are not permitted to list a particular number that you are seeking. That number is supposed to be determined by a jury after a jury trial.

Q: In a trial, does the Judge determine how much money I will be awarded?

A: In practically every accident and malpractice matter I have handled, I always ask for a jury trial. This means that a jury of your peers (members of the community) will be deciding the issues in your case.

The jury will be deciding whether you will receive money and if so, how much. The court does not give specific guidelines about how much an injury is worth. Rather, your attorney may suggest a figure together with an explanation of why he feels it is justified. The jury is free to accept, reject, increase or decrease any suggested number by the attorney. The trial judge still has the ability to modify any award that is made by the jury.

In a case that is decided solely by a Judge, then the Court would make a determination of how much you are to be awarded, if anything.

Q: Why are juries allowed to award money?

A: Our system of justice requires that a 'jury of our peers' evaluate our civil claims. The thinking behind a jury determining how much to award comes from the sense of community that each jury brings to jury deliberations. There will be high numbers and low numbers and many times there are no numbers, where a jury has rejected a person's damages claim.

Jurors are told to use their common sense when evaluating a case, and to use the evidence as well. There are multiple types of damages that juries award.

The most obvious is economic loss. What the person has lost in income, and what they can expect to lose in income in the future. Economic loss includes not just your salary, but your fringe benefits, health insurance premiums, and your medical bills.

Another element of damages if pain and suffering. This is a more difficult segment and jurors must determine whether the damages are significant and how they affect the person in their daily lives. We usually say that damages are not what a person is left with, but what has been taken from them that is most tangible to put a figure on.

What are the damages in the past? And, what type of pain and suffering can this person be expected to experience in the foreseeable future?

Judges do not set a range for what juries can or cannot award. Juries are told to use their common sense. The plaintiff's attorney (me) will usually suggest a number or a range in which to make an award. The defense will usually either not suggest a number and claim the injured victim doesn't deserve anything, or they will suggest an artificially low number to place this into the juror's minds as almost a 'high-low' scenario that the jury can choose from.

Regardless of what the jury awards, there are always requests to the trial judge to reduce an award, and there are always appeals that can and are made to reduce any award further.

Q: What is 'hearsay'?

A: That is a legal term used to describe statements made by someone who is not in court to tell us about what they heard.

Why is hearsay not admissible in Court?
Because an attorney does not have the benefit of actually questioning the person who made the statement who is not in Court. Without being able to cross-examine the person who made the statement, it would be very easy for someone to make up testimony, and nobody would ever know if the statements were true or not. Cross-examination allows an attorney to question the witness, and allows the jury to see and hear the person and how they answer the questions. Are they truthful? Are they shifty? Are they

secretive? Are they hiding something? The only way to truly unravel this is to have the witness in court telling the jury what they heard themselves.

Q: When a jury hears an injury or malpractice case and goes to deliberate do they have to stay overnight?

A: No. Only in some criminal cases does the jury get to stay overnight to deliberate. The reason is that the Courts do not want anyone to influence their decision, which could have a dramatic effect upon whether the defendant goes free or not.

In an injury or malpractice case (a civil case) if a jury has not finished deciding the case by the end of the business day, the Judge will allow them to return home, and then have them come back to Court the next day to continue deliberating until they reach a verdict.

Q: Why do I have to prove my case? Isn't it enough to show I was injured at the hospital?

A: No, it's not enough. The law in New York says that if you claim you were injured because of someone else's carelessness, then you have the obligation to prove it. Well, how much proof do I need? Again, the law says you must prove your case by a 'preponderance of the evidence'. This has been taken to mean that you must show that your version of events is more probably true than not true. If your proof leaves the jury with a 50/50 split, and they cannot determine if you've proven your case, then they are obligated to return a verdict for the defense.

However, if you are able to prove your case, where you tip the scales of justice in your favor, ever so slightly, then you have proven your case, and you would be entitled to an award in your favor.

Proof is presented by testimony from witnesses, from hospital and medical records, and from the parties to the lawsuit.

Legal objections during trial

Q: When a judge says "Objection Overruled," what does that mean?

A: It means that one side has objected to the question being asked. It also means that the judge has rendered an immediate decision on the objection and decided that the question can be asked and answered.

Q: What does it mean when a judge says "Objection Sustained"?

A: It means that one party has objected to the question. It also means that the judge has decided that the attorney asking the question CANNOT ask the question, and that the witness is NOT to answer the question.

There are many legal reasons why a judge would decide that an attorney could not ask a particular question.

Q: When an attorney objects to a question with the following comment "I object. It assumes facts not in evidence," what does that mean?

A: It means that the attorney raising the objection believes that the witness is being asked a question that asks him or her to assume facts that have not been introduced into evidence. If true, then the witness would be answering questions based on speculation or guessing.

To remedy this problem, an attorney can ask a witness hypothetical questions. "Assume Mr. Witness that the car was 10 feet away and also assume that it was a blinding snowstorm. In that circumstance is there any way you would have seen that car..."

Or in a malpractice case we ask the accused doctor whether there were departures from good care with hypothetical questions. These hypothetical questions bear directly on our case, since our client has testified (or will) that these facts are true and existed at the time of the event.

THE OATH

Q: If I'm called as a witness in a civil trial and for religious reasons cannot swear to tell the truth, what happens?

A: Courts are aware of different religious beliefs and instead will ask the clerk to have you affirm your ability to tell the truth, instead of swearing to tell the truth.

BEING ORDERED TO COURT

Q: What is a subpoena?

A: It a piece of paper that orders you to come into court and give relevant testimony about a particular case.

What if you don't want to go? In a civil case, a subpoena is a quasi-order, usually signed by an attorney. Sometimes a judge will sign the subpoena. You must go. If you don't you're subject to fines, sanctions, and possibly a visit by the local sheriff to your home or office.

A subpoena is a way to get a witness into court to testify.

Q: What are jury instructions?

A: They are legal principles that are given by the trial judge at the end of a case. The judge instructs the jury on the law as it exists. The jury must determine what the actual facts are, and then apply the current law to their findings of fact to come to their decision.

Q: In a civil trial in New York, how many jurors sit on a jury?

A: Six jurors will sit in judgment, and as a safety measure the court will usually have 2 or 3 backup jurors who sit through the entire trial as well. These backup jurors are called alternate jurors.

Q: In a civil trial, do we need all six jurors to come to a unanimous decision to get a verdict?

A: No. In New York, you only need 5 out of 6 on any given question to get a verdict. You also do not need the same 5 people to answer the same way on each answer.

Q: After a verdict is reached, what does it mean when the court 'polls the jury'?

A: It means that the clerk double checks the verdict by asking the jury foreperson verbally whether the jury answered the way they did on the verdict sheet. This is to confirm the written verdict.

Q: If the jury is unsure about testimony they heard during the trial, is there some way they can have it read back?

A: Yes. The court reporter is called back, the jury returns to the courtroom, and the reporter will read back the testimony that the jury wishes to re-hear.

Q: After a civil trial is over, can the lawyers speak to the jury?

A: Yes. The judge tells the jurors they are free to speak to whomever they wish. Interestingly, many jurors choose not to speak to the lawyers and make a hasty exit.

Q: Is there any limit to how long the jury can deliberate?

A: No, unless the jury comes back and says they're deadlocked and cannot make up their mind. In that case, the court gives the jury additional instructions to make every effort to discuss the deadlocked issues and try their best to come to a decision.

Q: Do you know before the trial starts what judge we're going to get?

A: No. The judge is assigned on a rotating basis, and whoever becomes available at the time your case is ready to be tried.

THE EMPTY COURTROOM

Q: When I'm in court, and I walk by other courtrooms, how come many of them are empty?

A: It may appear empty, but there are many people who work in each courtroom each day. These include clerks, court officers, court reporters, law clerks, the judge, and the judge's secretary. There are

many reasons why the courtroom may appear empty. The court might be holding settlement conferences with attorneys in their private chambers, instead of in the courtroom. The court might have a 'down' day, where there are no available witnesses during a trial. The judge might be on vacation.

Q: At trial, what is a 'direct examination'?

A: That is when I question my own witness and ask open ended questions. This allows my witness to answer with explanations.

Q: What is 'cross-examination'?

A: It is when I get to question my adversary's witness. I will ask leading questions, and try and have the witness respond only to my questions and not give long-winded explanations.

3 Things To Know When You Cross-Examine a Doctor at Trial

Your client has accused a prominent doctor of malpractice. Her case goes to trial, and your first witness is the well-respected doctor. How do you cross-examine him?

1. Learn as much medicine as possible that's involved in the case.

You have to be a mini-expert on the medicine before ever getting up in Court to question the doctor. Read medical textbooks, medical literature, and use other physicians as experts to teach you the medicine.

2. Ask only leading direct questions.

You must keep a tight leash on any witness whom you cross-examine. If you ask an open-ended question ("Tell us why the patient bled to death Doctor...") you will suffer the dire consequences of a 10 minute lecture to the jury by this medical witness. Big mistake. You don't want the jury to see how educated and wonderful this physician is. You want them to see how he answers YOUR questions.

"You operated on Mrs. Jones 1 year ago?"

"You perforated her aorta while examining her nose?"

"The patient bled to death as a result of that puncture, correct?"

"Good medical practice dictates that when doing this procedure you should stay away from the aorta, correct?"

"The aorta is not in the surgical field, right?"

Do not ask "So how is it that you ruptured the aorta while doing this procedure?" (That's an open ended question.) Instead ask "Did you expect to puncture the aorta during this procedure?" "What steps did you take to make sure the puncture did not occur?" ...and on it goes.

3. Do not ask a question when you don't know the answer!

During the course of a lawsuit you will have plenty of opportunity to learn everything about what happened. In New York, this is called the discovery phase of the lawsuit. If you are at trial, and do not know the answer to a specific question, I strongly suggest you NOT ask the question, unless the answer will absolutely not harm you or your case. Remember, you never know what will come out of the witness' mouth.

Here's a great example. A dispute arises between two men in a park. It's twilight. A scream is heard, and a witness to the scream turns and sees two men standing near each other. One man's nose is gone and his face is bleeding profusely. The other man is just standing there.

On the witness stand, the defense attorney asks the witness whether he actually saw his client bite the man's nose off. The witness replies "No. I didn't."

"Then you're not sure my client was the one who bit his nose off?"

"Oh, I'm sure alright. It was your client."

"Really? How can you be so sure?" asks the defense attorney.

"Because I saw your client spit out the man's nose from his mouth!"

Cross-examination of a doctor is not easy. Experience is the key and learning all the medicine possible helps frame your questions.

Q: What are 'leading questions'?

A: A leading question is one where the answer is suggested in the question. For example, instead of asking "Where were you last night?" I could ask "You were with Jim last night, weren't you?" The first question is open ended and allows the witness to give an explanation. The second question leaves no room for an explanation and only allows a yes or no answer.

Q: What is an opening statement?

A: In a civil trial, each side has the opportunity to make opening remarks to the jury. This allows the attorneys to give the jury an idea of what the case is about and what they can expect to see during the trial.

Q: What is a closing statement?

A: At the end of a civil trial, the attorneys again have the opportunity to address the jury and explain

what has been proven and not proven in their case. It's the last chance an attorney has to speak to the jury about the witnesses and evidence that have been presented to them.

Q: Why is a courtroom so formal, and why do we have to stand up when the judge walks in?

A: Our system of justice has developed to the point where we, as a democracy, respect the rule of law. It is only through that respect that laws can be followed and obeyed. In the event those laws are broken, there are consequences.

Standing up when a judge enters the courtroom is a sign of respect- that he or she is the sole arbiter of the law in that room. The courtroom is controlled by the judge and he or she has wide discretion as to what happens in that room.

Of course, if the judge oversteps their bounds, a higher court can review the events and overturn an improper decision.

EXPERTS

Q: When a medical expert testifies in a medical malpractice case, is there some magic language required for him or her to explain their opinions?

A: While there are no magic words that the expert must say, it is standard and common to hear an expert testify 'with a reasonable degree of medical probability' about his or her opinions.

This phrase tells the jury that the experts' opinions are (1) reasonable and (2) describes the relative degree of probability. In medicine there is often very little certainty. As long as the expert can testify that it is more likely than not that something happened, then x, y, or z.

The more likely than not standard is a requirement because it establishes that when taking every possibility into account, the event more probably happened than didn't happen- that it's more likely than not that it occurred.

Q: If there's more than one medical explanation for why I suffered injuries in my medical malpractice case, can I still win my case?

A: The law in New York does not require us to specifically identify which of two or more competing causes were the source of your injuries. As long as we can establish that it is 'more likely than not' that one of those explanations caused you harm, then we have established the evidence we need to have a jury evaluate your claim.

Q: Why do some cases have a lot of spectators at a trial?

A: As with anything, different cases generate different interest. Most cases are only heard by the

interested parties. Occasionally a spectator will wander in for a short time. Only in the 'juicy' cases do you see many spectators, and the press.

Q: In a civil trial, does the defendant (the person accused of causing an accident or malpractice) have to testify?

A: A civil trial is much different than a criminal trial. In a criminal trial the accused defendant has the choice to testify or not. Many times the accused defendant in a criminal trial will choose not to testify, because if they did testify, they'd have a hard time explaining away facts in the case.

In a civil case the defendant almost always testifies to give detailed explanations about what he did and why. In some cases a witness is unavailable or may have died. In that case, we will usually have taken their testimony before trial, called a deposition, or an examination before trial. This way we preserve their testimony so we can read it at trial. In some cases, we will videotape a witness's testimony because we want the jury to see the person testifying as well as listen to their words.

SAMPLE CASES

Q: My friends tell me that the lady who was burned by McDonald's coffee was awarded 3 Million dollars. My injury is worse, so why isn't my case worth more?

A: First, although the 'McDonald's lady' was awarded a large amount of money by the jury, that's not actually what she took home. The amount was reduced significantly following the verdict.

The value of your injury is evaluated by similar injuries in the community where you live or where your case is pending. A fractured foot in Rockland County will have a different value than a similar injury in Brooklyn. Remember, every case is different. Injuries affect different people different ways. Some people can ignore pain. Others complain about it constantly. Each injury causes different disabilities. There are many factors that go into the equation when we discuss the value of a case. Apples must be compared with apples. We cannot compare apples and oranges (or any other fruit you can think of).

Q: I was pregnant and had a stillbirth when I was five months pregnant. I think it's because of something the nurse midwife did in the clinic when she examined me. I feel terrible. Do I have a case?

A: Unfortunately, the law in New York says clearly that if the baby was not born alive, there is no way to bring a lawsuit on behalf of your stillborn baby.

However, the highest Court in New York (Court of Appeals) has recently held that a mother who suffers psychological and emotional trauma because of this stillbirth (presumably because of someone's wrongdoing), has the right to bring a lawsuit for her own psychological trauma.

For more information about a potential case involving this type of fact pattern, please call me; 516-487-8207.

Q: I just had breast implants put in and I don't like the way they came out. Can I bring a lawsuit against my plastic surgeon if he won't fix them for free?

A: There are two issues here. The first is your unhappiness with the result of the breast implants. The second is whether you can sue if he does not repair the first result for free.

First- the fact that you had breast implants suggests that you were not satisfied with your physical appearance to begin with. Breast implant and plastic surgery cases are inherently bad cases for me to take because they involve subjective feelings, opinions and impressions by the patient. Specifically, the patient is not happy with how they appear initially, and after the procedure, they are still not happy with the result. Just because you are unsatisfied with the breast surgery results does not mean that there was evidence of malpractice.

There are always risks associated with any surgery. I am positive that your plastic surgeon gave you a detailed form called an Informed Consent sheet that described the procedure. You may have also been given brochures or reading material describing the risks, benefits and alternatives to this breast surgery you were going to have. Again, I assume that since you went forward with the surgery, you signed this consent and recognized that there was a possibility the outcome might not be perfect.

The second point is that you must address your displeasure with your plastic surgeon. There are times when the doctor will agree to revise the procedure at no cost to you. At other times the doctor believes he or she did a good job, but other factors contributed to the poor outcome, and he may not be agreeable to revise the procedure for free.

Remember, you are free to bring a lawsuit, but the question is whether your case really has merit, and whether it is financially beneficial for you and your attorney to proceed.

In my opinion, I do not accept plastic surgery cases unless it is clear, based upon expert medical review, that there are departures from good care (not just that the patient is unhappy with the outcome of their boob job, or nose job), that the departures were a substantial factor in causing injury, and that the injury is permanent.

Q: I was reading a lot about the Terri Shiavo case and the right to life and the right to death claim. What happens if the hospital disconnects life support in violation of a Court order?

A: Simple. If you violate the law (assuming it's a proper and valid order) the hospital and the physicians who carried out the act will be held responsible if a Civil lawsuit is brought. There is an entirely separate issue about whether it is intentional as well. If an investigation reveals that the act was intentional, it would likely fall under some type of crime. If instead it was a 'misunderstanding' of the Courts' order, then a negligence claim would be the route to take in a Civil action for money damages.

One key question to keep in mind if that happens- What is the value of this individual's life to her husband? Every State has different requirements for a spouse or surviving family member to bring a lawsuit for wrongful death. In New York, the surviving spouse can only claim 'pecuniary loss' (financial loss to the family) for their loved one's death. Here in New York, there is no ability for the traumatized surviving family to claim emotional distress as a result of the hospitals' negligent actions. In a case, such

as Terri Shiavo's, where she has been in a persistent vegetative state for 15 years, it would be impossible to prove that there was any financial loss to the family as a result of her untimely death.

What about loss of guidance and support to her family and children? Well, I don't believe she had children-at least the news reports did not indicate she did, and if she had no kids, her husband wouldn't be able to claim this as part of a wrongful death suit in New York.

Why can't Terri Shiavo's parents bring a lawsuit for negligence if she was wrongfully disconnected from life support? I can only answer the question as it would apply if the entire dispute were taking place here in New York since I only practice law in the State of New York. Here in the Big Apple, and the Greater New York Metropolitan area, if there is a spouse who survives, then he or she automatically has the right to bring whatever action is deemed appropriate. The surviving parents are secondary (if there are no kids from the marriage). If there are kids, the kids would be second in line to make decisions about any potential lawsuit.

Keep in mind that the spouse can waive his or her right to bring such a lawsuit. The kids can also waive their rights as well, and let the victim's parents handle it. By waiving their rights they must be careful not to waive their rights to receive compensation from any lawsuit, rather, just waive their rights to start a lawsuit in their name for their loved one.

Slip & Fall
The 10 Most Important Things You Need To Know If You Slip and Fall in NYC

Q: What are the top 10 most important things you need to know if I slip and fall?

1. What was the weather like on the day you fell?
2. What were you wearing on your feet?
3. Do you wear eyeglasses?
4. Do you have a history of dizziness or falling?
5. Are you taking any medications that make you dizzy?
6. What did you slip or trip on?
7. After you fell, did you see what it was that you fell on?
8. Were there any witnesses to your fall?
9. Did you file an accident report with the owner of the property, or with the police?
10. How long do you think the dangerous condition existed before you fell?

Q: I slipped and fell on a city sidewalk and broke my leg. Do I have a case?

A: The key question is whether the City had 'notice' of the defect you fell over. Did they know about the condition and fail to fix it in time to prevent your accident? If they didn't have actual written notice, was the defect large and significant enough so that they should have known about it?

The answer to those questions will help determine whether we are able to prove that the City was responsible for your injuries. Remember, there may have been construction in the area where you fell that may have contributed to creating the defect you fell over.

With a claim against the City, you must file a notice of claim within 90 days of the date of the incident! This must be done correctly to protect your legal rights.

Failure To Diagnose Lung Cancer The Ten Most Important Things Your Lawyer Needs To Know

Lung cancer is deadly. The earlier you diagnose and treat it the better off you'll be- hopefully.

Depending upon the type of cancer and when it's diagnosed, will determine your treatment options and survivability. Believe it or not, you don't have to smoke to get lung cancer. There's second hand smoke, there's carcinogen's in our environment, and our work environments may have something to do with it.

As a lawyer, when a client comes to me wondering if their lung cancer could have been detected earlier, I need to know the following important answers:

1. Were you under the care of an internist, or any physician, during the time you believe you should have been diagnosed?

2. Did you make any complaints to your doctor that should have warranted a chest x-ray?

3. Does anyone in your family have a history of cancer, especially lung cancer?

4. What type of lung cancer were you diagnosed with?

5. What stage of lung cancer were you diagnosed with? (The stages are typically from Stage 0 to Stage IV, with IV being the most severe and deadly.)

6. How much time went by from when you believe you should have been diagnosed, until the actual diagnosis was made?

7. Did you ask your treating cancer specialist (an oncologist) if your outcome would be different if the cancer had been detected 'x' years ago? (This is very important, since different types of cancer have different growth patterns. Some are slow growing, and some are fast growing. If you have a slow

growing tumor, and had made complaints that suggested the need for further follow-up and x-rays, you might have the basis for a case.)

8. What is your prognosis? (What do the doctors think about your survivability and the treatment still available to you?

9. Are you a smoker?

10. What type of cancer have you been diagnosed with?

Then, with all of that information, I must obtain your medical records, x-rays, CAT scans, and other information, and have a medical expert (preferably a pulmonary specialist) review your records.

This expert will determine whether the standards of care in New York were breached, and if so, whether those departures from good care caused and contributed to your injuries. All of those elements must be present in order to start a lawsuit on your behalf. If any one of those elements is missing, it is impossible to prosecute a case for you.

Q: My husband was a construction worker who slipped off a scaffold at his job site. He broke his neck and died from his injuries. Can I bring a lawsuit against his employer?

A: No, not his employer. You can however bring a lawsuit against the owner of the property, the general contractor and any subcontractor that may have been involved with your husband's injuries and death.

Remember, you have only 2 years from the date of his death within which to start a lawsuit for his untimely death!

Q: I slipped and fell on a city sidewalk and broke my leg. Do I have a case?

A: The key question is whether the City had 'notice' of the defect you fell over. Did they know about the condition and fail to fix it in time to prevent your accident? If they didn't have actual written notice, was the defect large and significant enough so that they should have known about it?

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Q: I was driving a forklift that malfunctioned causing me to be thrown to the ground. The pallet I was moving crushed my leg. Can I sue the manufacturer of the forklift for not designing the lift properly?

A: If we can prove that the design was defective and there were simpler ways to protect you- the driver,

then it's entirely possible a case can be brought. Keep in mind that there may have been changes or modifications to the machine in order to fit your workers or your company. If changes were made, you'd need to find out who made those changes and why.

This is also called a products liability lawsuit.

Q: If I'm a Veteran of the Armed Services, and all of my medical care was with the VA Hospital, and I believe they caused me injury, can I bring a claim against the VA?

A: Yes. In fact the law requires that any claim against the VA be brought in a special court in New York, called the Court of Claims. Any cases that come on for trial in this Court are decided only by a judge, and not a jury.

In any other type of malpractice case, I always request a trial by jury.

Q: If I was injured on the job, do you handle workers compensation claims?

A: No. I only handle medical malpractice and personal injury claims. But, if you call me, I can give you the names of some very good attorneys in New York who handle these claims, and can probably help you.

Prior bad acts

Q: If I was convicted of a crime does that prevent me from bringing a lawsuit?

A: No. One should have nothing to do with the other.
If you bring a lawsuit for an accident or medical malpractice, your credibility is always an issue. You will be asked whether you have ever been convicted of a crime. If the answer is yes, you must answer truthfully. Being upfront about it is always better than trying to hide it. Besides, the defense will find out anyway when they do a search on you to see if you've ever been convicted. Just imagine what you'd do to your credibility if you denied ever being convicted, when in fact your conviction shows up on a background check!

In jury selection we let the jurors know that you have been in trouble with the law, paid your price and done your time. But, we let the jurors know that your past has nothing to do with the issues before them now. Hopefully the jurors will understand that and accept this fact. Regardless of what you did in the past, you are still entitled to good medical care, and entitled to be free from harm.

If you've declared bankruptcy...

Q: If I recently declared bankruptcy, can I bring a lawsuit for my injuries and then keep all the proceeds? My injuries have nothing to do with my bankruptcy, right?

A: Wrong. When you declare bankruptcy, you are required by law to list all your assets with the Court.

If you even suspect that you might have a potential lawsuit (malpractice or personal injury case) you must list that as a potential asset. If you inadvertently neglect to put this potential asset on your list, and you go to an attorney (and don't tell him about your bankruptcy) who then starts your lawsuit, the defense has an absolute right to get a Court order to dismiss your case. (They will definitely learn about your bankruptcy sooner or later.) The reason is simple. When you declare bankruptcy, your bankruptcy 'estate' is no longer yours. A bankruptcy 'trustee' (a Court appointed lawyer) supervises how your assets are distributed - with Court approval.

Once you have declared bankruptcy, you are no longer legally capable of starting a lawsuit in your own name. The case must be started in the name of the bankruptcy trustee who must then hire an outside lawyer experienced in malpractice or personal injury to handle your matter. If you are actually awarded money, either by a settlement or verdict, your attorney will receive a fee, the bankruptcy trustee will receive a fee, your creditors will be paid, and you will receive the remaining monies (in most cases) if there is any left to be distributed.

IF YOU HAVE DECLARED BANKRUPTCY WITHIN 10 YEARS, YOU MUST LET YOUR ATTORNEY KNOW THIS BEFORE YOU START ANY LAWSUIT.

CAN YOU LOAN ME MONEY?

Q: If you've taken my case, can you advance me my money?

A: No. Unfortunately, even with a good valid case, there are no guarantees that we can obtain compensation for you. Because of that uncertainty we cannot advance you any money. There are companies that will give you cash advances against the likelihood of success on your case, but these companies usually charge excessive interest rates to allow you the benefit of a cash advance. I do not recommend these companies to my clients.

Q: When you settle a case, why do you make a record in court of the settlement?

A: When a case is settled, it must be done in accordance with specific rules to confirm the settlement. Either it's done in Court, in the presence of a Judge and a Court reporter, or it's done privately between the attorneys.

If it's done in Court, the terms of the agreement are clearly spelled out and recorded by the reporter. Copies of the settlement are then distributed to all the lawyers.

If the settlement is done by the attorneys, make sure that your lawyer spells out each and every detail of the settlement terms. Another good idea is to make sure that a phrase is inserted into any settlement agreement that says that the settlement is guaranteed to be paid by the insurance company, regardless of whether the injured victim lives or dies before getting the settlement check. Read my April 2005 newsletter in the library section of my website, www.oginski-law.com to find out why this is so important.

"My lawyer wants out of my case. Can he just get up and leave?"

Q: My lawyer and I don't agree on strategy. Nor do we agree on how to present my case to the jury. Why is he trying to withdraw from my case?

A: Although I can't answer specifically why your lawyer wants to withdraw, I can tell you that if you cannot get along with your lawyer, and you disagree with his (or her) strategy on how to present your case at trial, you have a significant problem.

It then becomes impossible for your attorney to represent you properly, and if you and your attorney are not on the same page, he will likely withdraw as your attorney.

Before he can actually withdraw, he must ask the Court for permission to do so. You will be given an opportunity to agree to this, or object to this request. In all likelihood, the Court will let your attorney withdraw, and you will be given a limited time period to get a new lawyer.

Pain and Suffering Compensation is Tax Free

Q: Do I have to pay taxes on a settlement for my injuries?

A: No you do not. In New York, compensation for your injuries is tax free. You will receive notification from the insurance company that paid you compensation with documentation about your settlement. You need to give that to your accountant. However, there are no taxes to be paid on your settlement.

When you invest those monies into taxable investments, then any profit or gain you achieve is obviously taxable.

In a death case, an award for pain and suffering is generally taxable to the estate. In some instances there are legal ways to allocate the monies to the wrongful death cause of action (which is not taxable to the estate) rather than the pain and suffering cause of action.

It's bad enough being injured and then having to bring a lawsuit to obtain proper compensation and payments for your disabilities. Can you imagine the impact it would have if you then had to pay income taxes on those monies? Luckily, the government realized that in New York, *injury settlements are not earned income. Rather, they compensate an injured victim for the pain, suffering, and disabilities they suffered at the hands of another's carelessness*.

Beware of the unmarked van that follows you…

Q: What is surveillance video, and why do I need to know about it?

A: In many car accident cases where victims claim they were injured, insurance companies for the other driver routinely send out private investigators to secretly videotape you doing some type of physical activity.

They do this to determine if your claims are genuine. Naturally, if they are not, you deserve to be caught and brought to justice. However, when your claims are genuine, the insurance company surveillance videotapes can often help prove your disability. "Look at Mr. Jones, walking with a limp. He needs assistance getting into his car. You don't see him laying bricks, or playing basketball. We told you he could walk...but look at how his walking affects his balance and gait. This puts stress on his spine..."

Importantly, if you claim you cannot do certain daily activities, or do them with difficulty, you must be truthful when you make such statements. Otherwise, the videotape may show otherwise.

I had a client recently who claimed she lost vision in her eye as a result of a misread CAT scan. She was still driving. One day she noticed (with her good eye) that a suspicious car was following her. She got scared and started to take evasive action. Her actions almost resulted in a serious car accident. She thought someone was stalking her and tracked down a police car to file a complaint.

It turns out that the lawyer for the hospital we had sued had ordered surveillance video of my client. The suspicious car was nothing more than an insurance investigator trying to get the 'goods' on my client. (They didn't get any 'goods' because my client was seriously disabled, even though she was still able to drive with one good eye.)

Beware- if you claim you are injured and disabled, you must accurately describe how your injuries have affected you. More than once have we read in the newspapers that a personal injury victim exaggerated their injuries to bolster their lawsuit.

AFTER YOUR TRIAL

Q: What is an appeal?

A: An appeal is a request to a higher court to review and re-evaluate a decision made by a lower court. Appeals are complex, and are most often decided on the legal issues, as opposed to factual issues.

For example, in a jury trial, facts are elicited from witnesses, medical records and evidence. The jury must decide whether the injured victim's version of the events, more likely than not, supports a finding

in his favor. If the scales of justice tip even slightly in plaintiff's favor, then they are entitled to be compensated for their injuries.

In an appeal, the higher court looks to see whether the legal instructions given to the jury were appropriate, and whether certain evidence was properly admitted or excluded during the trial. If an error of law was made, the court must then decide whether it was a harmless error, or one that had irreversible consequences. If there was a legal error, there is a good chance the court will throw out the lower court decision, and order a new trial. There are other options as well, but we need more time and space to cover them all.

In general, if you become a client of my firm, our retainer agreement does not include any appeal. It only relates to your case up to and through the trial and any post-trial motions relating to the trial. If there is to be an appeal, further discussion about your legal options will need to occur as well as any potential legal fees that you might incur if you proceed forward.

MEDICAL ADVICE FROM YOUR LAWYER?

Q: My doctor tells me I need another surgery, what do you think?

A: As much as I'd like to give you my own personal opinion, I can only provide you with legal advice. I am not a physician, but rather an attorney who has handled medical malpractice and injury cases for over 18 years. I have a lot of contact with physicians of all specialties.

However, you must have a good relationship with your physician and you must decide how you will treat your medical condition. If you are in doubt about the treatment options available to you, I might suggest that you seek a second or even third opinion about your condition.

I cannot give you medical advice. I can only advise you about your legal options in the event you decide to have certain treatments.

Q: I'm unhappy with my current treating doctor, can you recommend a doctor for me to go to?

A: I could, but I won't. If you read my free report on my website, www.oginski-law.com in the Library section titled "**5 deadly sins that could wreck your injury claim**," you'll see why I simply do not recommend physicians for my clients. There's a very important reason I do not do this. CREDIBILITY. Yours, mine, and the physician who comes in to testify on your behalf.

Jurors don't really like to hear that the attorney sent the client to a doctor for ongoing treatment. Why not? Because if the attorney has sent you there, there's a good likelihood he's sent other client's there as well. There's also a good chance other attorneys have sent their clients to that doctor also. Importantly, the defense will make sure to bring out the fact that this doctor is a 'favorite' of plaintiff's attorneys because of what he says in behalf of patients who have been referred to him by attorneys.

"But another attorney I know does this. Does that mean it's wrong?" No it doesn't. In some cases, there may not be any expert or physician willing to evaluate or treat your condition. In that case, you may have no other option. Remember, in a lawsuit one's credibility is of the utmost importance. If you are caught in a lie, whether intentional or by mistake, the defense will argue that if you have lied about this fact, how can we believe you have testified truthfully to other important facts?

The bottom line is that I don't do it. I may suggest that you go to another hospital or clinic or possibly even another physician within the group you are seeing.

DOES THE COURT REALLY LOOK OUT FOR MY CHILD'S CASE?

Q: In an infant's case, or in a death case, how do I know that everything is being done appropriately?

A: In New York, the Courts oversee all lawsuits. In particular, the Courts must approve any settlement involving an infant (any child under the age of 18) and any death case.

After an infant's case or a death case has settled, I must apply to the Court for permission to formally settle the case. If the Court does not approve of the settlement (for various reasons) then I cannot settle the case, and we must attempt to remedy the problem immediately. [In 17 years of practice, I have not had any Court refuse to sign a settlement that I have recommended, and the Client accepted- but I have seen it happen to other attorneys.]

The Court reviews a large packet of materials in support of the proposed settlement to make sure everything is correct, and all documentation about expenses, calculations, allocation of monies and the proper parties are reviewed. Only upon receiving the Courts' approval, are we permitted to finalize your settlement.

DOCTOR CREDENTIALS

Q: What does it mean if a doctor is board certified?

A: It means they have completed a training program after going to medical school, and they have taken certification examinations to determine their proficiency in a particular specialty of medicine.

Generally in the United States, doctors go to medical school for 4 years. After medical school, they will then go on for further post-graduate training at a hospital. This is known as an internship/residency. The internship is their 1st year of training after medical school. After that 1st year, many hospitals consider the doctors to be in their residency. [This term comes from when doctors had to live on the hospital campus and literally be available day or night].

The length of a residency varies from 3 years up to 7 years depending on the specialty. During a doctor's internship & residency, they are employees of the hospital, and are [supposed to be] working under the supervision of an attending [senior] physician. In theory it sounds nice, but it doesn't always work in reality- especially in large municipal hospitals where the volume of patients can be overwhelming.

After the doctor completes their accredited internship/residency, then they go out into the 'real' world and start practicing medicine- either in a group practice, a solo practice, or with a hospital. In many specialties, the doctor must complete 2 years of practice (called clinical practice) before becoming eligible to take their board certification exam.

A board certification exam is a national exam, given to doctors in a specialty to test their knowledge and experience. If a doctor fails their board exam, they can retake it at a later date. Interestingly, they can continue to practice medicine in New York, without being board certified.

As long as the doctor is licensed to practice medicine, they can practice anywhere they choose. A doctor does not need to be board certified to practice medicine in New York. As a patient seeking medical services, you should ask your doctor whether they are board certified, because this establishes the basic minimum standards that the doctor must meet before being able to say that they are 'board certified'. If your doctor has not passed his boards, then you know that there was some deficiency with his/her ability to pass the exam.

Warning:

There are good doctors who are not board certified who are practicing medicine in New York. Likewise, there are board certified doctors who may not be good doctors. Just because someone is board certified does not mean that they were not careless at a given point in time, nor does it mean that they are not responsible for injuries they may have caused you.

Q: If a doctor has been disciplined by the Office of Professional Medical Conduct, why can he still continue to practice medicine?

A: The punishments handed out by OPMC (the Office of Professional Medical Conduct) in New York are varied and depends greatly on the allegations against the doctor and the conclusions reached by their investigation.

Punishments range from a slap on the wrist, to a written admonishment. Others require a doctor to undergo additional training or be supervised while performing specific procedures. If warranted, a physician's license can be revoked if the health and well being of the public is at risk.

Is A Doctor's Past Legal History Admissible In My Current Lawsuit?

In New York, if my doctor has been sued, and I bring a lawsuit against him now, can I use his prior cases against him at trial to show how bad he really is?

The quick answer is no, you can't. Remember, just because someone has brought a lawsuit in the past, doesn't necessarily establish that he/she is responsible for the patient's injuries. The facts of each case are very important. The previous case may have nothing to do with the type of claim you intend on bringing.

Even if the cases were somewhat similar, New York law does not allow us to use the prior case to establish that this particular doctor was responsible for your injuries in your case. In some limited instances, we might be able to prove habit or a pattern of behavior. For the most part, we cannot use it.

For example, if you get a ticket for running a red light and the following week get pulled over for driving over the speed limit- the fact that you had a prior ticket for running a red light has nothing to do with whether you were speeding one week later.

Does that mean it has no value? Absolutely not. When we investigate a case, we look to see if the doctor has been sued before, who was sued with him, who the attorneys were, and what the outcome of the case was. In some cases, we contact the attorneys who represented the patient to inquire about the facts of their case, to see if there are any similarities with your case.

If we know that a doctor has a history of being sued, we use it to negotiate a better settlement for you, as the doctor's insurance company will surely have information about the doctor's lawsuit history.

Q: I just read that a doctor in New York had 13 lawsuits pending against him. If I bring a case against him too, does this mean I'd automatically win?

A: No. Every case is different. However, when a doctor has become a frequent guest of the Court system, everyone involved in the process (the attorneys, the insurance companies, the Court) gets a particular idea about the type of doctor this is and what a jury is likely to do at trial.

This does not mean that we can use all or some of his other pending cases against him in your case, but there may be some similarity with one or more cases that might justify addressing it at trial.

Q: If my doctor has been sued, and I bring a lawsuit against him now, can I use his prior cases against him at trial to show how bad he really is?

A: The quick answer is no, you can't. Remember, just because someone has brought a lawsuit in the past, doesn't necessarily establish that he/she is responsible for the patient's injuries. The facts of each case are very important. The previous case may have nothing to do with the type of claim you intend on bringing.

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If we know that a doctor has a history of being sued, we use it to negotiate a better settlement for you, as the doctor's insurance company will surely have information about the doctor's lawsuit history.

CAN'T WE RESOLVE MY CASE WITHOUT GOING TO COURT?

Q: What is mediation and what is arbitration?

A: Mediation is a term used to describe settlement discussions and negotiation with an impartial 3rd party- usually a retired Judge of the Supreme Court of the State of New York. A 'mediator' attempts to bridge the gap between the parties in an informal setting, such as an office, to get the parties to agree on a settlement and resolve their differences.

Settlement discussions with a mediator are not binding unless the parties reach a settlement. That means that if negotiations break down, or are not resolved, the parties are not bound by the terms discussed during settlement negotiations.

Arbitration is slightly different. It's more formal, with documents and evidence in the form of testimony given, again in an office-type setting. Arbitration may be heard with just one arbitrator or a panel of arbitrators. A decision rendered by an arbitrator is generally binding on the parties. There are limited exceptions where it is not. For the most part, the parties must agree to abide by an arbitrator's ruling.

In some personal injury or malpractice cases, either side may propose mediation or arbitration at any time prior to trial. If agreeable to both sides, there is a potential for resolving the case through these procedures. Sometimes, one or both sides become unreasonable in their settlement position, and we have no choice but to proceed to trial. That's what we do- we prepare each case for trial.

Q: What is the amount of medical malpractice insurance most doctors in New York carry?

A: The average physician in New York has a medical malpractice insurance policy with a limit of $1.3 Million Dollars per occurrence, with a maximum limit of $3.9 Million Dollars per year. This means that their insurance policy will pay out a maximum of $1.3 million dollars in either a settlement or a judgment. Remember that this is usually the maximum that will be paid under their policy. Many physicians also carry 'excess' insurance which supplements their basic policy. This is similar to an

umbrella policy.

Keep in mind that an insurance company will do everything in their power to minimize what they pay out to an injured victim, despite the fact that the physician has the coverage needed to pay full and fair compensation.

Q: What are the names of the medical malpractice insurance companies that insure doctors and hospitals in New York?

1. Medical Liability Mutual Insurance Company, NYC
2. MMIP, Long Island, NY
3. Physicians Reciprocal Insurance Company, Long Island, NY
4. FOJP Service Corp., (Federation of Jewish Philanthropies), NY
5. CCC, Combined Coordinating Council, Based in NY and the Caribbean.

Some hospitals are self-insured. This means that they do not use an insurance company to purchase malpractice insurance. They take steps to make sure they have enough funds to pay for any malpractice settlements and/or judgments against them. This method can save the hospital money in the short term, but in many cases, can leave a hospital unable to pay large judgments.

Q: Do you handle Vioxx, Bextra or Celebrex cases?

A: No. If you feel you've been injured by any of these medications, give me a call and I can direct you to a fantastic New York City firm that has a huge staff to handle these types of cases.

KEEPING TRACK OF YOUR PAIN

Q: What is a pain journal?

A: When a person has been significantly injured, it might be helpful for a person to record in a journal or diary their daily problems. This documents the pain and suffering that they are experiencing on a daily basis. This however is a double edged sword.

The defense argues that such a pain journal is 'self-serving' and is being done only to bolster the claim of pain and suffering. The other side of the argument is that this journal is being made to document all of the injured person's pain that she and her family might otherwise forget.

The one downside to a pain journal is that the defense attorneys have the opportunity to question the plaintiff (injured victim) at great length about each and every entry that they made in their journal. This could go on for days, and in some cases it has taken days to do this at deposition!

OTHER TYPES OF MALPRACTICE

Q: If a chiropractor caused nerve damage during my treatment, do I have a case?

A: The answer might be maybe. A chiropractor is licensed by the State of New York and is supposed to have completed a specific course of study before becoming licensed to practice 'chiropractic' medicine.

A chiropractor must adhere to the standards in the community while treating you. If he or she departed from those standards, and those departures caused you injuries, then you possibly have a valid case. Please speak to an attorney to discuss this further.

Q: What is dental malpractice?

A: Where a dentist has departed from good dental care and caused you injury- that is dental malpractice.

Q: How common is dental malpractice?

A: Dental malpractice is lack of good care by a dentist. The lack of good care (also known as negligence, or a departure from good dental care) must have caused you injuries. The injuries must be significant in order to accept a claim for dental malpractice.

Many times I see clients who have injuries to one or two teeth. Often times, this is not considered 'significant' for the purposes of proceeding with a lawsuit because our expenses on the case will likely exceed what we could ever expect to obtain for you in compensation.

The more significant cases involve the failure by a dentist to diagnose and treat bone loss resulting in loss of teeth and needing surgical reconstruction for the bone loss.

This situation arises when dental decay continues untreated for a long period of time. If left untreated, the decay will continue into the bone. The bone structure becomes weakened and there is a definite loss of bone visible on x-rays. By the time this point is reached, even dental implants have very little chance of success. These types of cases are not that common, but when we see them, the damages can be very significant. If you have more questions about your dental case, please call and speak to me. 516-487-8207

Q: What is podiatric malpractice?

A: Podiatry is medicine of the foot. Doctors are licensed by the State of New York to practice foot medicine. Some podiatrists are surgeons and able to perform office based and hospital-based surgery. Others only practice office podiatry and do not operate.

Podiatric malpractice is a departure from good podiatric medical care.

Q: I went to my podiatrist to have a bunion removed. He did surgery to correct the problem, and now I can't walk well. Do I have a case?

A: There are different ways to treat a bunion surgically. There may be many reasons why you are having

trouble walking now. It is important to review your records and x-rays (before and after) to evaluate why you needed the surgery, and whether the procedure that was done was appropriate. We also look to see if you might have contributed to any potential injury (such as walking on your foot immediately after the surgery- this will cause the weight of your body to shift the bones in your foot, thus making it difficult for your body to heal the bones in the correct position).

For more information about a potential case against a podiatrist (foot doctor) please feel free to speak to me; 516-487-8207.

Rejection…It's not easy

Q: I don't understand why you rejected my case. Can you re-evaluate my case again?

A: The main reason why I will reject a case is that it does not meet the strict criteria needed to bring a successful and meritorious lawsuit. There may be other reasons as well, and I will usually describe them in detail in my letter to you explaining why I cannot accept your case.

Please remember that a great deal of time and effort have gone into evaluating whether you have a valid case. I have obtained medical records, x-rays, CAT scans (and any other diagnostic tests you've had). I've reviewed all of your records in detail myself. In addition, I have had an expert review all of your medical records. If my expert has given me the 'thumbs down', I have no choice but to advise you of that fact and to explain your options and alternatives in the letter I send to you. In all likelihood, I will call you to discuss my expert's opinion before I send you a letter rejecting your case.

Importantly, not every instance of wrongdoing can be considered to be malpractice. Also, not every instance of malpractice rises to the level of significant injury requiring an experienced attorney to handle your case.

If I have rejected a case, I will be unable to re-evaluate your records again. You will need to seek another legal opinion as soon as possible.

Filing a Complaint with the Department of Health

Q: Why would I want to file a complaint against a doctor or a hospital with the NY State Dept. of Health?

A: The Department of Health oversees all doctors and hospitals in New York State. Their job is to make sure that doctors and hospitals are treating patients appropriately and not putting the general public in danger.

If you file a complaint with the Department of Health they investigate your claim. They review the

medical records, talk with the people involved and come to their own conclusions about whether the treatment was appropriate. If they find that there were 'deficiencies' with the manner in which you or your loved one were treated, the Department of Health has many options available to them to address the deficiencies.

They can order a fine be paid; they can suspend or revoke a medical license; they can direct that a hospital prepare a statement of corrections and order staff to be re-trained; they can also sanction a doctor or hospital for their actions.

Q: What are the most common types of malpractice cases you see?

A: Failure to diagnose cancer- breast cancer, lung cancer, brain cancer, testicular cancer, ovarian cancer. These are significant cases that are seen most often.

INJURIES TO NEWBORN BABIES

Q: What is erb's palsy?

A: Erb's palsy is a nerve injury that happens to a baby at the time of birth. The injury usually causes damage to an arm because of difficulty with getting the baby out during a delivery. Depending on how severe the erb's palsy is, the injury could range from a temporary paralysis (inability to move an arm) for a short time, or if more severe, could be permanent. There are other types of nerve injuries that occur at birth including brachial plexus injury and klumpke's palsy.

If your child has some type of nerve injury to their arm after birth, you should speak to an experienced trial attorney immediately.

Q: My pediatrician told me that my baby has cerebral palsy. What is cerebral palsy, and how did my baby get it?

A: Cerebral palsy is a significant brain injury that causes many physical and mental problems with a child. There is great debate among physicians and experts about the cause and effect of cerebral palsy. Many doctors believe cerebral palsy is caused from lack of oxygen at the time of delivery, causing brain damage. Other doctors believe the injury to a baby's brain may be caused in-utero (in the mother's womb, before the baby is ever delivered).

If your child has been diagnosed with cerebral palsy, it is extremely important that your child be evaluated by a pediatric neurologist for purposes of diagnosis and treatment. You should also speak to an experienced lawyer if your child is diagnosed with cerebral palsy. There may be evidence of malpractice leading to significant injury. In order to fully evaluate whether there is a valid case, your medical records, the baby's records and the fetal monitoring strips have to be reviewed by an expert in the field of obstetrics and gynecology, and also an expert in the field of pediatric neurology.

Q: What is hypoxia?

A: It's a lack of oxygen. This term is often seen in cases with babies who have not been delivered in a timely fashion. We also see this term in anesthesia cases where the patient did not receive sufficient oxygen during or after the procedure. Hypoxia can cause damage to the brain.

Q: What is anoxia?

A: It is a total lack of oxygen. We see this term in cases involving babies who are not delivered in a timely fashion, causing some form of damage to their brain. It is also seen in anesthesia cases where the patient did not receive sufficient oxygen during the procedure, or their oxygen was cut off during the procedure. Anoxia has been shown to cause brain damage if prolonged.

LAWSUITS INVOLVING CHILDREN'S INJURIES

Q: Do I need to bring my child into your office when I meet with you?

A: The quick answer is yes. I want to see the child. I want to see for myself what injuries the child has and how your child interacts with you. I need to know what a jury will ultimately see at trial.

We know that in some instances it is not possible to bring your child into our office. In that case, we will arrange to see the child in the hospital, your home, or wherever he or she is.

Q: Can a parent recover money because their child has been injured?

A: Yes. This is called a claim for loss of services. As a result of the child's injuries, the parent has been deprived of the child's usual and customary services that he or she performed around the house or for the family. Typically, this is a secondary claim, and the child's claim always takes priority.

Q: Do I need to keep taking my child to the doctor while the lawsuit is pending?

A: Absolutely. Not only do you need to follow-up your child's medical condition with his doctor- for your child's health and well being, but we also need to periodically obtain the latest medical records for your child's condition to see if there has been any change, worsening, or improvement in their condition. We are also obligated to provide copies of your child's updated medical records to the defendants- so they can also learn how your child is progressing.

Q: Will I need to bring my child into Court for a trial?

A: Most likely, yes. But remember, depending on the age of the child, we would only ask the child to be in Court on one day, and only for a very short time. (In some cases, we only want the child there for a few minutes. In other cases, we need to question the child, and questioning will not be very long in Court.) This should not deter anyone from asking about a potential case for their child.

Q: If I bring a lawsuit for injuries my child suffered, how many times will I need to be questioned by the lawyers?

A: Usually only once. Questioning will be done in my office and may take hours to complete. However, once it is over, you need not return for further questioning.

Q: What is an 'attractive nuisance'?

A: This is a term used to define a hazardous area that children are attracted to. An example would be an unlocked construction site with construction trucks and equipment. Children are naturally very curious and their interest in construction equipment makes it very enticing to enter the property without regard for any potential hazards to their own life.

CLIENT SATISFACTION- IN THEIR OWN WORDS…

Q: What do your former clients have to say about the quality of your work?
A: Here- see for yourself!

"We are very happy with the settlement that you obtained. This was a great accomplishment that was made possible by your dedication and experience. Your sincere and caring manner helped to make this experience easier than expected. We truly felt as though we were being helped by a good friend and this case was not just another file number. We would be happy to recommend you to anyone. You've been great! Thanks for everything." Victor & Lucianna Aiello, Brooklyn, NY

"During the time of Mr. Oginski handling my case he was very courteous and pleasant to work with. His work was very thorough, efficient, swift and precise. All of these words define excellence. I would recommend Mr. Oginski to anyone who asks for legal advice." Jeanette Mason, Brooklyn, N.Y.

"Dear Gerry:

My mother, brother, and I would like to take this opportunity to express our deepest and sincerest thanks for your diligent work on our case. Your thoughtful and compassionate demeanor made this whole situation much less stressful and difficult on the three of us. We were all very pleased by the settlement and were all very relieved that we did not have to take this very personal situation to trial. Mr. Oginski kept us abreast of all issues and matters. He was a true professional, extremely knowledgeable. The settlement, given our circumstances was very acceptable.

Best regards, Anthony Gonzalez, Queens, N.Y."

"It is with total respect and appreciation for Mr. Oginski and Frances (his secretary/paralegal) that I write this short 'thank you'. My process was handled with total professionalism, knowledge and

compassion. Yes, I am pleased with my settlement because I am confident that Gerry was totally dedicated to the most favorable outcome possible." Millie Provenzano, Staten Island, NY

IN A DEATH CASE…

Q: If a family member has died and I need to come to you for legal advice, what documents do I need to bring to our meeting?

A: First, I want to express my condolences if that is the case. It's never easy when a loved one has died. It's even more difficult if you believe that their death was caused by someone's wrongdoing or carelessness.

Second, here are the documents that will help greatly and will allow me to proceed with an investigation into your case:

1. An original death certificate (the funeral home will be able to provide this. Also, ask the funeral home for a bill marked "fully paid."

2. Let me know whether an autopsy has been performed. If so, I can arrange to obtain a copy of it from the medical examiner's office.

3. A list (handwritten is just fine-it doesn't need to be typed) of the names and addresses of any doctor your loved one saw within the last two years.

4. A list of the immediate family members, together with their ages, dates of birth and social security numbers.

5. If your loved one had a will, please bring a copy with you. (I need this to know who the executor or executrix (female executor) is.)

6. If your loved one did not have a will, one of the close family members, (you'll choose) will need to be named as the administrator of the estate. This simply means that that person will stand in place of the deceased loved one. He or she will have their name put on the litigation documents, but importantly, that person does not receive any different or greater share of the recovery simply because they are the administrator (or administratrix for a female).

7. If you have copies of any medical records, bring them.

8. Bring any medical insurance cards, bills and receipts from any health insurance company about the treatment your loved one received recently.

9. If your loved one was employed, bring copies of their tax returns and w-2 forms for the last three years.

10. When you meet with me, try and bring any family members who have knowledge or information

about the specific events that led to your loved one's injuries and untimely death.

All of these documents assist me in promptly evaluating and processing your matter. Any original documents are returned to you, except for the death certificate. The Surrogate's Court requires an original death certificate for their file.

Q: What is an autopsy, and why would it help my case?

A: An autopsy is an in-depth examination of a dead person, by a doctor. The doctor who performs the examination is usually a pathologist who looks to find the precise cause of death. They do this by looking at all of the internal organs, including the brain, heart, lungs, liver, kidneys, and spleen. Each area of the body is examined for evidence that contributed or caused that person's death.

In a case involving claims of wrongful death (where a person or family has claimed that their loved one died because of someone else's carelessness) having an autopsy is crucial to proving your case. While an autopsy is vital to support such a case, it can also shed light on the possibility that your loved one did not die as a result of wrongdoing.

It's a double edged sword. The autopsy could help your claim by showing that your loved one died from wrongdoing, or it could show that the treatment or actions that happened before death did not play a role in causing the death.

There are some religions that prohibit autopsies, and in those cases, it becomes extremely difficult to prove, with a reasonable degree of probability, that wrongdoing (such as malpractice) caused their death. In those cases, we must rely on other evidence to support our claim.

I am often called upon by grieving families to ask whether an autopsy should be performed on their loved one. As in life, there are no set answers to this crucial question. Emotions run high following a family death; questions about improper treatment may cloud a family's judgment; uncertainty about the cause of death may also add to a feeling of helplessness.

The most common case where an autopsy is performed is in a traumatic accident. In murder or homicide cases autopsies are always performed as the police want to know exactly what caused the person's death. They can usually use this information to track the perpetrator.

In New York, if a person dies suspiciously, or within 24 hours of having had surgery, an autopsy will usually be performed to determine the precise cause of death.

For example, I had a case where a man on dialysis came home one day, and was found later by his family in his bathroom having bled to death. The walls were covered with blood and there were open bandages all over the floor. An autopsy was able to confirm that the man's shunt (the place where the dialysis needle was put into his arm each session) had gotten infected and progressively larger with each session. Nobody recognized that he was starting to bleed when he left the dialysis center. Unfortunately, when he arrived home, the shunt ruptured and since it was connected to an artery, blood shot out all over the bathroom, creating what looked like a murder scene. It was only through the autopsy that we were able to prove our case successfully.

Autopsies are usually performed by the County Medical Examiner. In the five boroughs of New York City, Brooklyn, Bronx, Queens, Manhattan and Staten Island, autopsies are performed by the New York City Medical Examiner's Office. In Nassau, it's the Nassau County Medical Examiner, and in Suffolk, it's the Suffolk County Medical Examiner.

Q: What is 'pecuniary loss'?

A: This is a term used to describe the financial loss that the family has suffered from the death of a family member.

If a person were earning say $30,000 per year, and they were 35 years old, we could project over the next 30 years how much they could be expected to earn over their working lifetime. In many cases, we use an economist to make these projections. The economist uses tables, guidelines, and generally available statistics to help guide us in determining how much money that person would have likely earned over their lifetime. Naturally, some things can never be measured with absolute certainty. Companies can fold, go bankrupt, people have been fired, and their health has worsened. But on the positive side, we also look at raises, bonuses, increased productivity, and successes and factor that in as well.

ECONOMIC LOSS TO YOUR FAMILY

Q: What if the person who died was not earning a living, or was retired? Can we still claim economic loss to our family?

A: Unfortunately, the answer in New York is no.

The current law does not permit us to claim that the family suffered a financial loss if they were not bringing in an income. What about social security income? Usually it's not a significant amount. Considering that most people on social security use their monthly payments for basic necessities such as rent, food, and clothing for themselves. There's usually not much left over, if anything to spend on family members or grandkids.

Q: Can family members recover for time they've been out of work while caring for a family member before they died?

A: The short answer is no. The longer answer is maybe. If it was a spouse, (husband or wife) who cared for their significant other while alive, then we can bring a claim for loss of services for that limited time period.

If the family had to hire and pay someone to do household chores; cook, clean, wash, etc., then we can try and claim those expenses as well.

However, where other family members took days or weeks off from work to help out with family tasks,

the law does not really permit us to recover those lost wages. NOR DOES THE LAW PERMIT US TO SEEK EMOTIONAL DAMAGES FOR THE FAMILY'S LOSS OF THEIR LOVED ONE. This is the most tragic part of such a claim.

The family has been devastated and they cannot recover compensation for their emotional suffering from the death of their loved one.

If you want to change this law, write to your congressman and senator. This is the only way this will be changed.

WHAT'S AN ECONOMIST AND WHY DO WE NEED ONE?

Q: Why do we need an economist for my mom's death case?
A: An economist is an expert who studies the economy and understands what happens to money over time.

In many cases where a loved one was working, we can show that had they lived for the rest of their natural life, they would be expected to earn at least the same amount of money they were earning at the time of their death. An economist brings his/her expertise to the case by showing that those earnings over time would be a significant amount of money that your family has now been deprived of.

The economist can also make projections, such as bonuses, benefits, increases in salary, to show what your mom could very likely have earned if she lived a natural life. Having an economist gives the jury a handle on the type of money your family lost. Without these calculations and testimony, the jury would literally have to guess and speculate- which is simply not permitted and would not be allowed at trial.

If your mom was not working, and was instead a 'stay-at-home' mom, the economist is also useful in calculating the value of her services to your dad and the rest of your family. Now that she's no longer around, you might have to hire a nanny, or house-cleaner to do some of the things that mom used to do all the time. An economist is needed to support this type of claim.

Unfortunately, there are many attractive nuisances everywhere we go, and we must always be aware of where our kids are at all times.

SLIP & FALL CASES- HERE'S WHAT I NEED TO KNOW

Q: What are the top 10 most important things you need to know if I slip and fall?

1. What was the weather like on the day you fell?

2. What were you wearing on your feet?
3. Do you wear eyeglasses?
4. Do you have a history of dizziness or falling?
5. Are you taking any medications that make you dizzy?
6. What did you slip or trip on?
7. After you fell, did you see what it was that you fell on?
8. Were there any witnesses to your fall?
9. Did you file an accident report with the owner of the property, or with the police?
10. How long do you think the dangerous condition existed before you fell?

Liens...Do I have to repay my health insurance company?

Q: What is a lien?

A: A lien is a promise to pay a debt. In some cases, you may have to repay a debt, even though you didn't even agree to repay it.

Here's what I mean. If you've received Medicaid to help pay for your medical expenses, and you bring a lawsuit and you are successful in obtaining compensation for your injuries, Medicaid has a legal right to ask you to repay the money that they paid in your behalf, for your medical expenses.

The same goes for Medicare. Sometimes we can negotiate with these agencies to get them to reduce the amount of money they are seeking for repayment, depending upon the amount of money we recover for you.

Also, some doctors do not get paid after treating you, for a variety of reasons. Occasionally, they will agree to continue treating you if you promise to repay them their professional fees if you recover money in a lawsuit for your injuries.

You must tell your attorney if you know of any liens being made against you from any source. You must also tell your attorney if you have received Medicare or Medicaid at any time. Only by providing this information can your attorney help you and guide you through the legal minefields and avoid the pitfalls that less experienced counsel might fall into.

What Does a 'Right of Subrogation' Mean?

When you go to the doctor or hospital for injuries you received from an accident or malpractice, in all likelihood your health insurance company will be paying your medical bills. [This does not include car

accidents, where your no-fault insurance company will be paying for your medical bills up to a certain dollar limit.]

If you continue to receive medical care for your injuries and those bills are paid by your health insurance company, then your health insurance company has a right to recover those monies that they paid for your medical care. Why? Because your injuries were caused by someone else. If you bring a lawsuit claiming pain and suffering and also that you incurred medical bills and you get money for your injuries- your health insurance company wants to be repaid.

Technically, your health insurer 'steps into your shoes' and can bring a claim against the insurance company of the person or hospital that caused you harm. They can obtain their money directly from them. Alternatively, the health insurance company can bring a claim against you, the injured victim saying that since you settled your case, you are obligated to repay us for what we already paid out to your doctors. This is the 'right of subrogation'. It appears in very small fine print in most every health insurance policy in New York.

Some policies are very specific and say, "If you bring a lawsuit to recover money for your injuries, and we have paid for your medical bills, we have a contractual right to be repaid." The Courts in New York have consistently permitted health insurance companies to intervene in pending injury lawsuits to allow the health insurer to recover money that they already paid.

LEGAL UPDATES FOR YOUR LAWYER

Q: Are lawyers in New York required to take continuing legal education to keep abreast and updated on the current changes in the law?

A: Yes. All lawyers in New York, regardless of their field of practice are required to take a minimum of 24 credits worth of continuing legal education classes over a two year period.

Many bar associations and trial lawyer associations offer these classes on a continuing basis throughout the year. Many trial attorneys take classes involving naturally, trials, use of evidence, depositions, cross-examination techniques, and similar topics.

SO, YOU'RE NOT SATISFIED WITH YOUR CURRENT LAWYER…

Q: If I already have a lawyer, but I'm not happy with what they're doing, can I switch to another lawyer?

A: Yes. But first, you need to explore exactly why you're unhappy with your current attorney. Did you

have unrealistic expectations? Were you promised more than what is being delivered? Are you being unreasonable in what you expect will happen in your case?

If after looking at all the reasons why there is a pending problem with you and your current attorney, keep in mind that when you go to another lawyer to continue your case, your original lawyer will be entitled to receive his expenses (also known as disbursements) immediately from your new attorney. This is not his fee. In fact, your current attorney may have already had settlement negotiations and received an offer. If you have rejected a settlement offer, and then go to another attorney, your first attorney will then be able to claim a lien against the amount that was originally offered to you in settlement. That means that he'll usually be entitled to a percentage of the amount that you turned down- especially if you obtain more money from a second attorney.

When you switch to a new lawyer, the defense lawyers always look askance at the merits of the case if the first lawyer has withdrawn from the case, or the client has discharged his first attorney and gone elsewhere to continue his case. So, although you may have good reason to go elsewhere, give strong thought to the risks and benefits associated with going to a second or even third attorney.

A LAWYER'S STATS

Q: What is your success rate?

A: I would love to tell you that we win every case, but we don't. As in life, there are no guarantees- even with a very good case. As most trial attorneys will tell you, there are cases that should be won at trial, and are not, and there are cases that should be lost, and inexplicably are won.

In addition, there are many cases where the parties have reached confidential settlements that our clients would definitely consider a 'win' but we cannot publicize the details of the case.

For a sample of our success stories, take a look at our RESULTS page on our website, www.oginski-law.com.

Q: How can I get copies of your newsletter?

A: Directly from our website, www.oginski-law.com in our Library section! Our newsletters are here for your review. Read up, and enjoy. Read actual testimony by Doctors in real malpractice cases! Read our news headlines with links to jury verdicts and awards. Our site has been called "A news-junkie haven for legal news, awards and verdicts." If you have any questions, please feel free to e-mail me at lawmed1@optonline.net, or call 516-487-8207.

TO BECOME A LAWYER

Q: How many years does it take to become an attorney?

A: You must first complete 4 years of college.
Then you must complete 3 years of law school.
In order to practice in New York State, you must then pass a rigorous exam called the Bar Exam. It is usually a two day exam consisting of both multiple choice questions and essay questions. Once you have passed the Bar Exam, you must apply to the Appellate Court to seek admission to the Bar. Only after submitting your application and passing an interview with the Character and Fitness Committee will you be admitted to practice law in the State of New York.

Q: If I know someone who has been injured, can I give them your name and phone number?

A: Yes you may. Many people don't know an attorney and unless they've been in this situation before, may not know where to turn or who to talk to. It's very important that an injured victim gets as much information as possible to become informed about what he or she should and should not do.

Remember, just because someone has the biggest ad in the yellow pages, doesn't mean they're the right person for your problem. Ask lots of questions, and for more in-depth reading take a look at my free special report on attorney advertising in the "Library" section of this website, as well as my Feb. 2005 Newsletter that talks about attorney advertising.

BONUS REPORT #1

10 Things You Absolutely Need to Know to Start a Lawsuit in New York

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1. Lawsuits seek to compensate you for your injuries.
a. They compensate you for:
i. Your lost wages, and your future lost wages,
ii. Your medical expenses, both past and future, and
iii. Your pain and the suffering it caused in the past, and for the future

2. Lawsuits do not directly seek to harm anyone's reputation.

3. A doctor who is sued will not lose their medical license if the lawsuit is successful.

4. A lawsuit attempts to compensate the injured victim, and at the same time, try to ensure that the same type of bad treatment is not repeated in another patient.

5. "A lawsuit is not a lottery."

a. This phrase is often used by defense attorneys during jury selection to remind jurors that their job is not simply to allow the injured victim to 'hit it big' and award huge amounts of unjustified money.
b. A more realistic approach to a lawsuit is for reasonable, full and fair compensation to allow you to recover all of your past and future expenses, and all of your past and future pain and suffering compensation.

6. You don't have to pay any money upfront to an attorney to handle your case. There is no 'hourly fee'.

a. Medical Malpractice and injury cases are generally handled on contingency.
b. That means that the attorney fee depends upon you winning your case. If you lose, the attorney loses as well, and receives no fee.
c. The expenses that the attorney pays to prosecute your case are technically supposed to be repaid by the client in the event the case is lost. However, as a personal matter, I have never asked a client to reimburse me for my expenses if I lose a case. It just doesn't make sense to do so, and in my personal opinion, it's bad business. However, some attorneys do require this, so make sure you ask first before you make your decision.

7. Not every attorney has the same experience.

a. Ask your attorney how many years they've been in practice,
b. Ask the attorney what percentage of medical malpractice or accident cases he handles compared to other types of cases,
c. Ask whether he/she tries cases in the Supreme Court (it's the trial level court for New York,
d. Ask whether he's ever lost a case;

i. If he tries cases, and claims he's never lost a case…I'd suggest either that the attorney is not being accurate, or simply only accepts clear-cut cases that he cannot lose- that's extremely rare.
ii. The majority of trial attorneys will have lost a case from time to time. Unfortunately, it's the nature of the beast.

e. Ask whether the attorney you meet with will be the one handling your case on a day to day basis. If not, who will be your attorney? Whom will you call with questions? How quickly will the attorney call me back? How often can you expect to receive correspondence from the attorney about the status of your case?

8. A lawsuit takes time to come to a conclusion.

a. The average time is 2-3 years from start to finish.

9. How often do I have to come into the attorney's office during this time?

a. Once to meet the attorney in an initial meeting,
b. Once to sign documents that start your lawsuit (often this can be done by mail),
c. Once to have your deposition (where you are asked questions by the other side's attorney),
d. At least once to prepare you for trial, and sometimes two or three additional times to prepare you.

10. As in life, there are no guarantees to winning. However, with good experienced counsel and thorough preparation, you stand a much better chance of being fully informed about your prospects and achieving a good result.

BONUS REPORT #2

10 Facts Your New York Personal Injury and Medical Malpractice Attorney May Not Tell You

By: Gerry Oginski, Esq.

1. **Your lawsuit is not guaranteed to win or get you money. Even with a good experienced attorney, you may still lose**.

- This is true whether you have a great case, or even a bad case.
- No one can predict the outcome of your case, even if you have all of your 'ducks lined up'.
- An experienced attorney is a guide and your advocate. He will do the best he can to achieve victory for you. However, not every case is worthy of winning, and not every case is successful. Even an attorney with an impressive list of wins to his credit can tell you of cases that he has lost. Unfortunately, that's the risk that all parties take when a case goes to trial.

2. The true value of your case is unknown until every detail of your case has been evaluated by experts.

- At the beginning of the case, your attorney must obtain all of your medical records.
- He must evaluate liability in your case.
- He must review all medicals and liability.
- He then must have his expert(s) evaluate your case, from top to bottom.
- He must do legal research to see what similar cases have settled for and what verdicts have been rendered in similar cases.
- He needs to do a search of appellate cases to see how the appeals courts have addressed these types of injuries.
- He needs to know what economic losses you have suffered and what your doctors believe you will need for your future years.

3. You (the client) are obligated to pay me back for my litigation expenses, even if you lose your case.

- This is true. However, most lawyers in New York who handle medical malpractice and personal injury do not ask the client to be repaid for all of their litigation expenses if the case is lost.
- Can you imagine the indignity to a client after losing a trial, to be told, "By the way, you now owe me $25,000 for my expenses?"

4. If you have health insurance, and health insurance paid for your medical bills, in all likelihood, you will be required to reimburse your health insurance company most of those bills…from YOUR share of the settlement, not the attorney's share.

- The reason is simple- Since you were the one who benefited from your health insurance company paying your bills (of course you paid those hefty premiums for this benefit) any money you recover, is repaid directly from your share.
- Your share- that means that you don't get your money until your insurance company gets their share first. Then and only then will you receive your settlement check.

5. If you bring a lawsuit on behalf of your child, any money that is awarded to your child CANNOT BE TOUCHED until he or she turns 18 years of age.

- This is to protect your child's money, plain and simple.
- All too often, parents, most of whom are good intentioned and some who are not, have tried to take hold of their children's money to use for their own purposes and debts. The Courts of New York refuse to make any exception to this rule.
- Years ago, lawyers were only permitted to place this money into Savings Banks, where the money laid dormant earning minimal interest until the child turned 18 and it was withdrawn.
- Nowadays there are usually better investment vehicles that will preserve the child's capital, and at the same time generate better investment returns than typically found in a savings account.

6. If your lawyer screws up your case or makes a mistake, he is obligated to disclose the mistake to you and advise you to either file a claim against his insurance company, or advise you to seek counsel with another attorney.

- The reason this disclosure is advocated is that if a lawyer screws up, the client will usually not know of the problem until much later. By that time, it may be too late to file a claim against the attorney.
- The attorney is not supposed to gain or shield himself from such legal wrongdoing.
- If you make a mistake, own up to it. Tell the client about it. Advise them of their rights at that point.

7. All lawyers in New York are required to take continuing legal education classes to keep up to date on legal changes.

- It makes sense. You don't want to have a lawyer who's 'out of touch' with what the law is, you want someone who is current on the law, and how it applies to your case.
- Generally, a lawyer is required to take 24 credits of classes over a two year period.

8. "Let's sue everyone we can think of, then we'll figure out who's really responsible later."

- If this is your attorney telling you this, I'd think twice about his or her ability and ethical obligations.
- If a lawsuit is started against someone without having a valid basis to do so, this could be considered frivolous litigation, and might subject the attorney and client to sanctions and fines. Make sure you know who you're suing and why.

9. If you lie about the facts of your case, or about the extent of your injuries, I am out of here.

- If I find out that you have lied about material items concerning liability or damages, I will be first on line in Court asking to be removed from your case.
- You must tell the truth about what happened to you, and how your injuries have disabled you.

10. Even though I tell you I pay all of the litigation expenses, there may come a time when I might ask you to pay for them, otherwise I will not continue on your case.

- The lawyer says he pays all expenses on his dime.
- At the end of the case, when and <u>if</u> money is obtained for you, the lawyer is reimbursed for his expenses.
- In a few rare instances I have seen an attorney ask the client to directly pay for their experts to come into trial, since new information indicates that the chances of winning the case are slim to none. In those cases, the attorney wanted to cut his losses and told the client, if you don't pay for the experts yourselves, "I'm asking the Court to release me as your attorney."
- The bottom line- ask your lawyer whether this might ever happen.

Comment: I hope this **SPECIAL REPORT** has opened your eyes to certain facts that need to be addressed with any New York attorney you choose to handle your injury case. Remember, the more information you have, the better choices you'll make.

If you have any questions, please feel free to call Gerry (at no obligation or expense to you) at 516-487-8207.

THE LAW OFFICE OF GERALD M. OGINSKI, LLC

25 Great Neck Road, Ste.4
Great Neck, N.Y. 11021
516-487-8207
www.oginski-law.com
http://nymedicalmalpracticevideoblog.com

Gerry practices exclusively in the State of New York and represents injured victims of medical malpractice and accidents in all five Boroughs, including the Bronx, Brooklyn, New York City, Queens, Staten Island, as well as Nassau and Suffolk Counties. All inquiries are free and totally confidential.

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516-487-8207