

HANDLING A MEDICAL MALPRACTICE CASE

Plaintiff Attorney's Prospective



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**DO YOU HAVE
A CASE?**

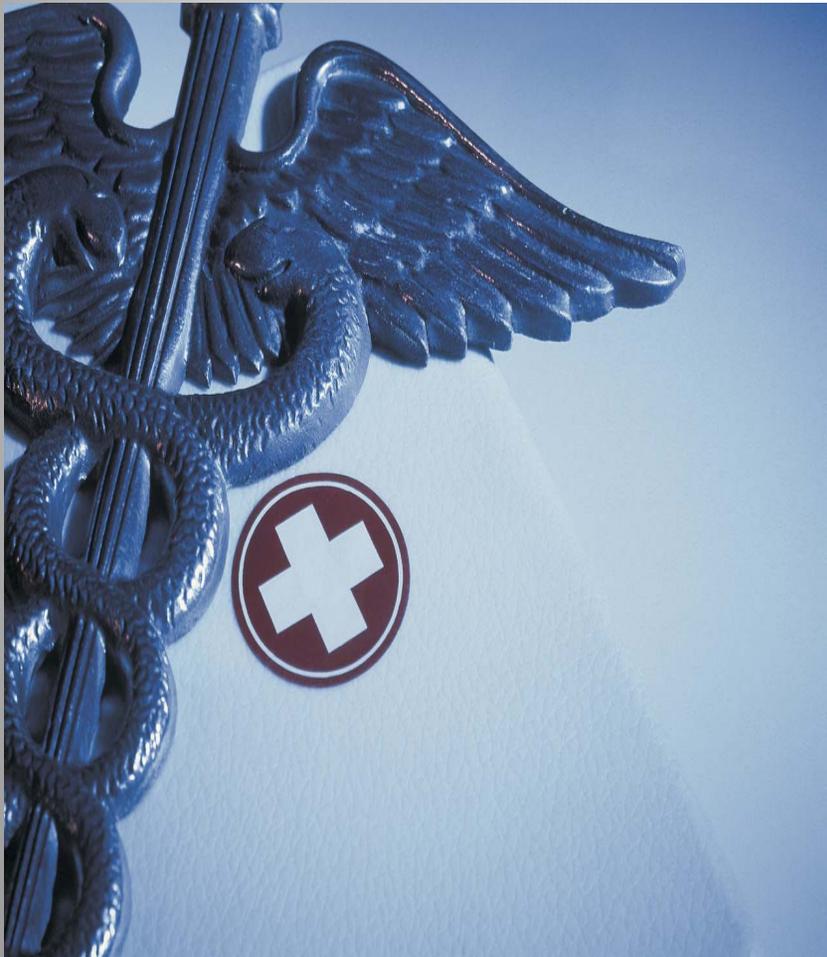


WHAT IS MALPRACTICE?

The negligence of any professional person in the course and scope of their professional practice is often called malpractice.

Malpractice is professional negligence.

WHAT IS MEDICAL MALPRACTICE?



“Medical malpractice is the negligence of a doctor. Negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do under the circumstances. It is a deviation or departure from accepted practice.”

DOCTORS' OBLIGATION AND REQUIREMENTS

“A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and ability which is expected of doctors who (perform, provide) that (operation, treatment, medical service) in the medical community in which the doctor practices.”

“The law recognizes that there are differences in the abilities of doctors, just as there are differences in the abilities of people engaged in other activities. To practice medicine a doctor is not required to have the extraordinary knowledge and ability that belongs to a few doctors of exceptional ability. However every doctor is required to keep reasonably informed of new developments in (his, her) field and to practice (medicine, surgery) in accordance with approved methods and means of treatment in general use. The standard of knowledge and ability to which the doctor is held is measured by the degree of knowledge and ability of the average doctor in good standing in the medical community in which the doctor practices.

“In performing a medical service, the doctor is obligated to use (his, her) best judgment and to use reasonable care.”

WHEN IS A DOCTOR LIABLE/NEGLIGENT?

“By undertaking to perform a medical service, a doctor does not guarantee a good result. The fact that there was a bad result to the patient, by itself, does not make the doctor liable. The doctor is liable only if (he, she) was negligent. Whether the doctor was negligent is to be decided on the basis of the facts and conditions existing at the time of the claimed negligence. ”

“A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful examination if it is a judgment that a reasonably prudent doctor could have made under the circumstances.”

“If the doctor is negligent, that is, lacks the skill or knowledge required of (him, her) in providing a medical service or fails to use reasonable care and judgment in providing the service, and such lack of skill or care or knowledge or the failure to use reasonable care or judgment is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harm caused.

“A doctor’s responsibility is the same regardless of whether (he, she) was paid.”

DEVIATIONS MAY BE CAUSED BY ONE OF THREE FAILINGS

- The failure to possess that reasonable degree of knowledge or skill that is ordinarily possessed by the average physician in good standing.
- The failure to use ordinary and reasonable care, diligence, or skill.
- The failure to use his or her own best judgment.

STANDARD OF CARE

Standard of Care: To establish liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (see Stukas v Streiter, 83 AD3d 18, 23 [2d Dept 2011]). It is the obligation of the finder of fact to determine, among other things, the accepted standard of medical practice, whether the defendant departed from that standard and, if so, whether such departure was a proximate cause of the plaintiff's injuries (see Gross v Friedman, 73 NY2d 721 [1988]).

Error in Judgment Charge

- Error in Judgment Charge: The error in judgment charge (PJI 2:150) states as follows: “A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.” This charge should only be read when there is evidence that the doctor made a choice among medically acceptable alternatives (see Nestorowich v Ricotta, 7 NY2d 393, 399 [2002]).

Requirement of Expert Medical Testimony

- Requirement of Expert Medical Testimony: Where there is evidence that the defendant physician exercised professional judgment in deciding how to treat the plaintiff, then expert testimony is needed to assist the jury in determining whether such treatment was negligent (James v Wormuth, 21 NY3d 540 [2013]). CPLR 4401-a provides that any action based upon a theory of lack of informed consent must be dismissed if the plaintiff has failed to provide expert medical testimony in support of the alleged qualitative insufficiency of the consent.

UNAUTHORIZED PRACTICE OF MEDICINE

- Unauthorized Practice of Medicine: Pursuant to CPLR 4504(d), the fact that a person practiced medicine without being licensed to do so is prima facie evidence of negligence. The plaintiff must still show proximate cause.

RES IPSA LOQUITUR

- Res Ipsa Loquitor: The doctrine of res ipsa loquitor can be helpful in medical malpractice actions where the plaintiff is unconscious and unable to identify the negligence of the defendant.

DUTY TO NON-PATIENTS

- No cause of action may be maintained on behalf of an infant plaintiff for “wrongful life”, i.e., the notion that he or she would have never been born but for the negligence of the defendant (DeChico v Northern Westchester Hosp. Ctr., 73 AD3d 838 [2d Dept 2010]). However, a parent may maintain a cause of action on his or her own behalf for the extraordinary costs incurred in raising a child with a disability who would not have been born but for the malpractice of the defendant (Becker v Schwartz, 46 NY2d 401 [1978]). To succeed, the plaintiff parent must show that malpractice by the physician deprived the parent of the opportunity to terminate the pregnancy within the legally permissible time period or that the child would not have been conceived but for the defendant’s malpractice. Since, under New York law, a parent has no legal obligation to continue support of a child after the age of majority (21 years), even if the child is disabled (see Family Court Act § 413[1]; Domestic Relations Law § 32[3]; Social Services Law § 101[1]), the “legally cognizable injury” in a wrongful birth action is only “the increased financial obligation arising from the extraordinary medical treatment rendered the child *during minority*” (Bani-Esraili v Lerman, 69 NY2d 807, 808 [1987]).

DUTY TO NON-PATIENTS

CONTINUES

- Malpractice which results in a miscarriage or stillbirth is a violation of the duty of care to the expectant mother, warranting the recovery of damages for the expectant mother's emotional distress (Broadnax v Gonzalez, 2 NY3d 148 [2004]). However, where the alleged malpractice causes in utero injury to the fetus, but where the baby is subsequently born alive, the mother may not recover damages for emotional harm based on the injury to the baby. The issue of whether the baby was stillborn or born alive can be hotly contested (see Amin v Soliman, 67 AD3d 835 [2d Dept 2009]; Levin v New York City Health and Hosps. Corp. (Harlem Hosp. Ctr.), 119 AD3d 480 [1st Dept 2014]).

PROXIMATE CAUSE

- **As there can be more than one proximate cause of an injury or death, the plaintiff has the burden of demonstrating that the malpractice was “a” cause, not “the” cause, of an injury. Generally, proximate cause must be established by expert opinion.**
- **Loss of chance: The failure to diagnose a condition can result in a missed opportunity to treat a condition. Sometimes, the missed opportunity may only have a moderate chance of success. Under the loss of chance doctrine, where the malpractice diminished the plaintiff’s chances of recovery, even if that chance of recovery was minimal, proximate cause may be a question for the jury. There are no specific percentages to apply (see King v St. Barnabas Hosp., 87 AD3d 238 [1st Dept 2011]).**

VICARIOUS LIABILITY

- **Hospital**
- **Agency**
- **Apparent Agency**
- **Resident Liability**

VICARIOUS LIABILITY HOSPITALS

- A hospital or other medical facility is liable for the negligence or malpractice of its employees (Bing v Thunig, 2 NY2d 656 [1957]). However, where the malpractice is performed by an independent physician, such as when the physician is retained by the patient himself, the hospital will generally not be held vicariously liable (see Fiorentino v Wenger, 19 NY2d 407, 414 [1967]). A doctor's affiliation with a hospital or other medical facility that does not amount to employment is generally not, standing alone, sufficient to impute the doctor's negligent conduct to the hospital or facility.

VICARIOUS LIABILITY AGENCY

- **Agency**: Even in the absence of an actual employment relationship between the doctor or medical professional and the hospital or medical facility, the hospital or facility may still be vicariously liable for the negligence of the doctor or medical professional if the hospital or facility exercised control over the doctor or medical professional (Mduba v Benedictine Hosp., 52 AD2d 450, 452 [1976]).

VICARIOUS LIABILITY

APPARENT AGENCY

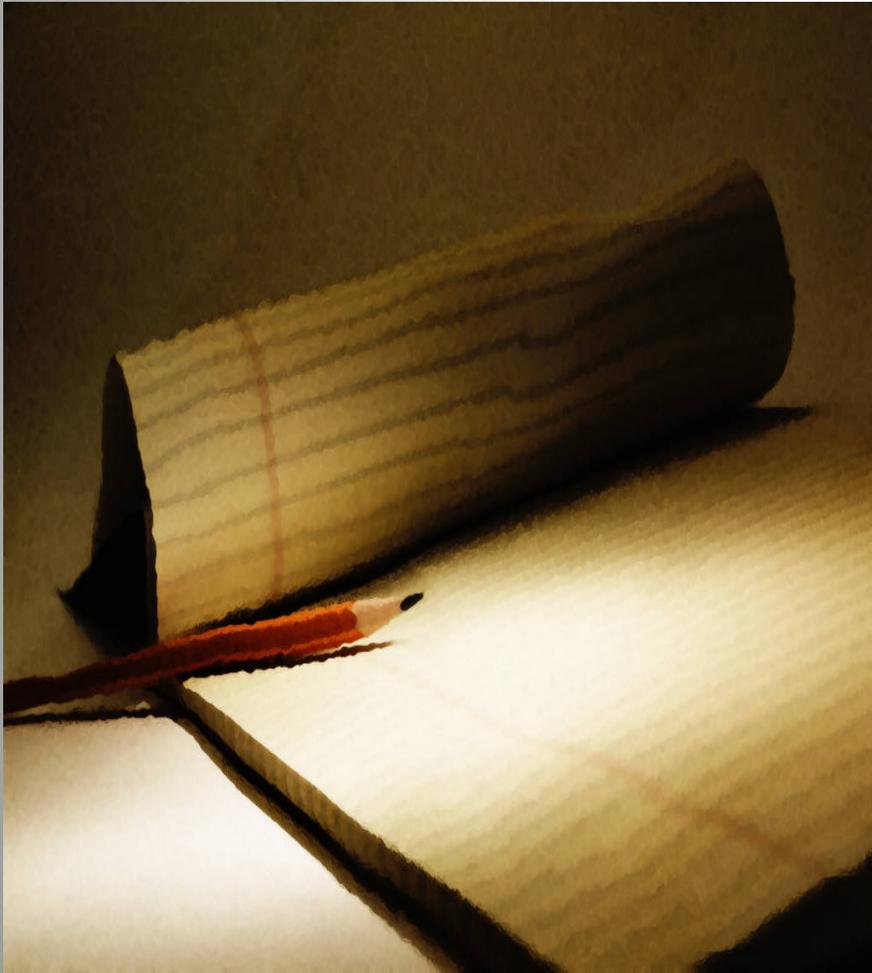
- **Apparent Agency**: Although vicarious liability for medical malpractice generally turns upon agency or control, apparent or ostensible agency may also serve as a predicate for such liability (see Hill v St. Clare's Hosp., 67 NY2d 72, 79 [1986]). **Apparent or ostensible agency exists where a hospital, clinic or doctor (the principal) represents to a patient, whether through words or conduct, that another doctor (the agent) possesses the authority to act on their behalf. If the patient then relies on this representation by the principal and accepts the services of the doctor in reliance upon the perceived relationship between the two parties, rather than upon the agent's own skill or expertise, then the principal will be subject to liability for harm caused to the patient by the negligence of the agent (see Dragotta v Southampton Hosp., 39 AD3d 697, 698 [2d Dept 2007]).**

VICARIOUS LIABILITY

RESIDENT LIABILITY

- Resident Liability: Generally, a resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, is not liable for malpractice by the attending physician. The resident will be liable for malpractice only where the attending doctor's directions so greatly deviate from normal practice that the resident should be held liable for failing to intervene.

EVALUATING THE CASE



- **STATUTE OF LIMITATIONS**
- **ASSESSING LIABILITY**

STATUTE OF LIMITATIONS

- Generally the statute of limitations for medical dental, and podiatric malpractice is 2 1/2 years, pursuant to CPLR § 214(a).

FYI: Negligence by an optometrist or psychologist is not medical malpractice, and is governed by a 3-year statute of limitations.

EXCEPTIONS TO THE GENERAL 2 YEAR AND 6 MONTHS

- **Infancy Toll**
- **Foreign Object Statute of Limitations**
- **Continuous Treatment**
- **Actions against Public Hospitals entitled to Notice of Claim**
- **Tolling and the Notice of Claim**

INFANCY TOLL:

- Under CPLR § 208, the statute of limitations is tolled due to the infancy of the plaintiff, but the toll is capped at 10 years, measured from the date of the accrual of the cause of action. Thus, in a medical malpractice case, an infant has the lesser of 2 years and 6 months past the age of majority, or 10 years from the act of malpractice.
- The toll of infancy is personal to the infant, and will not apply to a derivative cause of action brought by the parent (*Richardson v. New York City Health & Hospitals Corp.*, 191 AD2d 376 [1st Dept. 1993])

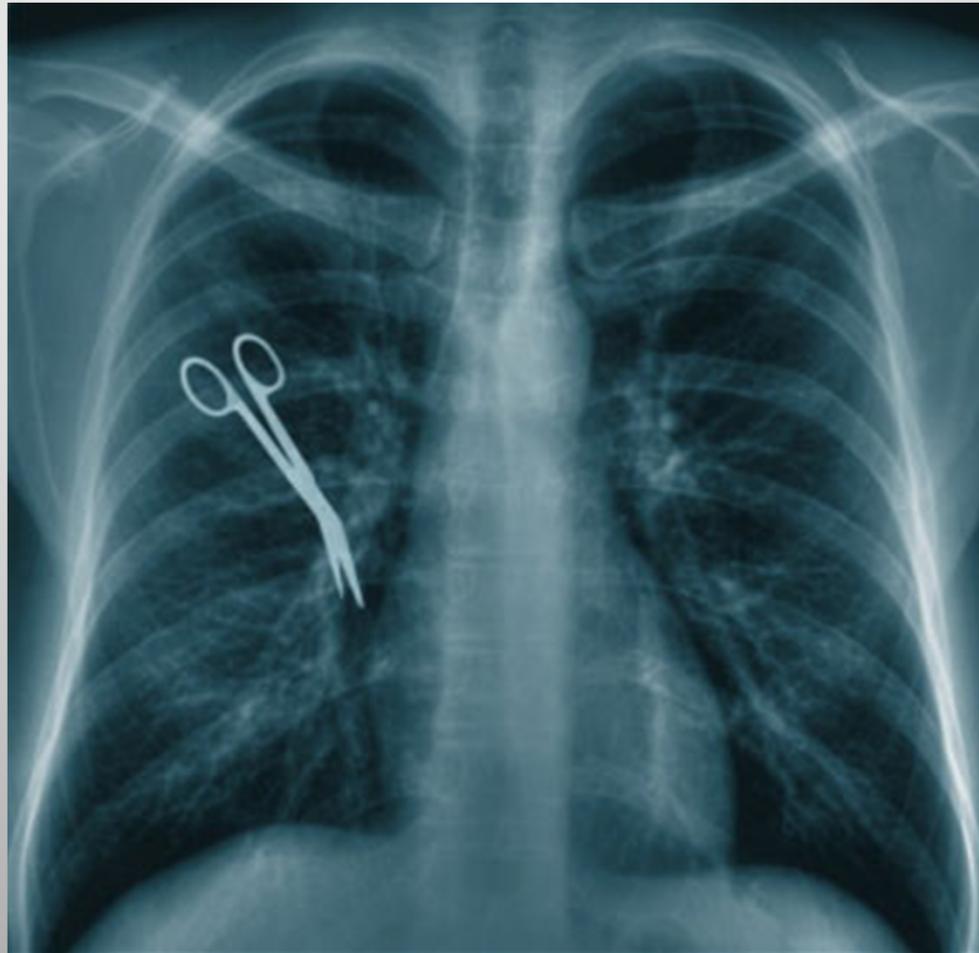
FOREIGN OBJECT STATUTE OF LIMITATIONS:

- **Under CPLR 214-a, an action based upon the discovery of a foreign object in the body of a patient may be brought within 1 year after the object is discovered, or the date of discovery of facts that would reasonably lead to such discovery, whichever is earlier.**

Foreign Objects vs. Fixation Devices:

“In determining whether an object which remains in the patient constitutes a ‘foreign object,’ the courts should consider the nature of the materials implanted in a patient, as well as their intended function. Objects such as surgical clamps, scalpels, and sponges are introduced into the patient's body to serve a temporary medical function for the duration of the surgery, but are normally intended to be removed after the procedure's completion. Clearly, when such objects are left behind, no assessment of the medical professional's expert judgment or discretion in failing to remove them is necessary to establish negligence. By contrast, items which are placed in the patient with the intention that they will remain to serve some continuing treatment purpose constitute ‘fixation devices’, a category of medical material that the pre-CPLR 214-a case law excludes from the ‘foreign object’ rule, and is now explicitly excluded by the terms of that statute” (Rockefeller v Moront, 81 NY2d 560, 564 [1993]).

FOREIGN OBJECTS



CONTINUOUS TREATMENT

- Under the continuous treatment doctrine, the 2-year and 6-month statute of limitations period runs from the date of last treatment where the plaintiff is undergoing treatment for the same illness, injury or condition that gave rise to the malpractice. This doctrine is the subject of frequent litigation. Note that a failure to make a timely diagnosis will not serve to toll the statute of limitations because an omission does not amount to a course of treatment.
- To establish that the continuous treatment doctrine applies, a plaintiff must show that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice (see Baptiste v Harding-Marin, 88 AD3d 752, 753 [2d Dept 2011]; Gomez v Katz, 61 AD3d 108, 111-112 [2d Dept 2009]).

CASE

- 69-year-old female, housekeeper goes for a screening mammogram.
- Mammographer correctly interprets films and recognizes suspicious lesions.

CASE

PLAINTIFF'S
EXHIBIT
2 for (S) inc
5-12-10

MD
MD
MD

MD
MD
MD

DR 01/11/2005 60359 DOB: 02/16/1934

BROOKLYN, NY 11228

PATIENT: EXAM: MAMMOGRAPHY, LEFT BREAST

Dear Dr. 

Your patient, Stella, had a left breast mammogram performed on 01/11/2005

CLINICAL HISTORY: Last clinical breast exam six months ago. Grandmother, sister and aunt had cancer. Patient had previous biopsy of left breast which was benign.

TECHNIQUE: Bilateral film screen mammograms were performed in CC and MLO projections.

FINDINGS: Exam 12/29/03 and 12/10/02.
There are reposed biopsy clips within the left breast at the 2 o'clock position and 4 o'clock position. There is a nodular density at the 2 o'clock position which has shown interval increase in size over the past two years. It presently measures approximately 0.8 x 0.8 cm. The margins are still round but there is suggestion of spiculation. Magnification views are therefore requested with compression. The remainder of the left breast is normal. The right breast again shows a benign intramammary lymph node in the axillary region. No other suspicious densities.

IMPRESSION:
THERE IS AN INCREASING NODULAR DENSITY AT THE 2 O'CLOCK POSITION OF THE LEFT BREAST. POSSIBILITY OF SPICULATION IS PRESENT. THIS IS AT THE SITE OF PREVIOUS BIOPSY. ADDITIONAL MAGNIFICATION VIEWS AND ULTRASOUND OF THIS LESION ARE REQUESTED. CORRELATION WITH PREVIOUS BIOPSY REPORTS WOULD BE HELPFUL AS WELL.

Thank you for referring this patient to us.



SEEMS GOOD... RIGHT?????

CASE



PROBLEMS

- The report was mailed to the wrong doctor and no report was sent to the patient.
- Three years later the patient moves to New Jersey and goes to pick up her original films to take them to her new doctor. When picking up her films the patient finds a report in a film envelope.

ACTIONS AGAINST PUBLIC HOSPITALS ENTITLED TO NOTICE OF CLAIM

- Service of a notice of claim within 90 days after accrual of the claim is a condition precedent to commencing an action against the New York City Health & Hospitals Corporation (see McKinney's Uncons Laws of NY § 7401[2]; General Municipal Law § 50-e[1][a]; Argudo v New York City Health & Hosps. Corp., 81 AD3d 575, 576 [2d Dept 2011]).

NOTICE OF CLAIM

Blumberg
Law Products

T 1183—Notice of Claim against a Public Authority Pursuant to §50
General Municipal Law; Not for use in the Court of Claims; 6-81

JULIUS BLUMBERG, INC.
PUBLISHER, NYC 10013

In the Matter of the Claim of

Claimant,
~~against~~ **NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION and**

TO:

PLEASE TAKE NOTICE that the undersigned claimant(s) hereby make(s) claim and demand against you as follows:

1. The name and post-office address of each claimant and claimant's attorney is:



2. The nature of the claim:

3. The time when, the place where and the manner in which the claim arose:

4. The items of damage or injuries claimed are (do not state dollar amounts)

The undersigned claimant(s) therefore present this claim for adjustment and payment. You are hereby notified that unless it is adjusted and paid within the time provided by law from the date of presentation to you, the claimant(s) intend(s) to commence an action on this claim.

Dated:

.....
The name signed must be printed beneath

.....
The name signed must be printed beneath

.....
Attorney(s) for Claimant(s)
Office and Post Office Address, Telephone Number

CORPORATE VERIFICATION

State of New York, County of

ss.:

being duly sworn, deposes and says that deponent is the
of
corporate claimant named in the within action; that deponent has read the foregoing Notice of Claim and knows the contents thereof, and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because said claimant is a corporation, and deponent an officer thereof, to wit its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

INDIVIDUAL VERIFICATION

State of New York, County of

ss.:

being duly sworn, deposes and says that deponent is the claimant in the within action; that he has read the foregoing Notice of Claim and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this
day of

19

Sworn to before me, this
day of

19

.....
In the Matter of the Claim of

.....
Notice of Claim Against

.....
Attorney(s) for Claimant(s)
Office and Post Office Address

LATE NOTICE OF CLAIM

- In order to serve a late notice of claim (after the 90 days), the plaintiff must request leave to do so from the court. The failure to request such leave will result in the notice of claim being deemed a nullity (see generally *McShane v Town of Hempstead*, 66 AD3d 652 [2d Dept 2009]).
- A motion for leave to serve a late notice of claim must be made before the expiration of the statute of limitations for commencement of an action against the New York City Health and Hospitals Corporation, which is 1 year and 90 days. Where a motion for leave to serve a late notice of claim is made after the 1-year and 90-day time period, the Supreme Court has no authority to permit late service of a notice of claim (see *Argudo v New York City Health & Hosps. Corp.*, 81 AD3d 575 [2d Dept 2011]).

TOLLING AND THE NOTICE OF CLAIM

- In an action against a governmental entity where a notice of claim is required, the infancy of the plaintiff will not toll the 90-day time period within which to file a notice of claim. However, infancy is a factor that the courts must consider in determining whether to grant an application to file a late notice of claim (Contreras v 357 Dean St. Corp., 77 AD3d 604 [2d Dept 2010]).
- Moreover, under CPLR 208, infancy will toll the 1-year and 90-day statute of limitations for commencing an action against a governmental entity. Since the time period within which to apply for leave to serve a late notice of claim is coextensive with the statute of limitations, infancy of the plaintiff will extend the time for seeking leave to file a late notice of claim (Contreras v KBM Realty Corp., 66 AD3d 627 [2d Dept 2009]).

TOLLING AND THE NOTICE OF CLAIM CONTINUES

- The continuous treatment doctrine applies to toll the 90-day period for filing a notice of claim (*Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263 [2002]; *Ramos v Rakhmanchik*, 48 AD3d 657 [2d Dept 2008]; *Watson v City of New York*, 273 AD2d 115 [1st Dept 2000]).

INVESTIGATING A POTENTIAL MEDICAL MALPRACTICE CASE:



- **Initial Intake Interview With the Client**
- **Review of Medical Records**
- **Consult Physician Expert**

INITIAL INTAKE INTERVIEW WITH THE CLIENT:



Obtain all facts relating to the plaintiff's medical history, including the condition which was being treated when the alleged malpractice occurred, as well as any prior and subsequent treatment for the same or similar conditions.

DOCUMENTS REQUIRED TO BE COMPLETED AND SIGNED BY THE CLIENT:

- **Discuss attorneys' fees (Judiciary Law § 474-a) and have the client sign a retainer.**
- **HIPAA compliant authorizations : Allowing you to request and obtain medical records pertaining to the client.**

RETAINER AGREEMENT (JUDICIARY LAW § 474-a)

MEDICAL MALPRACTICE CONTINGENT RETAINER AGREEMENT

I hereby retain _____ and _____, who assume joint responsibility for the representation, to act as my attorneys to prosecute any and all claims for injuries and damages sustained by _____.

In consideration of the services rendered and to be rendered, the undersigned hereby agrees to pay the attorneys and the attorneys are authorized to retain out of any monies that may come to the undersigned by reason of the above claim a fee equal to the statutory fee prevailing at the time of the disposition of the case, but in no event shall this fee exceed thirty-three and one-third percent (33 1/3%) of the sum recovered, whether recovered by suit, settlement, or otherwise. Section 474-a of the Judiciary Law presently sets forth the following fee schedule:

30% of the first \$250,000
25% of the next \$250,000
20% of the next \$500,000
15% of the next \$250,000
10% of any amount over \$1,250,000 of the sum recovered.

This section of the Judiciary Law also provides that in the event that extraordinary circumstances exist which give rise to a good faith belief that the above schedule provides inadequate compensation, the attorneys may make an application to the Court, upon affidavit with written notice, for greater compensation. I have been advised and understand that medical malpractice cases, such as the one I am bringing, frequently require extraordinary efforts on the part of my attorneys, due, among other things, to the complexity of the subject matters involved, the medical/legal expertise required in prosecuting such a case, and the difficulty and expense of obtaining appropriate medical experts to evaluate the case and provide opinions. Accordingly, I understand that it is likely that my attorneys will apply at the conclusion of the case for greater compensation than is dictated by the fee schedule set forth above. In no event will the attorneys apply for a fee greater than 33 1/3% of the sum received.

Such percentage shall be computed on the net sum recovered after deducting from the amount recovered: expenses and disbursements advanced by the attorneys for expert, investigative, or other services which are properly chargeable to the prosecution of the action or enforcement of the claim and not previously paid for by the undersigned. There shall be no deduction in computing such percentages for liens, assignments, or claims: in favor of hospitals, for medical care and treatment by doctors and nurses, or for self insurers or insurance carriers. _____ shall receive a percentage of _____'s net attorneys' fee equal to the percentage that the _____'s net attorneys' fee bears to the net recovery. The undersigned is ultimately responsible for the payment of all disbursements at the end of the case. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered.

This retainer is SUBJECT TO INVESTIGATION. If at any time, the attorneys determine that the client's claim lacks legal or medical merit, or if circumstances arise which make it impossible for the attorneys to represent the client's interests, then the attorneys may withdraw from representing the client.

In the event that the claim results in a judgment unfavorable to the undersigned, the attorneys shall not be obligated to undertake an appeal on the undersigned's behalf but may at their discretion choose to undertake appeal(s) on the undersigned's behalf. In the event that the claim results in a judgment favorable to the undersigned, and in the further event that said judgment is appealed by another party, the attorneys shall have the right to continue to represent the undersigned during the course of such appeals and any post judgment litigation.

If a fee dispute arises in this matter, the client may have the right to elect to resolve the dispute through arbitration pursuant to Part 137 of the Rules of the Chief Administrator.

This constitutes the sole agreement between the attorneys and the client, and any changes or modification shall be by subsequent written agreement signed by the parties hereto or their successors.

Dated: _____, 20____ (L.S.)

I have received a copy of this agreement _____ (initials) _____ (L.S.)

HIPAA COMPLIANT AUTHORIZATION



AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA
 [This form has been approved by the New York State Department of Health]

OCA Official Form No.: 960

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form: In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:

- This authorization may include disclosure of information relating to **ALCOHOL and DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
- If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
- I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
- I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
- Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
- THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:	
8. Name and address of person(s) or category of person to whom this information will be sent:*	
9(a). Specific information to be released: <input type="checkbox"/> Medical Record from (insert date) _____ to (insert date) _____ <input type="checkbox"/> Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers. <input type="checkbox"/> Other: _____ Include: (Indicate by Initialing) _____ Alcohol/Drug Treatment _____ Mental Health Information _____ HIV-Related Information	
Authorization to Discuss Health Information	
(b) <input type="checkbox"/> By initialing here _____ I authorize _____ Initials Name of individual health care provider to discuss my health information with my attorney, or a governmental agency, listed here: _____ (Attorney/Firm Name or Governmental Agency Name)	
10. Reason for release of information: <input type="checkbox"/> At request of individual <input type="checkbox"/> Other: _____	11. Date or event on which this authorization will expire:
12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Signature of patient or representative authorized by law: _____ Date: _____

* Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.

Instructions for the Use
 of the HIPAA-Compliant Authorization Form to
 Release Health Information Needed for Litigation

This form is the product of a collaborative process between the New York State Office of Court Administration, representatives of the medical provider community in New York, and the bench and bar, designed to produce a standard official form that complies with the privacy requirements of the federal Health Insurance Portability and Accountability Act ("HIPAA") and its implementing regulations, to be used to authorize the release of health information needed for litigation in New York State courts. It can, however, be used more broadly than this and may be used before litigation has been commenced, or whenever counsel would find it useful.

The goal was to produce a standard HIPAA-compliant official form to obviate the current disputes which often take place as to whether health information requests made in the course of litigation meet the requirements of the HIPAA Privacy Rule. It should be noted though, that the form is optional. This form may be filled out on line and downloaded to be signed by hand, or downloaded and filled out entirely on paper.

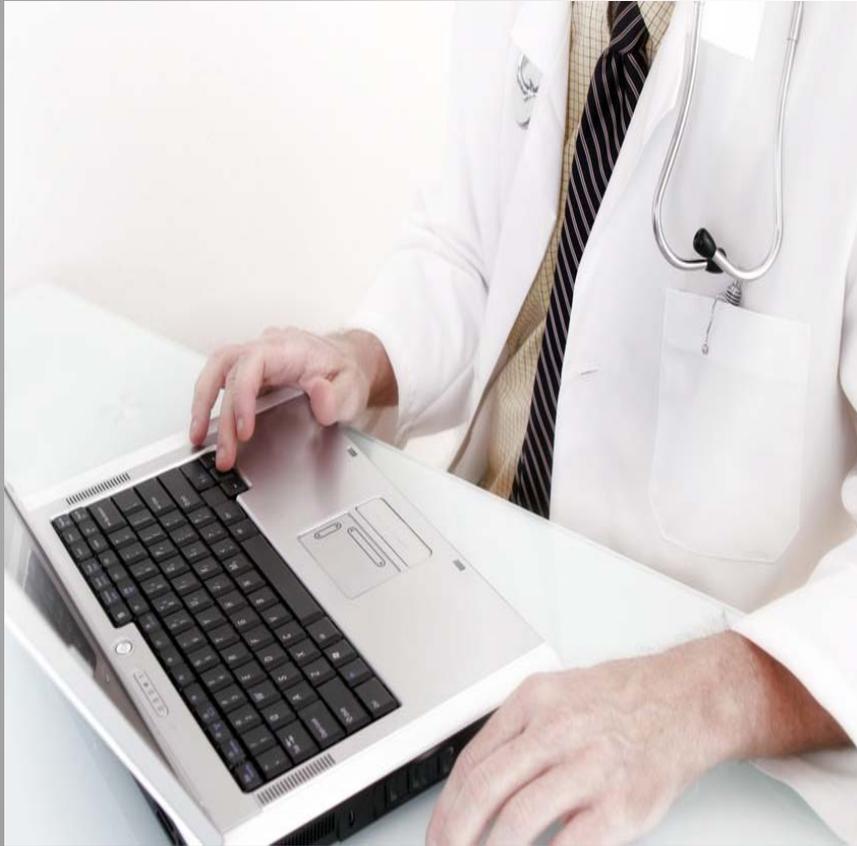
When filling out Item 11, which requests the date or event when the authorization will expire, the person filling out the form may designate an event such as "at the conclusion of my court case" or provide a specific date amount of time, such as "3 years from this date."

If a patient seeks to authorize the release of his or her entire medical record, but only from a certain date, the first two boxes in section 9(a) should both be checked, and the relevant date inserted on the first line containing the first box.

REQUEST MEDICAL RECORDS

- A HIPAA compliant authorization must be included with your request.
- Public Health Law § 18(2)e states that a provider may impose a reasonable charge for all inspections and copies, but that the charge may not exceed the actual costs incurred by the provider. In no event may the charge exceed \$0.75 per page.

CONSULTING A PHYSICIAN AS AN EXPERT



- Review medical records and consult medical and legal texts
- CPLR § 2012-a requires that the complaint be accompanied by a certificate of merit stating that the attorney consulted with a least one physician, and that the attorney has concluded that there exists a reasonable basis for the commencement of the action.

COMMENCING AN ACTION



- **Selecting Venue**
- **Summons, Verified Complaint & Certificate of Merit**
- **Answers**
- **Request for Judicial Intervention with a Notice of Medical Malpractice**

SELECTING VENUE

- **CPLR 503(a):** The place of trial shall be in the county in which one of the parties resided when the action was commenced
- **CPLR 503(c):** Corporations are deemed to be a resident of the county in which its principal office is located
- **McKinney's Unconsolidated Law of NY § 7401(3):** Actions against the New York City Health and Hospitals Corporation shall be brought in the City of New York, in the county in which the cause of action arose

SUMMONS, VERIFIED COMPLAINT & CERTIFICATE OF MERIT

- A complaint in a medical malpractice action “need not reveal matters that are commonly within the exclusive knowledge of the treating physician” but “it should set forth sufficient data for the defendant to ascertain what it is that plaintiff is complaining about” (Weber v Wise, 86 AD2d 891 [2d Dept 1982]; see CPLR 3013, 3014).
- The complaint should not contain an *ad damnum* clause (CPLR 3017[c]).
- CPLR 3012-a requires that the complaint be accompanied by a certificate of merit stating that the attorney consulted with at least one physician, and that the attorney has concluded that there exists a reasonable basis for the commencement of the action.

An exception to this requirement exists where the attorney is unable to obtain the required consultation with a physician because of a limitation of time (CPLR 3012-a[a][2]).

SUMMON AND VERIFIED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
[Redacted]

Index No.: _____ /0
Date Filed: _____ /0

Plaintiffs,

-against-

[Redacted]

Defendants.

-----X
TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
[Redacted]

Yours etc.,

[Redacted]

Attorneys for Plaintiffs
Office & P.O. Address

[Redacted]

By: _____

[Redacted]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
[Redacted]

Index No.: _____ /0

Plaintiffs,

-against-

[Redacted]

Defendants.

-----X
Plaintiff, complaining of defendants, by and through her attorneys, [Redacted]

[Redacted] respectfully shows to this

Court and alleges that:

1. Prior to the commencement of this action, and more particularly, on the [Redacted] day of April, 200[Redacted], the plaintiff, [Redacted], was duly appointed Administratrix of the Estate of [Redacted], deceased, by Order of the Honorable [Redacted] in the Surrogate's Court, County of New York, has duly qualified as such and is now acting in said capacity.
2. Upon information and belief, at all times herein mentioned, defendant, [Redacted] was a physician duly licensed to practice medicine in the State of New York.
3. Upon information and belief, at all times herein mentioned, defendant, [Redacted] specialized in the field of anesthesiology.

CERTIFICATE OF MERIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
[REDACTED]
[REDACTED]
[REDACTED]

Index No.: _____/09

Plaintiffs,

CERTIFICATE OF MERIT

-against-

[REDACTED]
[REDACTED]
[REDACTED]

Defendants.

-----X

[REDACTED], an attorney duly admitted to practice in the courts of the State of New York, hereby affirms pursuant to CPLR 2106:

We have reviewed the facts of this case and have consulted with at least one physician who is licensed to practice in this State and who we reasonably believe is knowledgeable on the relevant issues involved in this action, and we have concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of this action.

Dated: New York, New York
[REDACTED]

Yours, etc.,

[REDACTED]
[REDACTED]
Attorneys for Plaintiff
[REDACTED]
[REDACTED]

By: _____
[REDACTED]

ORDER OF CAPTION

- **First named defendant is generally deposed first.**
- **At trial, openings by defense are in the order of the caption.**
- **Summations are in the reverse order of the caption. Therefore the last named defendant sums up first.**

ANSWER

- A defendant's written response to a plaintiff's initial court filing (called a complaint or petition). An answer normally denies some or all of the facts asserted by the complaint, and sometimes seeks to turn the tables on the plaintiff by making allegations or charges against the plaintiff (called counterclaims) or providing justification for the defendant's behavior (called affirmative defenses). Normally a defendant has 30 days in which to file an answer after being served with the plaintiff's complaint.

REQUEST FOR JUDICIAL INTERVENTION WITH A NOTICE OF MEDICAL MALPRACTICE

- **Request for Judicial Intervention:** At any time after service of process, a party may file a request for judicial intervention (22 NYCRR 202.6).
- **Notice of medical malpractice:** Once issue is joined by the filing of answers, the plaintiff has 60 days to file a notice of medical malpractice action pursuant to CPLR 3406(a) (see 22 NYCRR 202.56).

REQUEST FOR JUDICIAL INTERVENTION

REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (7/2012)

COURT, COUNTY OF _____

Index No: _____ Date Index Issued: ____/____/____

CAPTION: Enter the complete case caption. Do not use et al or et ano. If more space is required, attach a caption rider sheet.

Plaintiff(s)/Petitioner(s)

For Court Clerk Use Only:

IAS Entry Date

Judge Assigned

RJl Date

-against-

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING: Check ONE box only and specify where indicated.

<p>MATRIMONIAL</p> <input type="checkbox"/> Contested <small>NOTE: For all Matrimonial actions where the parties have children under the age of 18, complete and attach the MATRIMONIAL RJl Addendum. For Uncontested Matrimonial actions, use RJl form UD-13.</small>	<p>COMMERCIAL</p> <input type="checkbox"/> Business Entity (including corporations, partnerships, LLCs, etc.) <input type="checkbox"/> Contract <input type="checkbox"/> Insurance (where insurer is a party, except arbitration) <input type="checkbox"/> UCC (including sales, negotiable instruments) <input type="checkbox"/> Other Commercial: _____ (specify)
<p>TORTS</p> <input type="checkbox"/> Asbestos <input type="checkbox"/> Breast Implant <input type="checkbox"/> Environmental: _____ (specify) <input type="checkbox"/> Medical, Dental, or Podiatric Malpractice <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Products Liability: _____ (specify) <input type="checkbox"/> Other Negligence: _____ (specify) <input type="checkbox"/> Other Professional Malpractice: _____ (specify) <input type="checkbox"/> Other Tort: _____ (specify)	<p>REAL PROPERTY - How many properties does the application include?</p> <input type="checkbox"/> Condemnation <input type="checkbox"/> Mortgage Foreclosure (specify): <input type="checkbox"/> Residential <input type="checkbox"/> Commercial Property Address: _____ <small>NOTE: For Mortgage Foreclosure actions involving a one- to four-family, owner-occupied, residential property, or an owner-occupied condominium, complete and attach the FORECLOSURE RJl Addendum.</small> <input type="checkbox"/> Tax Certiorari - Section: _____ Block: _____ Lot: _____ <input type="checkbox"/> Tax Foreclosure <input type="checkbox"/> Other Real Property: _____ (specify)
<p>OTHER MATTERS</p> <input type="checkbox"/> Certificate of Incorporation/Dissolution [see NOTE under Commercial] <input type="checkbox"/> Emergency Medical Treatment <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Local Court Appeal <input type="checkbox"/> Mechanic's Lien <input type="checkbox"/> Name Change <input type="checkbox"/> Pistol Permit Revocation Hearing <input type="checkbox"/> Sale or Finance of Religious/Not-for-Profit Property <input type="checkbox"/> Other: _____ (specify)	<p>SPECIAL PROCEEDINGS</p> <input type="checkbox"/> CPLR Article 75 (Arbitration) [see NOTE under Commercial] <input type="checkbox"/> CPLR Article 78 (Body or Officer) <input type="checkbox"/> Election Law <input type="checkbox"/> MHL Article 9.60 (Kendra's Law) <input type="checkbox"/> MHL Article 10 (Sex Offender Confinement-Initial) <input type="checkbox"/> MHL Article 10 (Sex Offender Confinement-Review) <input type="checkbox"/> MHL Article 81 (Guardianship) <input type="checkbox"/> Other Mental Hygiene: _____ (specify) <input type="checkbox"/> Other Special Proceeding: _____

STATUS OF ACTION OR PROCEEDING: Answer YES or NO for EVERY question AND enter additional information where indicated.

YES NO <input type="checkbox"/> Has a summons and complaint or summons wholice been filed? <input type="checkbox"/> If yes, date filed: ____/____/____	YES NO <input type="checkbox"/> Has a summons and complaint or summons wholice been served? <input type="checkbox"/> If yes, date served: ____/____/____
<input type="checkbox"/> Is this action/proceeding being filed post-judgment?	<input type="checkbox"/> If yes, judgment date: ____/____/____

NATURE OF JUDICIAL INTERVENTION: Check ONE box only AND enter additional information where indicated.

<input type="checkbox"/> Infant's Compromise		
<input type="checkbox"/> Note of Issue and/or Certificate of Readiness		
<input type="checkbox"/> Notice of Medical, Dental, or Podiatric Malpractice	Date Issue Joined: ____/____/____	
<input type="checkbox"/> Notice of Motion	Relief Sought: _____	Return Date: ____/____/____
<input type="checkbox"/> Notice of Petition	Relief Sought: _____	Return Date: ____/____/____
<input type="checkbox"/> Order to Show Cause	Relief Sought: _____	Return Date: ____/____/____
<input type="checkbox"/> Other Ex Parte Application	Relief Sought: _____	
<input type="checkbox"/> Poor Person Application		
<input type="checkbox"/> Request for Preliminary Conference		
<input type="checkbox"/> Residential Mortgage Foreclosure Settlement Conference		
<input type="checkbox"/> Writ of Habeas Corpus		
<input type="checkbox"/> Other (specify): _____		

RELATED CASES: List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases. If additional space is required, complete and attach the RJl Addendum. If none, leave blank.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case

PARTIES: For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in space provided. If additional space is required, complete and attach the RJl Addendum.

Un-Rep	Parties:	Attorneys and/or Unrepresented Litigants:	Issue Joined (Y/N):	Insurance Carrier(s):
<input type="checkbox"/>	Name: _____ Role(s): _____	Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address.	<input type="checkbox"/> YES <input type="checkbox"/> NO	
<input type="checkbox"/>	Name: _____ Role(s): _____		<input type="checkbox"/> YES <input type="checkbox"/> NO	
<input type="checkbox"/>	Name: _____ Role(s): _____		<input type="checkbox"/> YES <input type="checkbox"/> NO	
<input type="checkbox"/>	Name: _____ Role(s): _____		<input type="checkbox"/> YES <input type="checkbox"/> NO	
<input type="checkbox"/>	Name: _____ Role(s): _____		<input type="checkbox"/> YES <input type="checkbox"/> NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: ____/____/____

ATTORNEY REGISTRATION NUMBER

SIGNATURE

PRINT OR TYPE NAME

NOTICE OF MEDICAL MALPRACTICE

NOTICE OF MEDICAL, DENTAL OR PODIATRIC MALPRACTICE ACTION

Malpractice
Calendar No. _____

Reserved for Clerk's use

Index No. _____

SUPREME COURT

Assigned Judge _____

County _____

Plaintiff(s)

vs.

Defendant(s)

Please take notice that the above action for medical, dental or podiatric malpractice was commenced by service of summons on _____, that issue was joined thereon on _____, and that the action has not been dismissed, settled or otherwise terminated.

1. State full name, address and age of each plaintiff.
2. State full name and address of each defendant.
3. State alleged medical speciality of each individual defendant, if known.

4. Indicate whether claim is for

_____ medical malpractice

_____ podiatric or dental malpractice

_____ State date and place claim arose

5. State substance of claim

6. (Following items must be checked)

(a) Proof is attached that authorizations to obtain medical, dental, podiatric and hospital records have been served upon the defendants in the action _____

or

demand has not been made for such authorizations _____

(b) Copies of the summons, notice of appearance, all pleadings, certificate of merit, if required, and the bill of particulars, if one has been served, are attached _____

(c) A copy of any demand for arbitration election of arbitration or concession of liability is attached _____

or

demand has not been made for arbitration _____

(d) All information required by CPLR 3101(d)(1)(i) is attached _____

or

a request for such information has not been made _____

or

such information is not available _____

7. State names, addresses and telephone numbers of counsel for all parties

Attorneys for Plaintiff(s)

BILL OF PARTICULARS

- The bill of particulars in a medical malpractice action must provide a **general statement of the acts or omissions constituting the alleged negligence** (see CPLR 3043[a][3]; Contreras v Adeyemi, 102 AD3d 720 [2d Dept 2013]). **“There is no need for a plaintiff to set forth the manner in which the physician failed to act in accordance with good and accepted medical practice, since a physician is chargeable with knowing those medically accepted standards applicable to the proper care and treatment of the plaintiff”** (Toth v Bloshinsky, 39 AD3d 848 [2d Dept 2007]).

PRELIMINARY CONFERENCE STIPULATIONS AND ORDER

PC Orders differ by County: Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Calendar # _____
325 (d) _____

Plaintiff(s),
- against -

Defendant(s),
_____x

PRELIMINARY CONFERENCE ORDER
Pursuant to Part 202 of the Uniform Civil
Rules for the Supreme Court
HON. _____
Preliminary Conference Part
Index Number _____
Conference Date _____

APPEARANCES : **Plaintiff:** _____
Firm: _____
By Attorney: _____ Phone: _____
Carrier: _____ Phone: _____ Coverage Amount: _____
Defendant 1: _____
Firm: _____
By Attorney: _____ Phone: _____
Carrier: _____ Phone: _____ Coverage Amount: _____
Defendant 2: _____
Firm: _____
By Attorney: _____ Phone: _____
Carrier: _____ Phone: _____ Coverage Amount: _____
Defendant 3: _____
Firm: _____
By Attorney: _____ Phone: _____
Carrier: _____ Phone: _____ Coverage Amount: _____

- I INSURANCE COVERAGE:** To be furnished within ____ days.
- II BILL OF PARTICULARS:** 1. Not submitted: Bill of Particulars to be served by _____
2. Served: 2(a). Satisfactory 2(b). Unsatisfactory
3. Supplemental bill of particulars to be served _____
4. Bill of particulars for affirmative defenses to be served _____
- III MEDICAL REPORTS AND HOSPITAL AUTHORIZATIONS:** 1. Furnished (Except: _____)
2. Medical reports or authorizations for records to be served
3. Hospital authorizations to be served _____
- IV PHYSICAL EXAMINATION:** 1(a). Held 1(b) Waived
1(c). Examination of _____
To be held _____
Defendant to designate physician(s) within 21 days of plaintiff's EBT
2(a). Physician's report furnished
2(b). Copy of physician's report to be furnished to plaintiff
within ____ days of examination.

SC NO.8A Rev. 12/0404

PRELIMINARY CONFERENCE ORDER Page 2 of 2

- V EXAMINATION BEFORE TRIAL:** 1. Plaintiff Defendants All parties
2. To be held at _____
Date: _____ Time: _____
3. Held (Except: _____) Waived
- VI OTHER DISCLOSURE:** 1. None
2. All parties to exchange names and addresses of all witnesses, opposing parties' statements, and photographs. If none, an affirmation to that effect shall be exchanged.
3. Authorizations for plaintiff's employment records (IRS) including W-2 for period _____
4. _____
5. To be completed within _____
- VII IMPLER ACTIONS:** 1(a). None 1(b). To be commenced ____ days after all EBT's.
- VIII DESIGNATED FOR TRANSFER:** 1(a). CPLR 325 (c)
1(b). CPLR 325 (d)
- IX ADDITIONAL DIRECTIVES:** See attached page for additional directives
- X ALL PARTIES:** Are directed to complete discovery on or before _____, and appear for a compliance conference on _____.

Any statutory stays of disclosure due the pendency of motions pursuant to CPLR 3211, 3212 and 3213 are vacated.
Counsel will be required to justify, at the Compliance Conference, failure to adhere to the discovery schedule set forth herein.
In the event of non-compliance, costs or other sanctions may be imposed.

This constitutes the decision and order of this court.

Dated: _____ Enter: _____
J.S.C.

Parties must adhere to all dates contained herein relating to the completion of items in this order. Counsel may not enter into any adjournments without further order of this court.
SC. NO. 8A Rev. 12/04/04

PRELIMINARY CONFERENCE ORDER: NEW YORK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

INDIVIDUAL ASSIGNMENT PART [OR JUSTICE] _____

Index No. _____

DCM Track _____

- against - *Plaintiff(s)*,

**PRELIMINARY CONFERENCE
ORDER**

Defendant(s),

(202.8, 202.12 and 202.19
of the Uniform Rules)

APPEARANCES

Plaintiff(s): _____

Defendant(s): _____

It is hereby ORDERED that disclosure shall proceed as follows:

- (1) **Insurance Coverage:** If not already provided, shall be furnished by _____ on or before _____.
- (2) **Bill of Particulars:**
 - (a) Demand for a bill of particulars shall be served by _____ on or before _____.
 - (b) Bill of particulars shall be served by _____ on or before _____.
 - (c) A supplemental bill of particulars shall be served by _____ as to Items _____ on or before _____.
- (3) **Medical Reports and Authorizations:**
Shall be served as follows: _____

- (4) **Physical Examination:**
 - (a) Examination of _____ shall be held _____.
 - (b) A copy of the physician's report shall be furnished to plaintiff within _____ days of the examination.
- (5) **Depositions:** Depositions of Plaintiff(s) Defendant(s) All Parties shall be held _____

- (6) **Other Disclosure:**
 - (a) All parties, on or before _____, shall exchange names and addresses of all eye witnesses and notice witnesses, statements of opposing parties, and photographs, or, if none, provide an affirmation to that effect.
 - (b) Authorization for plaintiff(s)' employment records for the period _____ shall be furnished on or before _____.
 - (c) Demand for discovery and inspection shall be served by _____ on or before _____. The items sought shall be produced to the extent not objected to, and objections, if any, shall be stated on or before _____.
 - (d) Other [interrogatories, etc.] _____

Case Name: _____ Index No: _____ PC ORDER - Page 2

- (7) **End Date for All Disclosure:** _____

- (8) **Impleader:** Shall be completed on or before _____.
- (9) **Compliance Conference:** Shall be held on _____.
- (10) **Motions:** Any dispositive motion(s) shall be made on or before _____.
- (11) **Note of Issue:** _____ shall file a note of issue/certificate of readiness on or before _____. A copy of this order, an affirmation stating that the terms of the order have been complied with, and an affidavit of service of the affirmation and note of issue shall be served and filed with the note of issue on or before said date.

FAILURE TO COMPLY WITH ANY OF THESE DIRECTIVES MAY RESULT IN THE IMPOSITION OF COSTS OR SANCTIONS OR OTHER ACTION AUTHORIZED BY LAW.

SO ORDERED:

Dated: _____
J.S.C.

ADDITIONAL DIRECTIVES

In addition to the directives set forth above, it is further ORDERED as follows:

Dated: _____
SO ORDERED:

DEPOSITIONS

Depositions are generally conducted in the order of the caption.

Rules for Depositions (see 22 NYCRR 221):

The Office of Court Administration set forth three simple and straightforward rules for the conduct of attorneys at depositions:

- Any objections must be succinctly stated and no “[s]peaking objections” are permitted which might suggest the answer to the deponent (22 NYCRR 221.1)
- The deponent must answer all questions and may only be directed not to answer a question in order to preserve privilege, to enforce a court-ordered limitation, or to prevent causing significant prejudice to someone in response to a plainly improper question (22 NYCRR 221.2)
- An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should be answered (22 NYCRR 221.3).
- Under these rules, where an objection is succinctly stated, “the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115” (White v Martins, 100 AD2d 805 [1st Dept 1984]).

ARONS AUTHORIZATIONS:

OCA FORM No. _____

AUTHORIZATION TO PERMIT INTERVIEW OF TREATING PHYSICIAN BY DEFENSE COUNSEL

TO: _____
Physician's name and address

You are hereby authorized to discuss certain medical condition(s) involving: _____ with
Patient's name

_____ who is an attorney
Defense Attorney's Name and Address

representing _____ in a _____
Defendant's name Type of Lawsuit

brought by _____ against _____
Plaintiff(s) Name Defendant(s)

The lawsuit is currently pending and is at _____
Stage of Proceeding

YOU ARE PERMITTED TO DISCUSS ONLY THE FOLLOWING MEDICAL CONDITIONS WHICH ARE THE SUBJECT MATTER OF THE AFOREMENTIONED LAWSUIT: _____

1. NOTHING CONTAINED HEREIN AUTHORIZES YOU TO DISCUSS ANYTHING ABOUT THIS PATIENT OTHER THAN THE ABOVE-STATED MEDICAL CONDITIONS.
2. THE PURPOSE OF THIS INTERVIEW IS TO ASSIST THE DEFENDANT(S) IN THE DEFENSE OF THIS LAWSUIT BROUGHT BY THIS PATIENT. THIS AUTHORIZATION IS NOT AT THE REQUEST OF YOUR PATIENT.
3. YOUR WILLINGNESS TO PARTICIPATE IN THIS INTERVIEW IS ENTIRELY VOLUNTARY. YOU ARE FREE TO DECLINE THE REQUEST FOR SAID INTERVIEW.
4. You are permitted to disclose information relating to ALCOHOL and DRUG ABUSE, MENTAL HEALTH TREATMENT, except psychotherapy notes, and CONFIDENTIAL HIV RELATED INFORMATION only if specifically initialed below:
(Indicate by Initialing): ___ Alcohol/Drug Treatment; ___ Mental Health Information; ___ HIV-Related Information
5. If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2483 or the New York City Commission of Human Rights at (212) 308-7450. These agencies are responsible for protecting my rights.
6. I have the right to revoke this authorization at any time by writing to the health care provider listed. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
7. I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
8. Information disclosed under this authorization might be redisclosed by the recipient (except as noted in Item 5 above) and this redisclosure may no longer be protected by federal or state law.
9. If not the patient, name of person signing form: _____
10. Authority to sign on behalf of patient: _____
11. Date this authorization will expire: _____

Signature

Date

➤ Pursuant to Arons v Jutkowitz (9 NY3d 393 [2007]), a plaintiff must authorize defense counsel to conduct *ex parte*, off-the-record, interviews with non-party treating physicians. The physician-patient privilege is waived when plaintiffs place their own or decedent's medical condition at issue in the case.

October 17, 2014

[REDACTED]

Re: [REDACTED] v. [REDACTED]
D.O.B.:

Dear Dr. [REDACTED]:

Please be advised that our office represents Mr. [REDACTED] in the aforementioned matter. We have provided the defendants' attorneys ([REDACTED]) with a restricted authorization to contact you. **You are not under any obligation to speak with these attorneys.** In fact, you have the right to refuse to speak with them outright.

If you do decide to speak with defense counsel, we would appreciate it if you let us know and either (a) allow us to be included in the conversation or (b) speak with us after the conversation is concluded.

Please also note that the limited authorization given to defense counsel contains the following restrictions:

1. You are not authorized to discuss anything about Mr. [REDACTED] other than the medical conditions stated within the authorization.
2. You are advised within the authorization that the interview is not at Mr. [REDACTED]'s request, but that the purpose of the interview is to assist the defendants in the defense of the lawsuit brought by Mr. [REDACTED].

Re: [REDACTED] v. [REDACTED], et al.
D.O.B.:
October 17, 2014
Page 2 of 2

3. Your willingness to participate in an interview is entirely voluntary, you are free to decline the request for an interview.
4. The authorization does not authorize you to release Mr. [REDACTED]'s medical records.

Further, we would appreciate the opportunity to speak with you about Mr. [REDACTED]'s medical care and treatment. Please let us know a good time to contact you.

Thank you.

Very truly yours,

[REDACTED]

[REDACTED]

The non-party physician should be informed that his or her participation in voluntary.

CPLR 3101(d) DISCLOSURES

- Pursuant to CPLR 3101(d)(1), upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.
- In responding to such requests in medical malpractice actions, a party may omit the names of the medical experts (see CPLR 3101[d][1][i]). However, all other information concerning such experts should be disclosed. Some courts have interpreted this to mean that the defendants are entitled to full disclosure of the qualifications of a plaintiff's expert, even if such disclosure may permit the expert to be identified through internet research based upon his or her qualifications (see Thomas v Alleyne, 302 AD2d 36 [2d Dept 2002]). Other courts are more restrictive and hold that virtually all information regarding expert witnesses and their anticipated testimony is discoverable under CPLR 3101(d)(1)(i) unless the request is so detailed that disclosure would have the net effect of disclosing the experts' identities (see Mead v Rajadhyax' Dental Group, 34 AD3d 1139 [3d Dept 2006]; Pizzi v Muccia, 127 AD2d 338 [3d Dept 1987]).

NOTE OF ISSUE

- A note of issue must be accompanied by a certificate of readiness, which must state that there are no outstanding requests for discovery and that the case is ready for trial (22 NYCRR 202.21). See form note of issue at 22 NYCRR 202.21(b).
- Some courts require the disclosure under CPLR 3101(d) to be made with the note of issue.

NOTE OF ISSUE AND CERTIFICATE OF READINESS FOR TRIAL

 **B 537**—Note of issue and certificate of readiness: Uniform Rules, 22 NYCRR 202.21(b), 9-95

Blumberg EXCEL, Inc., NYC 10013
www.blumberg.com

NOTE OF ISSUE

For use of Clerk

Calendar No. (if any) _____
Index No. _____ Court, _____ County, N.Y.

Name of Judge assigned _____

NOTICE FOR TRIAL

- Trial by jury demanded
 - Of all issues
 - Of issues specified below
 - Or attached hereto
- Trial without jury

Filed by attorney for _____
Date summons served _____
Date service completed _____
Date issue joined _____

NATURE OF ACTION OR SPECIAL PROCEEDING

- Tort
 - Motor vehicle negligence
 - Medical malpractice
 - Other tort
- Contract
- Contested matrimonial
- Uncontested matrimonial
- Tax certiorari
- Condemnation
- Other (not itemized above) specify _____
- This action is brought as a class action

Amount demanded \$ _____
Other relief _____

against Plaintiff(s)

Defendant(s)

Special preference claimed under _____ Insurance carrier(s), if known: _____
on the ground that _____

Attorney(s) for Plaintiff(s)
Office & P.O. Address: _____

Phone No.: _____

Attorney(s) for Defendant(s)
Office & P.O. Address: _____

Phone No.: _____

NOTE: Clerk will not accept this note of issue unless accompanied by a certificate of readiness.

CERTIFICATE OF READINESS FOR TRIAL

(Items 1-7 must be checked)

For Clerk's Use
N. I. served on _____

Completed	Waived	Not required
-----------	--------	--------------

1. All pleadings served.....
2. Bill of particulars served.....
3. Physical examinations completed.....
4. Medical reports exchanged.....
5. Appraisal reports exchanged.....
6. Compliance with the Rules in matrimonial actions (22 NYCRR 202.16)
7. Discovery proceedings now known to be necessary completed.....
8. There are no outstanding requests for discovery.
9. There has been a reasonable opportunity to complete the foregoing proceedings.
10. There has been compliance with any order issued pursuant to the Precalendar Rules (22 NYCRR 202.12).
11. If a medical malpractice action, there has been compliance with any order issued pursuant to 22 NYCRR 202.56.
12. The case is ready for trial.

Dated: _____ Signature—type name below.

Attorney(s) for
Office & P.O. Address _____

State of New York, County of _____ ss.: State of New York, County of _____ ss.:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at _____

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at _____

That on the _____ day of _____ deponent served the within note of issue and certificate of readiness on _____

That on the _____ day of _____ deponent served the within note of issue and certificate of readiness on _____

attorney(s) for herein, at the attorney's office at _____

attorney(s) for at _____

in the case of either (a) or (b) during the attorney's absence from said office (a) by then and there leaving a true copy of the same with the attorney's clerk; partner; person having charge of said office. (b) and said office being closed, by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or box.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within New York State.

Sworn to before me on _____

Sworn to before me on _____

Admission of Service Due service of a note of issue and certificate of readiness, of which the within is a copy, admitted.....

Attorney(s) for.....

TRIAL



- **PATTERN JURY INSTRUCTIONS**
- **Special Verdict Forms (PJI 2:151A; 2:151B)**

PATTERN JURY INSTRUCTIONS

The applicable PJI rules are found at:

- **PJI 2:49 (Continuous Treatment)**
- **PJI 2:150 (Malpractice - Physician)**
- **PJI 2:150A (Malpractice - Informed Consent)**
- **PJI 2:151 (Negligence - Hospital - General Hospital)**

SPECIAL VERDICT FORMS

(PJI 2:151A; 2:151B)

Pursuant to CPLR 4111(d), the verdict in a medical or dental malpractice case must specify the items of general and special damages upon which the award is based, and the amount assigned to each item.

The list of items can include, among other things:

- **medical expenses**
- **custodial care**
- **rehabilitation services**
- **loss of earnings**
- **impairment of earning ability**
- **pain and suffering**

DAMAGES

The measure of damages is the difference between the patient's actual result and what the result probably would have been with proper care.

If the patient survives, the damages in every negligence case (whether involving an automobile accident or medical malpractice) are the same. The jury may consider past and future:

- Physical and mental pain and suffering (including loss of enjoyment of life).
- Expenses (e.g., medical expenses).
- Loss of earnings.
- Spouse's loss of "consortium".

DAMAGES IN A DEATH CLAIM

- In a death claim, the measure of damages in most states is largely restricted to the pecuniary loss to the estate (by virtue of the decedent's premature death). This involves a calculation of what the decedent's life expectancy (or more correctly, work expectancy) would probably have been but for the malpractice. This is multiplied by what the decedent probably would have earned in each of those years, (or, more properly, the portion of the earnings that would have been contributed to the dependents or added to the estate). Additional damages are permitted if the survivors include minor children; this compensates them for loss of parental care and guidance. In addition, damages are permitted for the conscious pain and suffering of the decedent caused by the malpractice. In the great majority of states, however, no damages are permitted for the grief or anguish of the survivors over the loss of their loved one.

SPECIAL DAMAGES

This list must be further broken down into past damages (those incurred prior to the verdict) and future damages.

For each item of future damages, the verdict sheet must include:

- The annual amount of the award in current dollars.**
- The date of the commencement of the item of damage.**
- The period of years for which the compensation is applicable.**
- The growth rate for that period of years.**
- Whether the loss or damage is permanent.**

This itemization process is required so that the court can properly reduce the awards to account for collateral source payments and enter a proper judgment under CPLR Article 50-A.

MEDICAL INDEMNITY FUND

(Public Health Law § 2999-g - § 2999-j)

- **The Medical Indemnity Fund (MIF) is a state administered fund designed to provide for future medical expenses in cases involving birth-related neurological injuries (brain-damaged baby cases). The purpose of the fund is to pay (or reimburse) the costs necessary to meet the future health care needs of “qualified plaintiffs” over their lives.**
- **A “qualified plaintiff” is defined as a “plaintiff or claimant who (i) has been found by a jury or court to have sustained a birth-related neurological injury as the result of medical malpractice, or (ii) has sustained a birth-related neurological injury as the result of alleged medical malpractice, and has settled his or her lawsuit or claim therefor” (Public Health Law § 2999-h[4]).**

Enrolling in the fund

- To enroll, a qualified plaintiff must have obtained a judgment or a court-approved settlement that includes an award for future medical expenses and provides that future medical expenses will be paid out of the fund
- Where applicable, the judgment or settlement must include fund-eligibility language.

Allocation and Attorney Fees

- A judgment or settlement agreement must clearly allocate between fund-related sums and all other categories of damages, including pain and suffering, past health care costs, and loss of services. It has become typical to allocate 50 percent of a settlement award to the fund
- Plaintiff's attorney's fees are based upon the entire sum awarded by the jury or the court or the full sum of the settlement (Public Health Law § 2999-j[14]). The attorney's fee is to be paid in a lump sum by the defendants and their insurers pursuant to Judiciary Law § 474-a.

EXAMPLE

- Assume a \$20 million settlement with a 50-50 allocation (50% non-fund damages, 50% fund damages). Attorneys fees are computed based on the \$20 million figure, in accordance with the framework set forth in Judiciary Law § 474-a.
- The defendant/insurer pays \$10 million to the plaintiff for non-fund damages. Expenses and attorneys fees are deducted from this \$10 million, but the attorneys fees are only deducted from this portion in proportion to the award for non-fund damages, meaning at a rate of 50%.
- The plaintiff is then enrolled in the fund and will receive payments for future medical expenses therefrom. The defendant/insurer does not have to pay the remaining 50%, i.e., the \$10 million. However, the defendant insurer does pay the remaining 50% of attorneys fees on the \$10 million that was allocable to the fund.