

*A VICTIM'S GUIDE TO*

# MEDICAL MALPRACTICE

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## Introduction: What Will You Learn in This Book?

Medical malpractice is a complex field of civil law. Unfortunately, the average person isn't able to navigate through a medical malpractice claim without the help of an attorney. In fact, many people with potential medical malpractice claims never ask for help from an experienced medical malpractice attorney. As a result, they never get justice.

The goal of this book is to educate you about medical malpractice. Armed with this education, we hope you will be able to hold medical professionals to the standards they swore to meet – the level of care that we expect from them. Our hope is that you can use this knowledge to fight for justice if you are seriously injured by the negligence of a doctor, nurse, or a hospital.

Here is a word of caution. In writing this book, we hope to give you a better understanding of medical malpractice. This book does **not** offer specific legal advice concerning any specific claim. It does **not** create an attorney-client relationship between you and my office. To create an attorney-client relationship with my office, we would have to speak with you personally, and each of us must sign an Attorney-Client Agreement in which we agree in writing to represent you.

If you have a malpractice claim, you should personally consult with an experienced medical malpractice attorney of your choice **AT ONCE** regarding the specific facts of your claim. If you delay, you could lose all of your legal rights to pursue your claim.

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# Chapter One: Defining Medical Malpractice

## What Exactly Is a Medical Malpractice Claim?

***Medical malpractice claims are professional negligence claims brought by victims, their families or their survivors when a medical professional breaches the standard of care, causing damages.***

Let me break that down. First, I want to reiterate that these are ***professional negligence claims***. Doctors usually have insurance that covers their negligence just as you have insurance for your car. It's important to note that the hospital or organization that employs a doctor will also likely be named in a claim because it's their employee that has been negligent and caused damage.

Now, let's go over ***who brings a medical malpractice claim***. Like I said, these cases are initiated by, "victims, their families or their survivors." For example, an adult who was misdiagnosed by a doctor and, as a result, suffered life-long injuries would be able to bring a claim themselves. But if it were a child who was harmed, or a family member who passed away as a result of a doctor's negligence, then it would be their family members who would bring claims against the medical professional. Never forget that *family members often could have claims too*.

You might have noticed that I've used the term, "medical professional." That is because ***a claim could be brought against any sort of medical professional***. Medical malpractice claims may be appropriate against physicians, registered nurses, nurse practitioners, psychiatrists, optometrists, podiatrists, anesthesiologists, dentists, and similar medical professionals. In short, a claim could be brought against any medical professional who commits malpractice. We aren't just talking about your family practitioner here.

If you've looked online for information on medical malpractice claims, you've probably come across the term, "standard of care." The ***standard of care*** is a key component of any medical malpractice case and has evolved over the years according to the rulings of various important negligence cases. As explained in an article from the *Western Journal of Emergency Medicine*, recent precedent essentially establishes that the standard of care is "what a minimally competent physician in the same field would do in the same situation, with the same resources."<sup>1</sup> Importantly, a medical professional may testify that another medical professional of the same field provided treatment or a level of care that was insufficient or negligent.

Sometimes, it's not what a doctor does wrong, but what they fail to do right. A medical malpractice action may be brought for negligent acts committed by a medical professional, or for acts the professional failed to do (i.e. omissions). A non-exhaustive list of the basis for medical malpractice claims includes: failure to diagnose an injury, misdiagnosis, misreading lab results,

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<sup>1</sup> Peter Moffett & Gregory Moore, The Standard of Care: Legal History and Definitions: the Bad and Good News, 12(1), W. J. Emerg. Med., 109, 112, (2011).

unnecessary surgery, surgical errors, leaving something inside of the patient's body, improper medication or dosage of medication, mistakes with follow-up or aftercare, premature discharge, and failure to obtain informed consent prior to undertaking a procedure. Depending on the facts of a particular case, all or some of these could be considered beneath the standard of care – these doctors did not reach the standard they are obligated to meet.

To be fair, the standard of care can be a bit of a moving target as doctors are expected to keep up with changes in their profession throughout their careers. Our bodies are wondrously designed by God and the scientific community is constantly collecting new information about the human body. That's great for medical care as a whole, but that also means that medical professionals need to keep up with new information and research in their fields. Unfortunately, doctors don't always do that. In one famous example from the 1970s, a doctor was accused of medical malpractice when he failed to diagnose a bruised child as a victim of the more-recently-recognized Battered Child Syndrome. He failed to conduct the appropriate x-rays of the child's skull and failed to contact the proper authorities.<sup>2</sup>

Something to keep in mind is that the standard of care is fact-specific. A cardiologist advising a patient with heart disease will be held to a certain standard if the patient is a 30-year-old triathlete training for her next event. But the cardiologist will be held to a different standard if the patient is a 90-year-old confined to bed-rest in hospice care. The patient is different in each example, and so the standard of care must be different, too. The standard of care will also be different if the practitioner is a cardiologist as opposed to a psychiatrist. The psychiatrist certainly doesn't have as deep of an understanding of your heart and cardiovascular system as the cardiologist.

Proving that a medical professional was negligent is important in a medical malpractice claim, but so is proving the damage caused by the negligence. In order to prevail in a medical malpractice claim, you must prove a breach of the professional standard of care. But you must also ***prove that your damages were caused by that breach of care***. The damages can range from disfigurement to death, with many types of harm in between. There are, in fact, different types of damages to be considered in a medical malpractice claim which we will talk about later.

Finally, this might seem silly, but one must know that in a medical malpractice claim, the alleged breach of care must occur ***within the scope of what the license allows the medical professional to do***. For example, a medical malpractice action would be appropriate against a doctor who chose not to give antibiotics to a patient obviously suffering from sepsis, resulting in the sepsis infection spreading throughout and paralyzing the patient's body. A medical malpractice action would not be appropriate against a doctor who failed to yield and caused an accident at an intersection on his way to the hospital. Only the first of these two examples pertains to the work the doctor is *licensed* to do.

Now let's go back to the beginning. What is a medical malpractice claim?

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<sup>2</sup> Landeros v. Flood, 17 Cal. 3d 399, 408 (Cal. 1976).

***Medical malpractice claims are professional negligence claims brought by victims, their families or their survivors when a medical professional breaches the standard of care, causing damages.***

Great! Now that you know the core principles behind medical malpractice claims, we'll dive a bit deeper.

## How Common Is Medical Malpractice?

It's sad, and rather scary, to think about the sheer number of mistakes that medical professionals make. In the book from the Institute of Medicine's Committee on Quality of Health Care in America entitled, *"To Err is Human: Building a Safer Health System,"* two large studies from 1991 on the occurrence of adverse events in hospitals are cited. After being extrapolated to the more than 33.6 million people admitted to hospitals in the U.S. in 1997, the combined findings of the studies indicated that between 44,000 and 98,000 Americans die annually "as a result of medical errors."<sup>3</sup>

However, an article from *U.S. News & World Report* titled, "Medical Errors Are Third Leading Cause of Death in the U.S.," provides evidence that the number of Americans who die annually in U.S. hospitals "may be much higher."<sup>4</sup> This article cites a 2011 report from the journal *Health Affairs* which "calculated that just over 1 percent of hospital patients die each year because of medical errors."<sup>5</sup> That is 400,000 plus annual deaths given the more than 35 million people hospitalized every year.<sup>6</sup> Furthermore, as its title suggests, the article reports that "medical errors are the third leading cause of death in the U.S., after heart disease and cancer."<sup>7</sup>

Breaking down the prevalence of medical malpractice claims provides some additional useful data. Between 2004 and 2014, the most common types of paid medical malpractice claims were error in diagnosis, errors related to surgery, and errors related to medication or treatment.<sup>8</sup> Furthermore, between 1992 and 2014, "catastrophic claims," or claims for losses exceeding 1 million dollars, made up 7.6% of medical malpractice claims.<sup>9</sup> Catastrophic injury is the type of claim that we at Moseley Collins Law specialize in. Why would we specialize in such a small percentage of claims? Because we want to help those that have been hurt the worst.

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<sup>3</sup> *To Err Is Human: Building a Safer Health System*, § 1 (Linda T. Kohn et al. eds., 1999).

<sup>4</sup> Steve Sternberg, *Medical Errors Are Third Leading Cause of Death in the U.S.*, *U.S. News & World Report* (May 3, 2016), <https://www.usnews.com/news/articles/2016-05-03/medical-errors-are-third-leading-cause-of-death-in-the-us>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Adam C. Schaffer et al, *Rates and Characteristics of Paid Malpractice Claims Among U.S. Physicians by Specialty 1992-2014*, 177(5), *JAMA Intern. Med.*, 710, 713, (2017).

<sup>9</sup> *Id.*

## Chapter Two: How Much Time Do I Have To File?

In litigation, as in life, opportunity is not a lengthy visitor. This is especially true when filing a claim for medical malpractice. The legal system sets strict requirements based on the facts and circumstances of each medical malpractice case. However, these limitations can be overcome if the proper actions are taken.

Each state has set time limitations for filing specific types of negligence claims, including medical malpractice claims. These prescribed time limits are covered by “statutes of limitations.” When the timeframe established in a statute of limitations has run out, ***a plaintiff’s claim, no matter how strong a case it might be, will likely be barred by the courts and will almost certainly be dismissed before a judge or jury ever gets a chance to hear it.***

For example, in California, under California Civil Rule of Procedure §340.5, a claim for medical malpractice must be brought by a plaintiff within “three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence *should have* discovered, the injury, whichever occurs first.”<sup>10</sup> In other states, the statute of limitations can be longer. So you should consult a lawyer of your choice concerning this. Reasonable diligence generally means that a person in the same or similar circumstances would have, or should have, discovered that they were injured due to the mistakes of a medical professional. If you wake up from a surgery and suddenly can’t walk, a reasonable person would probably think that something went wrong.

The laws of the various states can have additional requirements. In California, for example, on top of that statute of limitations, before bringing a claim for medical malpractice, §364 (a) of the rules of Civil Procedure requires a plaintiff to provide a healthcare defendant with at least 90 days’ notice of the plaintiff’s intent to file the medical malpractice claim.<sup>11</sup> This means sending notice to *all* prospective defendants. For example, for a wrongful death suit where a plaintiff/decedent died in an emergency room, the surviving family members may have a case against the emergency medical technicians, the ambulance drivers, the physicians, and the nurses. But the plaintiffs will only have a case against each of these entities if ***each receives proper notice of the claim.***<sup>12</sup> In California, under §364 (b), no particular form is required to be sent to the health care defendants, as long as the documents sent provide notice of the legal grounds for the claim, the type of loss sustained, and the type of injuries suffered.<sup>13</sup> Under §364 (d), if the notice of the plaintiff’s intention is filed within 90 days from the deadline for filing a lawsuit, the plaintiff will gain additional time – up to 90 days – to file the lawsuit.<sup>14</sup>

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<sup>10</sup> Cal. Civ. Proc. Code § 340.5 (West 1975).

<sup>11</sup> *Id.* at § 364 (a) (West 1975).

<sup>12</sup> *Id.* at § 364 (a) (West 1975).

<sup>13</sup> *Id.* at § 364 (b) (West 1975).

<sup>14</sup> *Id.* at § 364 (d) (West 1975).



As with most rules, there are often exceptions to the statute of limitations which “toll,” or place on hold, the statute of limitations. These include where a medical instrument is left inside of a patient’s body as a result of a botched or negligently-performed procedure.<sup>15</sup> Where the left-behind object has no therapeutic purpose and no diagnostic purpose (think a surgical knife or piece of gauze left inside of a patient’s body, rather than an artificial knee or a heart stent), the statute of limitations for medical malpractice may be tolled.<sup>16</sup> However, the plaintiff is still bound by the discovery rule. In most states, tolling also occurs in instances of fraud, or the intentional concealment of a medical mistake by either a medical professional or an insurance provider.<sup>17</sup>

***If you have a potential medical malpractice claim, you should promptly contact and consult with an attorney of your choice concerning all deadlines and all statute of limitation rules.***

In most states, another example of an “exception,” or a toll, is where the plaintiff is a minor child (i.e. someone under the age of 18), and the child’s guardian or parents are bringing a case on the child’s behalf. In California, for example, under §340.5 of the Civil Procedure Rules, if the plaintiff is a child, the lawsuit must be commenced within three years of the alleged malpractice.<sup>18</sup> If the child is under the age of six, the guardians/parents have until the child’s eighth birthday or three years, *whichever time period is longer*.<sup>19</sup> If the plaintiff was specifically injured before or during birth, such as by the alleged medical malpractice of the obstetrician, then the parents/guardians have up to six years from the date of childbirth to sue.<sup>20</sup>

In California, according to the Judicial Council of California, additional reasons for tolling the statute of limitations in a medical malpractice claim could include: the defendant’s absence from the state of California (California Civil Procedure §351)<sup>21</sup>; the plaintiff’s mental disability or incompetence (§352)<sup>22</sup>; imprisonment (§352.1)<sup>23</sup>; or the court taking over the practice of the attorney representing the plaintiff (§353.1).<sup>24</sup>

We know that doctors, nurses, hospitals and other health care providers can make mistakes that have lasting consequences on people’s lives. The exceptions to the statutes of limitations provide slight relief for these people who want to file a medical malpractice claim. Still, certain other rules may benefit defendants.

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<sup>15</sup> Cal. Civ. Proc. Code § 340.5 (West 1975).

<sup>16</sup> *Id.* at § 340.5 (West 1975).

<sup>17</sup> *Id.* at § 340.5 (West 1975).

<sup>18</sup> *Id.* at § 340.5 (West 1975).

<sup>19</sup> *Id.* at § 340.5 (West 1975).

<sup>20</sup> *Id.* at § 340.4 (West 1994).

<sup>21</sup> *Id.* at § 351 (West 1872).

<sup>22</sup> *Id.* at § 352 (West 2015).

<sup>23</sup> *Id.* at § 352.1 (West 1994).

<sup>24</sup> *Id.* at § 353.1 (West 1983).



Government entities sometimes have special procedural requirements for the filing of claims, which make suing them more challenging. For example, in California, under the California Tort Claims Act, §911.2 (a), a plaintiff has to file a claim with the government entity ***within six months of the date of the incident***.<sup>25</sup> For example, in order to sue a state-run psychiatric institute for medical malpractice, a plaintiff would have to serve the institute with a notice on a specific form outlining the details of his or her claim. According to the California Courts' website, "after you file your claim, the government has 45 days to respond. If the government agency denies your claim during the 45 days, you have 6 months to file a lawsuit in court from the date the denial was mailed or personally delivered to you."<sup>26</sup> These notice rules are designed to allow a public entity time to investigate claims, correct conditions and practices that led to the claims, and potentially, settle the claims, prior to a lawsuit being filed. Importantly, the limitations for commencement of actions against the state and its subdivisions, including state healthcare providers, can override some traditional forms of tolling.<sup>27</sup>

***Again, if you have a medical malpractice claim, you should consult at once with an attorney of your choice who practices medical malpractice representation in your state.***

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<sup>25</sup> Cal. Civ. Proc. Code § 911.2 (a) (West 2016).

<sup>26</sup> Statute of Limitations, California Courts: the Judicial Branch of California, <http://www.courts.ca.gov/9618.htm> (last visited Sept. 17, 2019).

<sup>27</sup> Cal. Civ. Proc. Code § 352 (b) (West 2015).

## Chapter Three: Getting Representation

### Why Is It So Hard to Find an Attorney to Take My Case?

Many plaintiffs in medical malpractice cases have a difficult time finding an attorney to take their case. Unfortunately, this difficulty often has to do with the cost the attorney would face if they were to take the case rather than the actual merits of the case. Put more precisely, the cost to take a medical malpractice case frequently far outweighs what an attorney would earn back if they were to win it, creating a financial barrier between attorneys and many potential plaintiffs which may be labeled the cost problem.

Most medical lawsuits are accepted under a contingency fee arrangement (i.e. the attorney receives a portion of the settlement or court awards if, and only if, the plaintiff wins) because most plaintiffs are individuals with limited financial resources who cannot afford an hourly fee arrangement. The contingency fee arrangement common to medical lawsuits plays a role in the cost problem by establishing the following financial equation for attorneys.

***The attorney's portion of the settlement or court awards given to the plaintiff – the cost of prosecuting the case = the net financial result of the case***

What this equation tells us is that, in order for the prosecution of a medical malpractice case to be financially feasible for an attorney, the attorney's portion of the settlement or court awards given to the plaintiff must be sufficiently larger than the cost of prosecuting the case. But this isn't the real source of the cost problem. The real source of the cost problem can be traced back to what usually gets plugged into this equation.

Prosecuting a medical malpractice case includes investigation, evaluation by experts, deposition testimony, getting documents, reviewing documents, travel, and hundreds of hours of attorney work. ***And the cost of these things, all of which an attorney pays out of pocket, is high.*** We at Moseley Collins law frequently spend around \$100,000 per medical malpractice case which increases to \$250,000 if the case goes to trial.

Given the high cost of prosecuting medical malpractice cases, attorneys can only take on those cases that have large expected damages because, in their absence, the portion they would receive of the settlement or court awards given to the plaintiff would not be large enough to make prosecution financially feasible.

To make matters worse, some states also have laws which unfairly place a cap on a plaintiff's damages, resulting in it being even less likely that the finances involved in a medical malpractice case will be feasible for an attorney. For example, in California, tort reform in the 1970s-1980s resulted in the State Legislature capping non-economic damages – damages for

pain, suffering, inconvenience, disfigurement or other impacts – ***at \$250,000, no matter how badly a doctor or hospital hurt you.***<sup>28</sup>

Each state has its own rules. But in California, the California Medical Injury Compensation Reform Act (a.k.a. MICRA), has maintained this cap for nearly 40 years and has remained unchanged, even with the rising costs of every aspect of litigation – not to mention inflation.

Caps on pain and suffering damages may seem high enough to still allow for many medical malpractice cases to be financially feasible for attorneys. Sadly, however, this isn't the case. As mentioned above, the cost of prosecuting a medical malpractice case can be as high as \$250,000. So, \$250,000 in pain and suffering damages, though it may seem like a lot of money, will often not be enough to make it financially feasible for an attorney to prosecute a case. At least in states like California, what usually is needed to bump the expected damages to a number high enough to make a medical malpractice case financially feasible for an attorney is high *economic* damages (e.g. past wage loss, future wage loss, future medical care, past medical care, etc.).

Another sobering fact is that the importance placed upon economic damages by MICRA disproportionately hurts those who have little to no income, such as children, the elderly, and full-time parents. Because these people do not work, they have little to no economic damages from lost income, resulting in their damages usually maxing out at only \$250,000.<sup>29</sup>

A recent study published in the *Vanderbilt Law Review* provides strong evidence for the existence of the cost problem facing medical malpractice plaintiffs. Of the attorneys who participated in the study, ***over 75% said that they reject more than 90% of the medical malpractice cases they come across primarily due to a combination of high litigation expenses and insufficient damages.***<sup>30</sup>

On a related note, another reason why medical malpractice plaintiffs can have difficulty finding an attorney to represent them is that, upon being contacted, attorneys who do not specialize in medical malpractice often take too long in referring the case to those who do, resulting in the statute of limitations applicable to the case expiring before the plaintiff can secure representation. Most general personal injury attorneys do not wish to take on a medical malpractice claim. They think the cases are just too expensive and too difficult.

## How to Increase the Odds of Getting Representation

Despite the often prohibitive costs of medical malpractice litigation and the documented reluctance of attorneys to take these types of cases on, there are ways that you as a plaintiff can “know before you go,” and increase your odds of getting a qualified attorney to take your case.

<sup>28</sup> MICRA, Consumer Attorneys of California, <https://www.caoc.org/index.cfm?pg=issmicra> (last visited Sept. 17, 2019).

<sup>29</sup> Id.

<sup>30</sup> Joanna Shepherd, Uncovering the Silent Victims of the American Medical Liability System, 67:1, Van. L. Rev., 151, 154, (2014).

If the treating physician tells you that he or she made a mistake, write down when and where the physician said so, and exactly what was said. Request copies of your records from the hospital or treatment facility. There may be a modest printing charge, but you might avoid this cost and expedite the process by asking the staff if they can put the documents on a thumb drive that you supply. Key records include operative records, anesthesia records, emergency room records, discharge records, all imaging (e.g. x-rays, CT scans, MRI images), and all progress notes from doctors.

In addition to your medical records, organize all of your other records related to the case. These may include photos of your injuries, medical bills, and notes on communications. A traditional binder with tabs works fine.

When you organize your documents, you are familiarizing yourself with your own case. This will be helpful for getting an attorney to consider taking your case for two reasons. First, attorneys are busy. They have offices to manage and existing clients to serve. To make the most of limited time, you want to be able to make the most convincing presentation possible when speaking to an attorney. Second, documents are the cornerstone of your case. What is in your binder (or on your thumb drive) now will be examined by experts, and likely end up as one of your lawyer's exhibits in an Offer of Settlement or Motion for Summary Judgment later.

You should also research your case and symptoms online. You can find a wealth of information that will help you understand your case and the important issues it presents.

Once you have your documents prepared, you can begin your search for an attorney to take your case. ***Keep in mind, of course, that your time limit according to the statutes of limitations is still running in the background.*** Don't wait too long to get proper documentation before calling an attorney. With that disclaimer aside, and your hypothetical documents prepared, you can search for an attorney online. The facts of your case can be a guide as you search the internet. Try to find attorneys with listed cases or listed practice specialties that are a match with your case. For example, if you live in Sacramento, California, and want to litigate against a doctor for failing to treat an infection that results in septic shock, look for something like, "failure to treat sepsis medical malpractice attorney Sacramento."

Once you have made initial contact with an attorney, these steps will help you convince the attorney that your medical malpractice case is one that they should take:

- (1) ***Know what the attorney is looking for.*** In a medical malpractice case, the attorney is conducting a cost-benefit analysis and looking for strong indications that the case could be a winner. These include an obvious mistake; serious, permanent injuries; clear causation, and collectability. Because you have done some research concerning your case and hopefully have your documents organized and ready before you make the call, you will be ready to answer questions related to these categories and tell your story in a way that highlights the strengths of your case in each category.

- (2) ***If the attorney says no, find out why.*** This will help you refine your presentation for the next attorney call.
- (3) ***Don't give up if they say no.*** The reason could have nothing to do with you. The attorney may not be an expert in your legal issue, may not have the time, or may not have the staff. Keep telling your story until you find an attorney who is able to take on your case. Plan to start with who you think is the best attorney. Then go to the next one. We've taken (and won great recoveries for) plenty of cases that other attorneys have declined. I know that it can be difficult to persevere through the suffering you've endured as well as to fight for justice, but please don't get discouraged quickly.
- (4) ***If the attorney does not say yes or no, be polite, but follow up.*** If the call does not end in a definitive yes or no, explain to the attorney that you are concerned about the statute of limitations. Ask the attorney what the next steps will be, and when you can follow up.
- (5) ***Be a partner in your case.*** Remember, you are helping to build your case. Take more good notes with the attorneys you speak with. Be a partner in your own representation and a resource to the attorneys. The efforts you make – from little things like researching your injury or medical issues online and organizing your medical records to more complicated tasks like writing a narrative of what happened to you if requested by your attorney – saves attorneys time, back-office resources, and ultimately, money. Because the financial feasibility of a case is one of the main reasons attorneys reject medical malpractice cases, the time you save the attorney ratchets up your value as a client.

If you follow these tips, you will very likely increase your odds of finding an attorney to take your case. A combination of these strategies will allow you to present yourself as a powerful ally and show the attorney that, even though he or she is the one investing the money, you are invested in your case in other meaningful and significant ways.

## Chapter Four: Seeking Justice Outside the Courtroom

### How to File a Complaint with a Licensing Board

In addition to civil litigation, there are other avenues most states have for an aggrieved patient to bring their concerns about a certain medical professional. In California, the California Medical Board reviews and investigates complaints about, and disciplines, medical professionals, including but not limited to, licensed physicians, surgeons, and licensed midwives.<sup>31</sup> Additionally, although the Board's staff reviews and investigates complaints about podiatrists and physician assistants, they do not take any disciplinary action against them. Rather, any disciplinary action taken against a podiatrist or a PA is decided by the appropriate licensing board or bureau.<sup>32</sup>

The types of complaints filed with the Medical Board may include but are not limited to those related to substandard care, prescribing issues, sexual misconduct, or the drug, alcohol, mental or physical impairment of a medical professional.<sup>33</sup> Those complaints "alleging negligence that involve patient death or serious bodily injury are given highest priority."<sup>34</sup> Keep in mind, however, that this is a government entity, so nothing is done exceptionally fast.

In California, the California Department of Community Affairs ("DCA") oversees and digitally facilitates the complaint process since the California Medical Board is one of its licensing agencies. A complaint form may be filled out and mailed directly to the California Medical Board.<sup>35</sup> Or, a complaint may be filed online through DCA's BreEze online services.<sup>36</sup> BreEze is DCA's online licensing and enforcement system for all of its Boards, Bureaus, and Committees.<sup>37</sup>

Most states have a website that allows a complainant to look up the license number of the medical professional with only the professional's name. Your online complaint will require you to 1) identify the board or bureau of the individual or organization in question, 2) record the relevant license type, 3) provide a detailed description of what happened and why you are filing your complaint, 4) provide the address where the incident occurred, 5) provide additional information as requested, 6) identify the individual or organization in question, 7) provide your contact information, 8) attach files which serve as evidence supporting your claim(s), and 9) potentially

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<sup>31</sup> Complaint Information, Medical Board of California, <http://www.mbc.ca.gov/Consumers/Complaints/> (last visited Sept. 17, 2019).

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> How Complaints Are Handled, Medical Board of California (March 2019), [http://www.mbc.ca.gov/Publications/Brochures/complaint\\_info\\_english-web.pdf](http://www.mbc.ca.gov/Publications/Brochures/complaint_info_english-web.pdf).

<sup>35</sup> Submit Complaint By Mail, Medical Board of California, [http://www.mbc.ca.gov/Consumers/Complaints/Submit\\_By\\_Mail.aspx](http://www.mbc.ca.gov/Consumers/Complaints/Submit_By_Mail.aspx) (last visited Sept. 17, 2019).

<sup>36</sup> Submit Complaint Online, California Medical Board, <http://www.mbc.ca.gov/Breeze/Complaints.aspx> (last visited Sept. 17, 2019).

<sup>37</sup> Id.

sign an authorization for release of records.<sup>38</sup> Files which may be useful in substantiating your claim include patient records, audio and video recordings, correspondence, billing statements, and proofs of payment.

To file a complaint by mail, you will be required to 1) provide information regarding the person your complaint is against (e.g. full name, address, phone number, license number), 2) provide a detailed account of the incident(s) in question, 3) submit relevant documents (e.g. patient records, photographs, video and audio recordings, correspondence, billing statements, proof of payments), and 5) sign and date both the complaint form and an Authorization for Release of Medical Information Form.<sup>39</sup>

In California, a Consumer Services Analyst receives and reviews each complaint, gathering all necessary information to evaluate the complaint. If enough evidence exists, the complaint will be advanced to a medical consultant. If enough evidence is determined to exist by the medical consultant, the complaint will be sent to the DCA investigation office closest to the site of the alleged incident.<sup>40</sup>

In the course of an investigation, if the medical professional is determined *not* to have conducted himself or herself below the standard of care, the complaint will be closed. Similarly, if the medical professional is determined to have acted below the standard of care but not with gross negligence, the complaint will be closed. ***But if the medical professional is determined to have committed gross negligence, the results of the investigation may be submitted to the Attorney General “for a formal charge that may lead to disciplinary action against the physician’s license.”***<sup>41</sup>

The entire process, from the date the Board is notified of a violation to the date formal charges are filed, is governed by a special statute of limitations. Exceptions to the statutes of limitation are applied in cases involving “sexual misconduct, care and treatment provided to minors, and proven intentional concealment of specific unprofessional conduct.”<sup>42</sup>

In those cases where you cannot find an attorney to represent you or you feel monetary damages are not sufficient for the wrong that was done by a doctor or other licensed medical professional, the filing of a complaint with the Medical Board of your state may help ensure that corrective action is taken and that the medical professional is not permitted to harm additional patients.

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<sup>38</sup> DCA BreEz Online Training Tutorial: File a Complaint, California Department of Consumer Affairs, [https://www.dca.ca.gov/webapps/breeze/file\\_a\\_complaint\\_breeze/file\\_a\\_complaint\\_breeze.html](https://www.dca.ca.gov/webapps/breeze/file_a_complaint_breeze/file_a_complaint_breeze.html) (last visited Sept. 17, 2019).

<sup>39</sup> Consumer Complaint Form, Medical Board of California (Jan. 2019), <http://www.mbc.ca.gov/Forms/07i-61.pdf>.

<sup>40</sup> How Complaints Are Handled, Medical Board of California (March 2019), [http://www.mbc.ca.gov/Publications/Brochures/complaint\\_info\\_english-web.pdf](http://www.mbc.ca.gov/Publications/Brochures/complaint_info_english-web.pdf).

<sup>41</sup> Id.

<sup>42</sup> Id.



## How to File a Complaint with the Department of Public Health

Most states have a Department of Public Health (DPH), another resource for filing complaints of medical malpractice. The DPH regulates and investigates complaints for licensed and certified health care *facilities* as well as certain types of healthcare professionals.<sup>43</sup> ***So, if you have a complaint against a nursing home, this is an avenue to take.*** A complaint may usually be filed with the DPH of your state by phone, fax or mail. If you plan on mailing a complaint, you can simply draft a letter or use a form accessible online.<sup>44</sup> In California, you can also submit the complaint online via the California Health Facilities Information Database.<sup>45</sup> In most cases, the agency will acknowledge receipt of a Complaint within ten (10) days or less.<sup>46</sup>

In California, according to the CDPH website, the database is a source of information for approximately 10,000 health care facilities in California, and provides such information as facility ownership, licensing status, performance history of previous complaints, entity/facility-reported incidents, and state enforcement actions.<sup>47</sup> Regulated facilities are those which provide medical services and must be licensed by the State of California, including, but not limited to, general acute care hospitals, hospices, home health agencies, skilled nursing facilities, and primary care clinics.<sup>48</sup> In addition to filing administrative complaints, the CDPH website can be a valuable fact-finding resource for a litigant filing a malpractice lawsuit due to the wealth of information the website provides about hospitals and prior incidents at hospitals.

Every complaint received by the DPH is documented in an electronic tracking system and assigned to a health facilities evaluator supervisor who is a registered nurse. Incoming complaints are prioritized by the supervisor based on their content, the immediacy of the alleged violation, the inherent risks, and any requirements of state and federal law. The supervisor also assigns the complaint investigation to a “CDPH health facilities evaluator nurse (HFEN).”<sup>49</sup> In the case of a complaint determined to indicate “immediate jeopardy,” in California, the CDPH is required by law to respond to the site “within 24 hours for long-term care facilities and providers and within 48 hours for hospitals and non-long-term care facilities.”<sup>50</sup>

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<sup>43</sup> Complaint Investigation Process, California Department of Public Health, <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ComplaintInvestigationProcess.aspx> (last visited Sept. 17, 2019).

<sup>44</sup> Licensing and Certification Program, California Department of Public Health (March 26, 2018), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/FileAComplaint.aspx>.

<sup>45</sup> Cal Health Find Database, California Department of Public Health (June 28, 2018), <https://www.cdph.ca.gov/programs/chcq/lcp/calhealthfind/Pages/Home.aspx>.

<sup>46</sup> Complaint Investigation Process, California Department of Public Health, <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ComplaintInvestigationProcess.aspx> (last visited Sept. 17, 2019).

<sup>47</sup> Cal Health Find Database, California Department of Public Health (June 28, 2018), <https://www.cdph.ca.gov/programs/chcq/lcp/calhealthfind/Pages/Home.aspx>.

<sup>48</sup> Health Care Facility Licensing and Certification, California Department of Public Health (Sept. 11, 2019), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/ApplyForLicensure.aspx>.

<sup>49</sup> Cal Health Find Database, California Department of Public Health (Oct. 2, 2018), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ComplaintInvestigationProcess.aspx>.

<sup>50</sup> Id.

*As may be clear by now, one of the primary focuses of DPH is elder care and elder abuse.* Too often we see elderly people suffering from bedsores while in a nursing home due to the negligence of their nurses and staff. In California, that's exactly what the CDPH investigates.

Investigations by the nurse evaluator may include a team of staff members such as doctors, pharmacists, dietitians, occupational therapists and medical record experts. The complainant, who can be anyone – the patient, resident, a family member, an estate administrator, or even an anonymous individual – is permitted to accompany the evaluator and team.<sup>51</sup>

After the investigation, the DPH evaluator (along with a supervisor) must determine if the complaint is “substantiated” or “unsubstantiated” in light of the gathered facts. In California, if the complaint is substantiated and involved a violation of one or more regulatory requirements, ***the CDPH may perform enforcement action or issue penalties.*** The administrative actions taken by the CDPH depend on the severity and the scope of any violations found.<sup>52</sup>

## What Can I Do about a HIPAA Violation?

Let's start by establishing what HIPAA is, and who to call when something goes wrong. A HIPAA violation is when someone violates your privacy in relation to your health. This could be a nurse speaking loudly in the hallway about how you should apply cream to your rash, your doctor texting you test results, or your dentist's office not properly disposing of your billing records.

Enacted by Congress, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) established a set of national standards for maintaining certain *protected health information*, or “PHI.” HIPAA protects PHI under a series of rules created and enforced by the United States Department of Health and Human Services.<sup>53</sup>

HIPAA applies to covered entities which have access to your PHI, including health plans; health insurance companies; HMOs; certain government programs like Medicaid and Medicare; most healthcare providers such as doctors, clinics, hospitals, psychologists, chiropractors, nursing homes, pharmacies, and dentists; healthcare clearinghouses; and businesses associated with these entities, such as billing companies, companies that store or destroy medical records periodically, accountants, and lawyers.<sup>54</sup>

Medical information protected under HIPAA includes information contained within medical records, information conveyed orally between a doctor and a nurse about your treatment, progress notes, billing information, and information stored by health insurance companies, just to

<sup>51</sup> Cal Health Find Database, California Department of Public Health (Oct. 2, 2018), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ComplaintInvestigationProcess.aspx>.

<sup>52</sup> Id.

<sup>53</sup> Health Insurance Portability and Accountability Act of 1996 (HIPAA), Centers for Disease Control and Prevention, <https://www.cdc.gov/phlp/publications/topic/hipaa.html> (last visited Sept. 18, 2019).

<sup>54</sup> Summary of the HIPAA Privacy Rule, U.S. Department of Health and Human Services (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>.

name a few. The Office of Civil Rights (“OCR”) within the Department of Health and Human Services investigates civil complaints of HIPAA being violated.<sup>55</sup>

According to the *HIPAA Journal*, common violations of HIPAA include impermissible disclosures of PHI; unauthorized access of PHI; improper disposal of PHI; texting of PHI; failure to provide patients access to their PHI upon request; failure to conduct a risk analysis; failure to manage risks related to the confidentiality, integrity and availability of PHI; failure to implement safeguards as to PHI; failure to enter into a HIPAA-compliant agreement with business associates; failure to provide PHI training and security training; theft of patient records; sharing of PHI over social media; and failure to notify of a PHI breach.<sup>56</sup> For these and other violations, the Office of Civil Rights assigns penalties on a four-tier system:

- **Tier I Fines** are levied against covered entities that are unaware of their violation of HIPAA and with reasonable due diligence would have known HIPAA rules were violated. Tier I fines range from \$100 to \$50,000 per violation, capped at \$1.5 million per year;
- **Tier II Fines** are levied when the Office of Civil Rights has reasonable cause to believe that a covered entity knew, or should have known, about a HIPAA violation by exercising reasonable due diligence. Tier II fines range from \$1,000 to \$50,000 per violation, with a maximum of \$1.5 million per year;
- **Tier III Fines** are assigned to those covered entities who demonstrate a willful neglect of HIPAA’s rules and protections but correct the violation within 30 days of its discovery. Tier III fines range from \$10,000 to \$50,000 per violation, with a maximum of \$1.5 million per year;
- **Tier IV Fines**, the highest of the civil penalties, are handed out when covered entities willfully neglect HIPAA’s rules and make no effort within 30 days to correct the violation. Tier IV Fines are \$50,000 per violation, with a maximum of \$1.5 million per year.<sup>57</sup>

Criminal penalties may be also assessed under HIPAA regarding violations committed by either individuals or corporate representatives of covered entities. The Department of Justice (“DOJ”) prosecutes these violations.<sup>58</sup>

A covered entity which knowingly uses, causes to be used, obtains, or discloses personal health information faces 1) a potential fine of up to \$50,000, 2) imprisonment for up to one year,

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<sup>55</sup> Summary of the HIPAA Privacy Rule, U.S. Department of Health and Human Services (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>.

<sup>56</sup> What is a HIPAA Violation?, HIPAA Journal, <https://www.hipaajournal.com/what-is-a-hipaa-violation/> (last visited Sept. 18, 2019).

<sup>57</sup> HIPAA Violation Fines, HIPAA Journal, <https://www.hipaajournal.com/hipaa-violation-fines/> (last visited Sept. 18, 2019).

<sup>58</sup> Enforcement Process, U.S. Department of Health and Human Services (June 7, 2017), <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/enforcement-process/index.html>.

or 3) both. If the offense occurs under false pretenses, the penalty could be 1) a fine of up to \$100,000, 2) imprisonment for up to five years, or 3) both. And if the offense committed involved an intent to sell, transfer, or otherwise use personal health information for commercial gain, personal gain, or malicious harm, the penalty could be 1) a fine of up to \$250,000, 2) imprisonment for up to ten years, or 3) both.<sup>59</sup>

If you believe a HIPAA breach has occurred, whether it is of your own protected health information, or that of a loved one, you may file a complaint in writing by mail, fax or e-mail to the Office of Civil Rights. You can also file a complaint online through the agency's online portal.<sup>60</sup> In any case, the OCR will require certain information such as the name of the covered entity and details about the alleged breach. ***You are protected under HIPAA against retaliation for filing a complaint, and any act of retaliation, discrimination or similar improper action taken against you for exercising your rights under HIPAA is strictly prohibited.*** Complaints should be filed within 180 days of the occurrence of the violation, which may be extended for good cause.<sup>61</sup>

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<sup>59</sup> Wrongful Disclosure of Individually Identifiable Health Information, Social Security, [https://www.ssa.gov/OP\\_Home/ssact/title11/1177.htm](https://www.ssa.gov/OP_Home/ssact/title11/1177.htm) (last visited Sept. 18, 2019).

<sup>60</sup> How to File a Health Information Privacy or Security Complaint, U.S. Department of Health and Human Services, <https://www.hhs.gov/hipaa/filing-a-complaint/complaint-process/index.html> (last visited Sept. 18, 2019).

<sup>61</sup> Id.

## Chapter Five: When You Need Care NOW

### What Do I Do If I Am Not Receiving Adequate Care?

We've already explained that there is a certain level of care from the medical industry to which all patients are entitled, and that there are resources in the form of government regulatory bodies that will step in if that standard is violated. But dealing with the government can take a while, and medical mistakes can often be a matter of life or death. In this section, we discuss additional resources available when a patient is not receiving adequate care.

Independent “patient advocates” or “health care advocates,” which are often *private companies*, untethered from medical-industry influence, exist to provide assistance to, and advocacy for, patients. Unlike lawsuits and regulatory group complaints, patient advocates can act immediately.

According to AdvoConnection, “Advocates work outside of existing reimbursement-based healthcare systems in order to bring you the best care you can get, focused on your wants and needs, without the for-profit influence or rationing that takes place from inside of the medical system.”<sup>62</sup> Health care advocates may provide such services as accompanying patients to medical appointments, staying with hospital patients at their bedsides, helping patients learn more about their medical condition and treatment options, helping patients make difficult medical decisions, reviewing prescriptions to make sure there are no conflicts, teaching pain management techniques, helping patients navigate the insurance “maze,” helping patients dispute coverage denials, managing or reducing bills, helping develop end-of-life plans, filling out paperwork like living wills, DNRs, and other advance directives, tracking paperwork and records, and much more.<sup>63</sup>

AdvoConnection, as well as the National Association of Health Advocacy Consultants,<sup>64</sup> are two of many organizations which serve as clearinghouses for locating a health advocate near you. Verywell Health, an award-winning online resource for health information, suggests treating the selection process like any other job interview, with targeted questions for the candidate such as: whether he or she has ever worked with a patient with an ailment similar to yours before, what their credentials are, do they have a certification from the Patient Advocate Certification Board, what is their charge for services, do they have references, and where are they located.<sup>65</sup>

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<sup>62</sup> Services: How an Independent Patient or Health Advocate Can Help You, The AdvoConnection Directory, <https://advoconnection.com/advocacy-services/> (last visited Sept. 18, 2019).

<sup>63</sup> Id.

<sup>64</sup> Guidance Through the Deep Waters of Today's Healthcare, National Association of Healthcare Advocates, <https://www.nahac.com/#!event-list> (Last visited Sept. 18, 2019).

<sup>65</sup> Trisha Torrey, How to Find, Interview, and Choose a Patient Advocate (Sept. 16, 2019), Verywell Health, <https://www.verywellhealth.com/how-to-find-and-choose-a-patient-or-health-advocate-2614923>.

A national advocacy group, Patients Rising, provides support and education to people suffering from chronic and life-threatening illnesses, and advocates for what patients need, including access to treatments, innovations, and care.<sup>66</sup> Of the resources the organization offers, one is “Voices of Value,” a multi-media hub created by patients, for patients. The goal of Voices of Value is to share information and insights into dealing with chronic or life-threatening illnesses. Another resource is “Patients Rising University,” an online system that connects patients with experts from various fields. This way, experts can directly share information on topics, including healthcare organization, financial planning for a chronic illness, and clinical trials.<sup>67</sup>

## Understanding Health Insurance

Your insurance company is another resource available to you, in terms of both the quality of care and the cost of care. You may have insurance through your job, or through Medicaid or Medicare, or through a private policy purchased through the healthcare “marketplace.” Since the Affordable Care Act (“ACA”), open enrollment for a marketplace program is limited to the window of November to mid-December of each year.<sup>68</sup> ***If you missed this opportunity, you may still be able to change insurance providers through a “special enrollment period” triggered by specific events, provided you act within 60 days of the specific event occurring.*** Triggering events include getting married, having a baby or adopting a child, getting divorced or legally separated, the death of a policyholder, if you moved, or if anyone in the household lost coverage within the past 60 days or anticipates losing coverage within the next 60 days.<sup>69</sup>

Health insurance companies offer two major types of plans – Health Maintenance Organizations and Preferred Provider Organizations, also known as “HMOs” and “PPOs.” Both HMOs and PPOs attempt to optimize health care services in terms of benefits and costs by facilitating them through a single network. ***But they each come with pros and cons.***

HMOs usually require you to choose a primary care physician or “PCP” who then becomes the point person through which you gain access to medical care. Importantly, the PCP you select must be affiliated with the HMOs’ network and the insurance company will not cover any out-of-network services. In contrast, PPOs do not require you to select a gatekeeper PCP and will allow you to see doctors outside of the PPOs’ network.<sup>70</sup>

Another way HMOs and PPOs differentiate from one another is that, with an HMO, you cannot make an appointment with just any specialist. Rather, your PCP must refer you to a spe-

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<sup>66</sup> About, Patients Rising, <https://patientsrising.org/about/> (last visited Sept. 18, 2019).

<sup>67</sup> Id.

<sup>68</sup> Dates and Deadlines for 2020 Health Insurance, HealthCare.gov, <https://www.healthcare.gov/quick-guide/dates-and-deadlines/> (last visited Sept. 18, 2019).

<sup>69</sup> Enroll in or Change 2019 Plans – Only with a Special Enrollment Period, HealthCare.gov, <https://www.healthcare.gov/coverage-outside-open-enrollment/special-enrollment-period/> (last visited Sept. 18, 2019).

<sup>70</sup> HMO vs. PPO Health Insurance, FindLaw, <https://consumer.findlaw.com/insurance/hmo-vs-ppo-health-insurance.html> (last visited Sept. 18, 2019).

cialist who falls within the HMOs' network. But with a PPO, you can freely schedule an appointment with a specialist of your choosing.<sup>71</sup>

Finally, what many consider to be the most important difference between HMOs and PPOs is their respective cost breakdowns. Because HMOs restrict you to only in-network providers, they have lower monthly premiums. PPOs, on the other hand, give you access to out-of-network providers, but usually have you “pay a higher percentage of the costs for those services.”<sup>72</sup> Furthermore, in those cases where you go to an out-of-network provider, a separate deductible may apply.<sup>73</sup>

When selecting an HMO versus a PPO, *consider your past medical needs and try to forecast your future ones, think about the availability of providers close to where you live, and consider your income.*

If your employer does not provide you with health coverage, you missed open enrollment for purchasing a healthcare plan from the marketplace, and you do not qualify for special enrollment, *you still have options* in most states. You may be able to purchase a “short term” healthcare plan, also known as “gap” coverage, which is designed for people “who experience a temporary gap in health coverage.”<sup>74</sup>

Although short term healthcare plans usually cost less than other major health plans, they are more limited. For example, short term healthcare plans, among other things, are not renewable, are often medically underwritten, exclude coverage for pre-existing conditions, and are not required to cover essential health benefits (e.g. maternity care, prescription drugs, mental health care, etc).<sup>75</sup>

Finding the rules and costs of healthcare coverage to be overwhelming, still others turn to Membership Organizations, or groups dedicated to providing resources and benefits to members who may be defined as sharing common interests, trades or professions, for their healthcare. Examples of groups which may be able to help you find healthcare are unions, alumni associations, or professional associations, such as your local chamber of commerce.

Additionally, there is a unique group of alternative plans which many find valuable called “Health Sharing Plans” or “Medical Cost Sharing Ministries.” These plans are not traditional health insurance. Instead, they are associations comprised of individuals of similar mindsets who agree to help pay each other’s medical expenses.<sup>76</sup> These plans succeed because of their design

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<sup>71</sup> HMO vs. PPO Health Insurance, FindLaw, <https://consumer.findlaw.com/insurance/hmo-vs-ppo-health-insurance.html> (last visited Sept. 18, 2019).

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Karen Pollitz et al, Understanding Short-Term Limited Duration Health Insurance, Henry J. Kaiser Family Foundation (Apr. 23, 2018), [https://www.kff.org/report-section/understanding-short-term-limited-duration-health-insurance-issue-brief/#endnote\\_link\\_255134-1](https://www.kff.org/report-section/understanding-short-term-limited-duration-health-insurance-issue-brief/#endnote_link_255134-1).

<sup>75</sup> Id.

<sup>76</sup> What is the Health Share Membership, Blake Insurance Group, <https://www.blakeinsurancegroup.com/healthshare-membership/> (last visited Sept. 18, 2019).



as faith-based programs, where members of the same faith commit to helping each other face life's unforeseen tragedies. Health Sharing Plans don't have a network, and members may visit any provider of their choice and use their membership card like a regular insurance card. Many require bills to be paid upfront, then submitted for reimbursement. They generally ask that all members pay a fee, which forms the pool of money for the members to draw from,<sup>77</sup> and they ask that all members profess the same values. Several major examples of Health Sharing Plans are Christian Health Care Ministries,<sup>78</sup> Samaritan Ministries,<sup>79</sup> Medi-Share,<sup>80</sup> and Liberty Health Share.<sup>81</sup>

No matter what health insurance avenue you choose, it is always a good idea to know exactly what is covered and what is not. ***You might have a lot more freedom with your coverage than you think.***

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<sup>77</sup> See Lauren Greutman, Health Sharing Programs: The Complete Guide to Medical Cost Sharing, Lauren Greutman (Dec. 14, 2018), <https://www.laurengreutman.com/save-money-with-health-care-sharing-ministries/>.

<sup>78</sup> Christian Health Plans, [https://www.christianhealthplans.net/?kw=Christian%20Ministries%20Healthcare&gclid=CjwKCAiA2fjjBRAjEiwAuewS\\_XITdaj-2Xp-bxo1ETzdX4xWVuR25lZ\\_QYtrsZ8YrzdDQO7CzcjaoBoCxWsQAvD\\_BwE](https://www.christianhealthplans.net/?kw=Christian%20Ministries%20Healthcare&gclid=CjwKCAiA2fjjBRAjEiwAuewS_XITdaj-2Xp-bxo1ETzdX4xWVuR25lZ_QYtrsZ8YrzdDQO7CzcjaoBoCxWsQAvD_BwE) (Last visited Sept. 18, 2019).

<sup>79</sup> Samaritan Ministries, [https://samaritanministries.org/?msclkid=79afdae0c5181b64f429869e702c0249&utm\\_source=bing&utm\\_medium=cpc&utm\\_campaign=Christian%20Healthcare%20Ministries&utm\\_term=christian%20healthcare%20ministry&utm\\_content=Christian%20Healthcare%20Ministries](https://samaritanministries.org/?msclkid=79afdae0c5181b64f429869e702c0249&utm_source=bing&utm_medium=cpc&utm_campaign=Christian%20Healthcare%20Ministries&utm_term=christian%20healthcare%20ministry&utm_content=Christian%20Healthcare%20Ministries) (last visited Sept. 18, 2019).

<sup>80</sup> Medi-Share, <https://www.medishare.org/> (last visited Sept. 18, 2019).

<sup>81</sup> Liberty HealthShare, [https://www.libertyhealthshare.org/share?gclid=CjwKCAiA2fjjBRAjEiwAuewS\\_aCAI-3zult8nEGc781TikhUOWS2Rp2ujDR74CRrRmsuBM5z8km-zxoCMFgQAvD\\_BwE](https://www.libertyhealthshare.org/share?gclid=CjwKCAiA2fjjBRAjEiwAuewS_aCAI-3zult8nEGc781TikhUOWS2Rp2ujDR74CRrRmsuBM5z8km-zxoCMFgQAvD_BwE) (last visited Sept. 18, 2019).

## Chapter Six: How You Can Help Lady Justice

### How You Can Help Improve California's Tort Reform Laws

As discussed in these articles, the California Medical Injury Compensation Reform Act has maintained the same unfair cap of \$250,000 for pain and suffering damages and wrongful death claims for forty years. This unfair cap has rendered many viable medical malpractice claims too expensive for all but the most confident and expert attorneys to take on.

Forty years. That's a long time. A quick trip down memory lane shows that, in 1975, a gallon of gas cost 59 cents, a stamp cost 13 cents, a new home cost \$48,000, and you could have seen *Jaws*, *One Flew Over the Cuckoo's Nest*, or *The Return of the Pink Panther* for about two dollars at the local movie theater.<sup>82</sup> While the cost of living has risen exponentially, ***pain and suffering damages for people whose lives were changed forever by the negligence of doctors and hospitals have remained fixed.***

Not every state has a cap on non-economic damages in medical malpractice suits. And some state courts have overturned the caps as unconstitutional. For example, in the case, Estate of Michelle Evette McCall v. U.S., where the family of a new mother who died while under the negligent care of the U.S. Airforce sued the United States, the Florida Supreme Court held that Florida's cap on noneconomic damages violated the Equal Protection Clause of the Florida Constitution. One of the reasons the Court provided for why the cap on noneconomic damages violated the Equal Protection Clause was that it imposed an “unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants.”<sup>83</sup> The Court also noted that Florida's cap on noneconomic damages had “***the effect of saving a modest amount for many by imposing devastating costs on a few – those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap.***”<sup>84</sup>

Can California ever become like Florida, or the many other states which have raised, eliminated, or never created caps on pain and suffering damages for medical malpractice? Thankfully, the answer is, “**Yes.**” Laws are changed all the time, by the legislatures who enacted them, at the urging of the voters who vote legislators into office. Every citizen can make a difference. Whether or not you are suffering today from medical malpractice, it could happen to you tomorrow. Don't let the doctors and the hospitals, who are supposed to be bound by the sacred Hippocratic Oath to do no harm, have the loudest voice. ***If you live in California, call, write or***

<sup>82</sup> Comparing the Cost of Living Between 1975 and 2015: You Are Being Lied and Fooled When it Comes to Inflation Data and the Cost of Living, My Budget 360, <http://www.mybudget360.com/cost-of-living-compare-1975-2015-inflation-price-changes-history/> (last visited Sept. 18, 2019).

<sup>83</sup> Estate of McCall v. United States, 134 So. 3d 894, 901 (Fla. 2014).

<sup>84</sup> Estate of McCall v. United States, 134 So. 3d 894, 903 (Fla. 2014).

*e-mail your state representative and ask that MICRA be repealed today.*<sup>85</sup> In the meantime, if you live in California or another state that has an unfair cap on pain and suffering damages for medical malpractice, you can try to circumvent it by selecting an attorney who will advocate for the greatest amount of damages possible.

## A Final Word of Caution

Please remember that this book is meant for general educational purposes only and **not** legal advice regarding a specific case. Reading this book does **not** create an attorney-client relationship with our office. To do that, you will need to personally contact our office, discuss your case fully, and sign a written Attorney-Client Agreement with our office. If you have a specific medical malpractice claim, you should contact our office or an experienced attorney of your choice **AT ONCE** for specific and accurate legal advice and representation. *If you delay, you may lose all your legal rights.*

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<sup>85</sup> California State Legislature, [http://www.legislature.ca.gov/your\\_legislator.html](http://www.legislature.ca.gov/your_legislator.html) (last visited Sept. 18, 2019).