

The background of the entire page is a photograph of a surgeon in an operating room. The surgeon is wearing a green surgical cap, a white face mask, and green scrubs. They are leaning over a patient who is lying on an operating table. The room is dimly lit, with the primary light source being the surgical lights. Various pieces of medical equipment, including monitors and a ventilator, are visible in the background. The overall color scheme is a mix of dark teal and green.

# A Guide to Indiana Medical Malpractice Law

Information Law Guide

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## **I. Medical Malpractice – What is it?**

The terms "medical negligence" or "medical malpractice" are the same things. Medical negligence or medical malpractice is nothing more than "negligence" in the setting of medical treatment. Negligence is just another word for carelessness. When a person is careless, they are, by definition, negligent. And carelessness simply means not taking enough care under the circumstances. So, if a doctor or a nurse or anyone who provides you with medical treatment fails to take enough care under the circumstances, and you suffer an injury as a result, you have been the victim of medical negligence or medical malpractice.

Medical providers have a legal duty or responsibility to follow established “standards of care” when diagnosing and treating a patient’s medical condition. If a medical provider does not follow established standards of practice when reacting to a particular medical problem and injury or harm results, that physician or medical institution may be held liable for medical malpractice. Medical “standards of care” are not contained in any one book or document. Standards of care are taught in medical school. Medical textbooks provide information and standards which direct how a doctor should handle a particular set of symptoms or a given situation.

Medical negligence or medical malpractice does not mean that a medical provider tried to harm you or intended to harm you. A doctor or a nurse or a hospital can have the very best of intentions towards you and still commit medical negligence or medical

malpractice if they fail to take enough care under the circumstances to protect you from harm.

## **II. What are the Elements of a Medical Malpractice Case?**

### **(A) Duty to the Patient**

There are several critical elements to medical malpractice cases. The first step is to determine whether the physician or medical provider had a "duty" to the patient. In order for there to be a duty of a doctor or other medical professional to provide care to a patient, there must be some form of agreement between the doctor and the patient regarding medical treatment. If a doctor or other medical professional agrees to treat a patient, then a certain degree of competence and skill is expected.

### **(B) Did the Medical Provider “Breach” or Violate the Standard of Care?**

Medical professionals have a legal duty to adhere to the applicable "standard of care" when they render medical treatment. Expert witnesses are usually required in medical malpractice cases to establish the standard of medical care in the geographical area or in the area of medical specialty at issue. The second element of a medical malpractice claim requires the presentation of expert testimony that defines what the acceptable standard of care is and explains how the physician's conduct did not meet the standard of care.

### **(C) Did the Medical Provider’s Negligence Cause the Injury or Harm?**

The third element of a medical malpractice claim is causation. The attorney representing the victim of medical negligence must prove that that physician's actions (or omissions) caused injury or harm to the patient. A doctor or medical provider may have been negligent in treating a patient, but in some cases that negligence is not the cause of

the injury suffered by a patient. Because the law requires a causal connection between the doctor's negligence and injury, not all instances of medical malpractice are compensable. Determining causation in medical negligence cases is often a very complicated issue that requires a thorough analysis of the patient's medical records. Proving causation, in a medical negligence case, usually requires the assistance of expert witnesses.

In many cases, the cause of injury can be attributed to the negligence of multiple health care providers. For example, a patient may be treated by a number of doctors, nurses, and medical technicians during the course of a hospital stay. Determining which of these providers were negligent, and how that negligence caused harm to the patient can be extremely complex. The emergency room doctor may have incorrectly diagnosed a patient, but a subsequent consulting doctor may have been negligent in failing to correct the diagnosis. A subsequent series of errors in the operating room, each by a different surgical technician, may require naming each technician as a defendant because each negligent act contributed to the injury. In such cases, experts are needed to determine the cause of injury or harm.

### **III. Investigating a Medical Malpractice Claim**

The first step in investigating a medical malpractice claim is usually a meeting between the lawyer and the patient (or the patient's family members) to discuss the facts and obtain the patient's perspective on what happened with his or her medical treatment. The next step is to gather all of the pertinent medical records. You can expect to be asked to sign a number of medical "authorizations" that will enable your lawyer to write for copies of your medical records. This often means contacting a number of hospitals and medical providers for office notes, x-ray films, lab tests and other medical data.

After all of the medical records are obtained and organized, your lawyer must find the right specialist to carefully review the records. There are times when a medical expert will want to examine or talk to a patient. More often, a thorough evaluation of the merits of a medical malpractice case can be made from the medical records as well as statements from the patient (or patient's family members) about the chronology of key symptoms and treatment events. As noted above, an expert reviewing the merits of a medical malpractice case looks at the case with two questions in mind: (1) did the medical provider violate established standards of care; and (2) if the care was substandard, did it make a difference in worsening the patient's health.

#### **IV. Litigation Expenses Associated with Medical Malpractice Claims**

Medical malpractice lawsuits can be expensive to pursue. Litigation expenses are monies that need to be paid in order to bring the lawsuit. A typical case can involve three or four (or even more) medical specialties who were involved in providing care to a patient. Each medical specialty involved in the case may need to have an expert witness hired to review the care that was provided by a particular specialist. The medical experts who review the case and testify must be paid fees for their services.

When medical records are requested, there is a charge for getting medical records. There are also the court reporter costs if depositions are taken. If the case proceeds to a trial, there will be additional expenses for expert witnesses, medical illustrations, computer animations, blow-ups, models or other evidence presented to the jury. One of the factors that you should consider, when selecting an attorney to handle your medical malpractice case, are the resources of the lawyer or law firm that you are considering. If the law firm you are considering does not have the resources to pay for expert witnesses and properly fund your medical malpractice case, that law firm may "cut

corners” that jeopardize your case. It pays to hire a lawyer who has the financial resources to take your case all the way to trial, if necessary.

Because litigation expenses in a medical malpractice case can be significant, we have adopted a policy of advancing litigation expenses on behalf of clients. We seek reimbursement of litigation expenses that we advance on behalf of a client only if we obtain a recovery for the client through a settlement of the case or a damage award at trial.

## **V. Indiana’s 2 Year Statute of Limitations**

A two-year statute of limitations was established for filing of a medical malpractice claim against a health care provider. The statute of limitations usually begins at the time of the alleged negligent act or omission and not at the time the patient discovers the negligence. Children who are the victims of medical malpractice prior to the age of six are allowed until their eighth birthday to file a medical malpractice claim. In 1999, the Indiana Supreme Court decided, in a case called *Martin v. Richey*, that Indiana’s two-year statute of limitations could be extended in a limited number of cases where the patient proves that the act of malpractice is concealed. When this exception applies, a patient may file a complaint within two years of the discovery of the malpractice and resulting injury, or learning facts that, with reasonable diligence, should have led to the discovery of the malpractice.

## **VI. Indiana’s Medical Malpractice Act**

Most medical malpractice lawsuits in Indiana are brought under the terms of Indiana’s Medical Malpractice Act. Indiana’s Medical Malpractice Act is one of the most comprehensive (and anti-consumer) tort reform measures in the United States.

This Act governs malpractice claims against “qualified providers.” While the vast, vast majority of medical providers in Indiana are “qualified providers,” not all health care

providers in the state are qualified providers. To become a “qualified provider,” entitled to the protections of Indiana’s Medical Malpractice Act, a health care provider must file a proof of financial responsibility and pay a surcharge assessed by the Indiana Department of Insurance. The purpose of the surcharge is to support the “Patient Compensation Fund,” a state-sponsored excess insurance program. The Patients Compensation Fund was established to make money available to individuals permanently disabled as a result of medical malpractice. Under the Indiana Medical Malpractice Act, the defendant medical provider and his or her insurance carrier are responsible for the first \$250,000 in damages. The Patient’s Compensation Fund is liable for the excess over what is owed by all the qualified providers, up to an overall damage cap of \$1,250,000. In other words, currently, the maximum amount of damages that the Patient’s Compensation Fund has to pay for any single occurrence of malpractice is \$1,000,000.

Under Indiana’s Medical Malpractice Act, all malpractice claims against a qualified provider must be reviewed by a medical review panel before the claim can be filed in court. The process begins when an injured patient files a "proposed medical malpractice complaint" with the Indiana Department of Insurance. The Department notifies the healthcare provider and his or her insurance carrier of the proposed complaint. A lawyer is hired by the insurance company to defend the claim. The parties work with a “chairman” of the medical review panel (who is an independent lawyer) to select the medical review panel, which usually consists of three doctors. Sometimes, nurses are permitted to serve on medical review panels if the case involves negligent nursing care. If the defendant is a health care professional who specializes in a specialized field of medicine, two of the panelists selected must be from the same field or area of medicine as the defendant. Panel members are compensated for their service on the medical review panel.

The three medical providers who serve on a medical review panel take an oath that they will be impartial and base their decision on the medical evidence. Before the medical review panel reviews a claim, the parties then have the right to engage in discovery. They take depositions and ask the other side to provide information under oath. The parties prepare medical malpractice “submissions.” The submissions may contain medical records, affidavits from the parties, depositions, expert reports, medical literature and the contentions of the parties.

After the medical review panel reviews the submissions, each panelist expresses an opinion as to whether the evidence supports the patient’s complaint. A panel opinion must be rendered within 180 days after selection of the last member of the panel. Once the panel has reviewed all the evidence, it has 30 days to render an expert opinion, in writing, to be signed by panelists.

The opinion of the medical review panel does not decide or end the case. Regardless of the medical review panel’s decision, the patient has the right to go to court, and the defendant health care provider has the right to defend the case. The panel’s written opinion also is admissible but not conclusive at trial. Any member of the medical review panel can be required to testify as an expert at trial if the case proceeds to court. If a case that has been through a medical review panel goes to trial, the jury will be informed of the opinions of the three medical review panel members. Experience has shown that Indiana juries (who decide medical malpractice cases) are often influenced by the opinion of the medical review panel when they decide the outcome of a case.

In cases brought under Indiana’s Medical Malpractice Act, a patient’s “contributory negligence” is a defense that bars any recovery by a plaintiff. A patient has a duty to exercise reasonable care, which includes providing his or her doctor with accurate and complete information and following the doctor’s instructions.

## **VII. Settlement of Medical Malpractice Cases in Indiana**



If a qualified health care provider agrees to a settlement, that amount is normally paid as a structured settlement annuity. The structured settlement annuity pays out a total of \$250,000, but would only have a cost or “present value” of \$187,001. If there is a settlement with a qualified health care provider for \$250,000 (or a structured settlement annuity that costs \$187,001), the health care provider’s liability is established. The patient then has the right to go to the Indiana Department of Insurance to have his or her additional damages paid from the Patient’s Compensation Fund. To obtain any damages from the Patient’s Compensation Fund, the patient must file a court petition seeking approval of an agreed settlement with the health care provider and must also contain a demand for additional damages from the Fund. As noted above, the maximum amount the Patient’s Compensation Fund may pay is \$1,000,000. The patient’s lawyers and lawyers representing the Patient’s Compensation Fund usually try to reach an agreement on the amount of damages. If that is not possible, the patient has the right to have a judge decide how much additional compensation is due.

#### **VIII. Medical Malpractice Trials**

In Indiana, there is an increasing number of cases that go to trial even in situations where the medical review panel has determined that the health care provider committed malpractice. Medical malpractice cases are tried to a jury, like any other lawsuit, in the county where the alleged malpractice occurred. In Indiana, medical malpractice cases are decided by a jury consisting of six members. If a medical malpractice case proceeds all the way to a jury trial, that can dramatically increase the litigation expenses. In a typical medical malpractice case, both sides will call multiple expert witnesses to prove the case or defend the case. Expert witnesses charge fees for their time and travel expenses. If a plaintiff receives a verdict against a health care provider, the first \$250,000 is paid by the

insurance carrier for that health care provider. The rest of the damages are paid from the Patient's Compensation Fund, up to \$1,000,000, the maximum allowed by Indiana law.