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Navigating the red tape of med-mal suits against Kaiser and government hospitals

How to sue Kaiser, the VA, and California government-owned hospitals

Suing Kaiser

Kaiser Permanente is the largest health-care network in California, with nearly eight million members. In fact, Southern California has 3,762,200 Kaiser members as of 2014. This is a gigantic machine of a company which, despite its claim of being a "non-profit," has more money than you can imagine. We are not sure how this company can claim to be a non-profit when it spends millions a year in political contributions to their interests (where did the money come from?) Intimidated yet?

Not only is Kaiser massive, but it has successfully navigated its way out of California courtrooms. Kaiser's members unknowingly sign an arbitration agreement when obtaining coverage that is, save a few exceptions, locked in. What does this mean for plaintiffs?

Well, for starters, a finder of fact ("neutral" arbitrator) will act as the judge. It is important to note that many of these "neutral" arbitrators have a substantial financial interest in finding against the plaintiff so that they do not lose "favor" with Kaiser and the Office of the Independent Administrator, or OIA, and continue to be hired. However, in my dealings with the OIA, the majority of the neutral arbitrators are fair and reasonable in their dealings on the case.

We know that medical malpractice cases are expensive in general, but be prepared to pay a little extra when going against Kaiser. Obviously, deposition and expert costs are the same, but now you have to pay a daily rate for the neutral arbitrator, ranging from $3,000 to $5,000. Place this rate against jury and court reporter fees and you can see my point.

Is there any good news? Sort of.

Typically, with independent doctors and their insurance companies, the doctor's consent is needed before a settlement can be reached. This is not true for Kaiser. Kaiser does not require or totally rely on the input of the doctor being sued. This is much more akin to auto insurance, and therefore creates an easier road to pre-arbitration settlement.

What is the process?

Like any medical malpractice case, you need to start by sending your Code of Civil Procedure, section 364 intent-to-sue letter ("364 Letter"). This letter must be sent to these three entities in a Southern California case:

- Kaiser Foundation Health Plan, Inc. (KFHP)
- Kaiser Foundation Hospitals (KFH)
- Southern California Permanente Medical Group (SCPMG)

Attn: Legal Department
393 E. Walnut Street, 2nd Floor
Pasadena, CA 91188-8110

In your 364 Letter, be sure to set out the legal basis of the claim, the losses suffered, and the names of specific parties (doctors) who you believe are at fault. Keep in mind that there are specific statutes of limitations on medical-malpractice cases. To be safe, always assume that you have one year to demand arbitration against Kaiser. Serving the 364 Letter within the last 90 days of the statute-of-limitations period tolls the statute for 90 days beyond that one-year limit. To be safe, always demand arbitration within one year of the date of the incident, even if proper notice of intent to sue has been given through a 364 Letter.

You will then need to demand arbitration. This is done via letter in a similar fashion to the 364 Letter you should have sent previously. In Southern California, be sure to name all three Kaiser entities listed above in this demand. Your demand should be more detailed than your 364 Letter. In the demand, give a detailed account of exactly what occurred to your client and why it was below the standard of care. Set forth your claim for damages due to the malpractice and any future care that will be needed (if known).

After arbitration has been demanded, you will receive a packet from the OIA wherein you will have to pick an arbitrator and pay some fees. To avoid filing fees and arbitrator fees in certain circumstances please reference the OIA rules, section B.12 and B.13. There are two options to pick your arbitrator: (1) with defense counsel, mutually select one off the list provided or the longer list of qualified Kaiser arbitrators; or (2) submit your ranked list back to the OIA. The ranking list is your opportunity to research each potential arbitrator and decide who may be plaintiff-friendly. Use the CAALA List Serve and Internet to complete this research. You will find several "dings" on every list you get and you are allowed to cross four of them off completely. The OIA will compare your list with the list from defense counsel, check the availability of the arbitrators, and select the one with the lowest combined "rank."

At that point, the arbitrator will contact your office and set up a phone

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conference (much like a CMC) to discuss dates for the arbitration and any other pending issues. From this point forward the case moves along similar to that of being in Superior Court. Good luck.

Suing the Department of Veterans Affairs

The current media coverage of the care (or lack thereof) provided to our veterans by the Department of Veterans Affairs certainly makes this topic timely. Over the last few months, it has become clear that the procedures currently in place in certain "health-care systems," which are the local medical centers, are a set-up for patients falling through the cracks and bad outcomes, up to and including preventable deaths. This section is a primer for the basic differences between pursuing a medical malpractice case against the VA and the typical California state case against a private health-care provider.

Medical-malpractice suits against the Department of Veterans Affairs (VA) are generally governed by the Federal Tort Claims Act (FTCA). However, certain California substantive laws are also applicable, including the substantive law defining the elements and proof of a cause of action for medical malpractice. The interplay between federal and California law makes the legal analysis and procedural steps to competently handling a medical-malpractice case against the VA complex, and requires the practitioner to proceed carefully to avoid several pitfalls.

Initially, in order to pursue a lawsuit against the VA, the plaintiff must first exhaust her administrative remedies by filing an administrative claim with the VA Health Care System that provided the negligent care. (28 C.F.R. § 14.2 (2010).) It is important to note that the applicable statute of limitations is defined by the FTCA (28 U.S.C. § 2401(b)), which requires that the claim be filed within two years of accrual, and that the California statute of limitations under Code of Civil Procedure section 340.5 is inapplicable. One important statute-of-limitations trap to be aware of and to avoid is that the VA can only be held liable for the actions of its employees who are acting within the course and scope of their employment. That means that you must ensure that the providers at issue, namely the physicians, were not independent contractors and take the necessary steps to preserve the statute of limitations for a state court claim against them in case the VA informs you that it has no responsibility for the actions of one or more of the providers.

From a technical standpoint, the Standard Form 95 is utilized for filing the claim. (http://www.justice.gov/civil/docs_forms/SF-95.pdf) You must claim all damages that your client is entitled to recover in the initial form, because the amount of the initial claim is the limit of recoverable damages in the later lawsuit. (28 U.S.C. § 2675(b).) Relief from this law is granted only if newly discovered evidence, that was not reasonably discoverable at the time of filing, comes to light. (*Ibid.*) Therefore, before filing, it is incumbent on you as the attorney to have an understanding of the full extent of your client's damages; otherwise, your client may later be prevented from recovery of all of the damages he could have recovered.

The MICRA cap on general damages is applicable, and the amount of your client's claim should be consistent with that limitation on damages. In addition to identification of the key individuals and facts supporting the claim, similar to a factually specific complaint, the claimant is also required to submit evidence to support her claim – in other words, the medical records and any other evidence that proves the necessary elements.

The VA has six months from the time the claim is filed to respond to the claim. Theoretically, this allows for the VA to investigate and, where appropriate, settle claims and avoid unnecessary litigation. The claimant may deem the claim denied and file in United States District Court if there is no response or the claim is not fully settled after six months. The VA Office of Regional Counsel will be assigned to handle the claim, and may often ask you to divulge information such as your expert's opinions. This should be carefully considered in each case, weighing the likelihood of obtaining a fair settlement at that point in time versus the value of the information revealed. You should, but may not always, receive cooperation in confirming that the providers at issue were in fact employees of the VA at the time of the negligent care and treatment. Once a lawsuit is filed in the appropriate Federal District Court, the U.S. Attorney General will take over the defense of the case. The A.G. will certify that the named defendants were government employees acting within the course and scope of employment, and after doing so the United States will be substituted-in as the named defendant. Another important difference is that the case will proceed to a court trial, as there is no right to a jury trial under the FTCA.

Finally, the FTCA limits the amount of attorneys' fees recoverable to 20 percent of a settlement and 25 percent of the amount of any judgment. The Ninth Circuit has held that this law preempts the MICRA limitations on attorneys' fees set forth in Business and Professions Code section 6146. (*Jackson v. United States* (9th Cir. 1989) 881 F.2d 707, 713.) So, although the recoverable fees are more limited under the FTCA than under MICRA for the first $100,000 recovered, and either the same or five percent less for the next $500,000, thereafter the fees are an additional five percent or 10 percent past the maximum rate set by MICRA. The break-even point for this increased fee is approximately $725,000 for judgments and $930,000 for cases that are settled, after which medical-malpractice cases against the VA can actually result in increased attorneys' fees over a California state case. It is incumbent upon the practitioner to include the difference in fee structures into the initial retainer agreement so that it comports with the FTCA. Failure to do so, and the charging of a fee exceeding the FTCA rates, can lead to a fine of $2,000, a year of imprisonment, or both. (28 U.S.C. § 2678.)

In total, although handling a medical-malpractice case against the VA can be initially daunting in terms of navigating

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the several important procedural differences compared to handling a California state case, once you familiarize yourself with these steps the fundamentals are not so substantially different that they should bar you from considering a worthwhile case.

Suing California state- and county-owned hospitals

This type of claim needs to be addressed briefly for statute-of-limitations concerns. Namely, if you are suing a facility for medical malpractice, you need to immediately understand the ownership of that facility. If the medical facility is owned by the State of California, you will need to follow the rules of the California Tort Claims Act (Gov. Code, § 810 et seq.). This means your claim will need to be made within *six months* of the alleged malpractice and, upon denial, you must pay specific attention on how to proceed. This differs from the regular one-year statue for a private facility or doctor.

Fortunately, these types of claims don't come up as much as one would think. Typically, when a doctor is at fault, she will have her own private practice and insurance (and simply have privileges at the hospital). Usually, only when an employee of the hospital is at fault will you need to have a California government-owned hospital as a defendant. For example, a recent case I had dealt with an X-ray technician (employee) who failed to remove metallic leads from my client's chest before an MRI. My client suffered significant burns because of this mistake, and I had to sue the facility, which was government owned. Obviously, you will need to verify the employment status of the doctor or culpable party to know whether a government tort claim is needed. If you feel that the state government-owned facility may be culpable, you should err on the side of caution and properly bring it into the action.

For reference, here is a list of government-owned and -operated facilities in the Los Angeles area. This is not a complete list and should not be used as such. Furthermore, there is some disparity between USC and UCLA in dealing with the Regents of the University of California but I urge you to err on the side of caution when dealing with any of these facilities. File your government claim!

- Harbor-UCLA Medical Center
- LAC+USC Medical Center
- Olive View-UCLA Medical Center
- Rancho Los Amigos National Rehabilitation Center
- Martin Luther King, Jr. Multi-Service Ambulatory Care Center
- Long Beach Comprehensive Health Center
- Edward R. Roybal Comprehensive Health Center
- El Monte Comprehensive Health Center
- H. Claude Hudson Comprehensive Health Center
- Hubert H. Humphrey Comprehensive Health Center
- Mid-Valley Comprehensive Health Center
- Bellflower Health Center
- Wilmington Health Center
- Antelope Valley Health Center
- South Valley Health Center
- La Puente Health Center
- Dollarhide Health Center
- Glendale Health Center
- San Fernando Health Center
- Lake Los Angeles Health Center
- Little Rock Health Center

Avoiding the aforementioned pitfalls will not only help you to avoid legal malpractice, it will also show the opposing side that you are competent in what you do.

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