Chapter 7

MEDICAL MALPRACTICE

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PART I:  STRATEGY

§ 7.01  Scope

This chapter covers:

- Pre-suit evaluation and investigation of medical malpractice cases.
- Identification of defendants and applicable defenses.
- Causes of action and potential issues in pleading.
- Procedures for conducting discovery including the use of experts.
- Preparation for trial.
- Issues arising during trial.
- Settlement of medical malpractice actions.

§ 7.02  Objective and Strategy

The purpose of this chapter is to provide comprehensive coverage of the issues pertaining to medical malpractice actions, beginning pre-suit and continuing through pleading, discovery and trial. This chapter is designed to help a practitioner spot the relevant issues and possible pitfalls. It will also guide a practitioner through the common causes of action and the potential defenses to a medical malpractice lawsuit.
PART II: INVESTIGATING AND EVALUATING MEDICAL MALPRACTICE CASES

§ 7.03 CHECKLIST: Investigating and Evaluating Medical Malpractice Cases

☐ Conduct initial client interview.
  ○ Evaluate plaintiff’s character, demeanor and credibility.
    
    **Discussion:** See § 7.04[1][a] below.
  ○ Elicit information regarding underlining incident, plaintiff’s medical history, subsequent treatment and damages.
    
    **Discussion:** See § 7.04[1][a] below.
  ○ Have plaintiff sign retainer and medical authorizations.
    
    **Authority:** N.J. Ct. R. 1:21-7.
    
    **Discussion:** See § 7.04[1][a] below.
  ○ Obtain and review plaintiff’s medical records.
    
    **Authority:** N.J. Admin. Code §§ 13:35-6.5(b), 13:35-6.5(c).
    
    **Discussion:** See § 7.04[1][b] below.
  ○ Consult physician in same medical specialty as defendant in order to obtain an Affidavit of Merit for plaintiff.
    
    **Authority:** NJS 2A:53A-27.
    
    **Forms:** Form CLI 7.703.01, Affidavit of Merit for Medical Malpractice
    
    **Discussion:** See § 7.04[1][c] below.
  ○ Interview defendant to review course of treatment provided to plaintiff, defendant’s conversations with plaintiff and plaintiff’s family and defendant’s reasons for chosen course of treatment and evaluate defendant’s demeanor.
    
    **Authority:** NJS 2A:53A-40.
    
    **Discussion:** See § 7.04[2] below.
Assess merit of plaintiff’s cause of action for medical malpractice.

Consider following issues:

- Did defendant owe duty of care to plaintiff?
- Did defendant breach that duty by deviating from applicable standard of care for general medical practitioner or medical specialist?
- Was this valid exercise of defendant’s judgment?
- Did defendant’s breach proximately cause plaintiff’s injuries?
- Did plaintiff suffer damages as a result?


**Discussion:** See §§ 7.05[1] and 7.05[2] below.

§ 7.04 Conducting Client Interviews

[1] Interviewing Potential Plaintiff

[a] Conducting Initial Interview

The plaintiff’s initial client interview should enable a practitioner to determine whether a viable medical malpractice action may be sustained. During this interview, a practitioner should evaluate plaintiff’s character, demeanor and credibility to assess not only the validity of plaintiff’s claim, but also how good a witness plaintiff will be. A practitioner also should inquire whether plaintiff has consulted other attorneys.

**Warning:** The fact that plaintiff has consulted other attorneys, who have rejected the medical malpractice case, should trigger a red flag that there may be a problem with the case. Upon learning that plaintiff
has consulted more than one attorney, the practitioner should conduct a thorough investigation of the claim.

The plaintiff should be asked about the following:

1. The incident in question, including plaintiff’s medical history and the medical history of plaintiff’s immediate family;
2. Plaintiff’s medical treatment after the alleged malpractice and the opinions of those medical practitioners regarding the alleged malpractice;
3. Whether plaintiff followed medical advice;
4. A description of the alleged negligence by the defendant(s); and
5. Whether any subsequent treating physicians have given an opinion on the issue of malpractice.

If a practitioner decides to accept the case, the client should be advised of the fee, which is generally a 1/3 contingency plus expenses. See N.J. Ct. R. 1:21-7. However, before entering into a contingent fee arrangement, a practitioner must advise the client of the right to compensate the attorney on an hourly basis. See N.J. Ct. R. 1:21-7(b). The client should be given a retainer agreement and medical authorization forms to sign.

[b] Reviewing Plaintiff’s Medical Records

A practitioner should obtain and carefully review plaintiff’s medical records. Physicians, and other persons licensed by the Board of Medical Examiners, must prepare contemporaneous, permanent treatment records that accurately reflect the treatment and services rendered to their patients. N.J. Admin. Code §§ 13:35-6.5(b), 13:35-6.5(c).

Timing: A physician must provide a copy of his treatment records within 30 days of receiving a written request from either the patient or an authorized representative of the patient. N.J. Admin. Code § 13:35-6.5(b).
$10. For x-rays or other materials that cannot be routinely copied on a photocopier, a physician may charge only the actual cost of the duplication or the fee charged to him for the duplication, plus an administrative charge of the lesser of $10.00 or 10 percent of the cost of the duplication. N.J. Admin. Code § 13:35-6.5(c).

[c] Consulting Expert Physician for Purpose of Obtaining Affidavit of Merit

In most medical malpractice actions, an Affidavit of Merit from a licensed medical practitioner must be provided within 60 days after the defendant’s answer is filed or the action will be subject to dismissal. NJS 2A:53A-27. The affidavit must state that a reasonable probability exists that defendant’s care deviated from acceptable professional standards. The expert physician generally must be in the same specialty as the proposed defendant. In certain circumstances, however, an Affidavit of Merit may be executed by a physician who is not in the same specialty as the defendant. NJS 2A:53A-41(c); see §§ 7.19, 7.24 below.

Timing: Although the Affidavit of Merit is not due until 60 days after defendant’s answer is filed, if time permits, a practitioner should consult a physician before the complaint is filed in case any problems arise in obtaining an affidavit.

Forms: Form CLI 7.703.01, Affidavit of Merit for Medical Malpractice

[2] Interviewing Potential Defendant

During defendant’s interview, a practitioner should review the course of treatment rendered by defendant to plaintiff. A practitioner should inquire about all defendant’s conversations with plaintiff and plaintiff’s family, as well as with any co-defendants. A practitioner should determine defendant’s underlying reasons for selecting the particular course of treatment.

A practitioner also should evaluate defendant’s demeanor to determine whether the defendant will make a good witness at his or her deposition and at trial.
**Strategic Point:** If a physician states that he or she has been misidentified by plaintiff or that he or she was not involved in plaintiff’s care or treatment, an affidavit of noninvolvement may be filed to dismiss the action against that physician pursuant to NJS 2A:53A-40; see § 7.20[1] below.

§ 7.05 Determining Basis of Liability for Medical Malpractice Claim

[1] Demonstrating Duty of Care

To state a valid medical malpractice claim, plaintiff must show that:

1. A duty of care existed;
2. Defendant breached that duty by deviating from the applicable standard of care;
3. Defendant’s breach proximately caused plaintiff’s injuries; and
4. Plaintiff suffered damages as a result.


[2] Standard of Care

When a physician takes a case, there is a duty imposed upon that physician to exercise the degree of care, knowledge and skill generally possessed and exercised by the average physician practicing in the field. *Schueler v. Strelinger*, 43 N.J. 330, 344, 204 A.2d 577 (1964) (standard of care and departure from standard). A physician’s failure to have and utilize such skill and care toward the patient, which results in injury or damages
§ 7.05[2] NEW JERSEY PERSONAL INJURY LITIGATION 7-12


A physician is permitted to exercise judgment when there exists two or more proper courses of medical treatment. *Velazquez v. Portadin*, 163 N.J. 677, 686-687, 751 A.2d 102 (2000) (relationship between medical judgment and standard of care). However, a physician who departs from standard medical practice where no judgment is permitted will not be excused from the consequences. Thus, the exercise of medical judgment cannot be used to avoid liability for ordinary negligence. The defense of medical judgment is only applicable in cases where the facts support an exercise of judgment and not in every case, which had been the practice before *Velazquez v. Portadin*, 163 N.J. 677, 751 A.2d 102 (2000).

When the physician holds himself or herself out as a specialist, he or she is held to a higher standard of care. *See Carbone v. Warburton*, 22 N.J. Super. 5, 9, 91 A.2d 518 (App. Div. 1952), aff’d, 11 N.J. 418, 426, 94 A.2d 680 (1953) (difference between general practitioner and specialist).

Expert testimony typically is necessary to establish the applicable standard of care.

**Exception:** Although expert testimony generally is necessary to establish the standard of care, expert testimony is not required in cases involving common knowledge, that is, where defendant’s negligence is easily apparent to a lay person. *See § 7.23[3] below.*
PART III: IDENTIFYING DEFENDANTS

§ 7.06 CHECKLIST: Identifying Defendants

☐ Determine liability of various types of physicians.
   ☐ Consider following issues:
      • Referring physician generally is not liable for malpractice by surgeon or specialist.

   **Authority:** Tramutola v. Bortone, 63 N.J. 9, 304 A.2d 197 (1973).

   **Discussion:** See § 7.07 below.

      • Absent agency relationship, physician generally is not liable for malpractice by covering physician.


   **Discussion:** See § 7.07 below.

      • Consulting physician must advise patient’s treating physician of his or her findings.


   **Discussion:** See § 7.07 below.

☐ Determine liability of hospitals.
   ☐ Consider following issues:

      • Generally, hospital is liable for negligent acts of its employees, but not for those of independent contractors.

§ 7.07  

**Discussion:** See § 7.08 below.

- Tort Claims Act and Charitable Immunity Act may pose additional requirements or limitation on damages when suing hospitals.

**Authority:** NJS 2A:53A-1 *et seq.*, NJS 59:8-1*et seq.*

**Discussion:** See § 7.08 below.

☐ Determine liability of nurses for medical malpractice.


**Discussion:** See § 7.09 below.

☐ Determine liability of other medical practitioners.


**Discussion:** See § 7.10 below.

§ 7.07  

**Examining Liability of Physicians**


§ 7.08 Examining Liability of Hospitals

A hospital is liable for the negligence of its employees, including physicians, under the doctrine of respondeat superior. This doctrine requires the existence of an employment relationship, rather than an independent contractor arrangement. See *Tobia v. Cooper Hosp. Univ. Med’l Ctr.*, 136 N.J. 335, 343, 643 A.2d 1 (1994); *Corleto v. Shore Memorial Hosp.*, 138 N.J. Super. 302, 306, 350 A.2d 534 (Law Div. 1975). While nurses often are employees of the hospitals in which they work, most physicians are not. Physicians generally are independent contractors, who are extended privileges to treat patients at the hospital.

**Exception:** While hospitals generally are not liable for negligence of independent contractors working in the hospital, it may be possible to maintain a claim against the hospital for extending privileges to, or failing to remove, an incompetent independent contractor, such as a physician. *Corleto v. Shore Memorial Hosp.*, 138 N.J. Super. 302, 307-308, 350 A.2d 534 (Law Div. 1975). It also may be possible to hold a hospital liable where the hospital held out emergency room physicians as its employees and plaintiff reasonably believed that the physicians were employees of the hospital. *See Arthur v. St. Peters Hospital*, 169 N.J. Super. 575, 581-584, 405 A.2d 443 (Law Div. 1979).

**Warning:** When a medical malpractice action is filed against a hospital, either the Tort Claims Act, NJS 59:8-1 *et seq.*, or the Charitable Immunity Act, NJS 2A:53A-1, *et seq.*, or both may be implicated, thereby creating additional requirements for the action and/or a cap on damages recoverable by plaintiff. See §§ 7.13 and 7.14 below.

§ 7.09 Examining Liability of Registered Nurses

A medical malpractice claim may be maintained against a registered nurse. *See Adams v. Cooper Hosp.*, 295 N.J. Super. 5, 8-9, 684 A.2d 506
§ 7.10 NEW JERSEY PERSONAL INJURY LITIGATION 7-16


§ 7.10 Examining Liability of Other Medical Practitioners

A medical malpractice action may be maintained against other medical practitioners, such as dentists and physical therapists. See Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 774 A.2d 495 (2001); Woodger v. Christ Hospital, 364 N.J. Super. 164 (App. Div. 2003).
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PART IV: DETERMINING APPLICABLE DEFENSES

§ 7.11 CHECKLIST: Determining Applicable Defenses

☐ Determine applicable statute of limitations.

☐ Consider following issues:
  
  • Generally, a medical malpractice action must be filed within two years after cause of action accrued.

  Authority: NJS 2A:14-2.


  • Generally, wrongful death action must be filed within two years after decedent’s death.

  Authority: NJS 2A:31-3.


  • Limitations period for medical malpractice action will be tolled if patient was minor or insane at time of malpractice.

  • Limitations period for medical malpractice action will be tolled if patient dies before filing medical malpractice action and action was not time barred at time of decedent’s death.


  • Discovery rule applies to delay accrual of cause of action where patient reasonably is unaware that he or she has been injured or that injury is due to fault of identifiable person or entity.


Examine requirements of Tort Claims Act.

Consider following issues:

- Injured patient must notify public hospital of tort claim within 90 days of accrual of cause of action, however, this time period is tolled by infancy or incompetency.

**Authority:** NJS 59:8-8.

**Discussion:** See § 7.13 below. See Ch. 5 above (Governmental Liability).

- If more than 90 days but less than one year has elapsed, injured patient may make application to file late notice of claim.

**Authority:** NJS 59:8-9.

**Discussion:** See § 7.13 below.

- Notice of tort claim must include claimant’s name address; address to which notices should be sent; date and location of occurrence giving rise to claim; general description of injuries sustained; name(s) of public entity or employee that caused injury; and amount claimed to date, as well as any additional information required by public entity.

**Authority:** NJS 59:8-4, 59:8-6.

**Discussion:** See § 7.13 below. See Ch. 5 above (Governmental Liability).

Examine Charitable Immunity Act, which limits damages against nonprofit hospitals to $250,000.

**Authority:** NJS 2A:53-8.

**Discussion:** See § 7.14 below.

Examine defense of Good Samaritan Law, which exempts from liability for negligence persons providing emergency care at scene of accident or while transporting victim to medical facility.

**Authority:** NJS 2A:62A-1.
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Discussion: See § 7.15 below.

☐ Examine bar of Workers’ Compensation, which bars worker from filing action in Superior Court for malpractice by medical practitioner who is employee of injured worker’s employer.


Discussion: See § 7.16 below.

☐ Examine defenses of comparative or contributory negligence to reduce damages by percentage of negligence attributable to patient.

Authority: NJS 2A:15-5.1, 2A:15-5.2.

Discussion: See § 7.17 below.

☐ Examine bar of entire controversy doctrine.

☐  Consider following issues:

• Party joinder is no longer mandatory, however, parties still must disclose names of all non-parties who should be or are subject to joinder in action.

Authority: N.J. Ct. R. 4:30A (Comment).

Discussion: See § 7.18 below.

• Generally, all known claims that form controversy between parties must be included in single action or they will be precluded.

Authority: N.J. Ct. R. 4:30A (Comment).

Discussion: See § 7.18 below.

☐ Examine defense of failure to file Affidavit of Merit.

☐  Consider following issues:

• Affidavit of Merit is required for actions against most medical practitioners, including physicians, dentists, podiatrists, registered nurses, chiropractors, physical therapists, registered pharmacists and health care facilities.

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Discussion: See § 7.19 below.

- Affiant cannot have any financial interest in outcome of case; cannot be compensated on contingency fee basis; and generally, must be board certified or specialize in same specialty as defendant.

- If plaintiff cannot comply with board certification or same specialty requirement, plaintiff may apply to court to waive that requirement.


Discussion: See § 7.19 below.

☐ Examine other defenses.

☐ Consider following issues:

- If defendant has been misidentified or was not involved in plaintiff’s care and treatment, defendant may file affidavit of noninvolvement to dismiss medical malpractice action against that defendant.


- Other general defenses including lack of jurisdiction, insufficiency of service of process, failure to state claim upon which relief can be granted may apply in medical malpractice actions.


§ 7.12 Determining Statutes of Limitations

[1] Calculating Statutes of Limitations in Medical Malpractice Cases

The statute of limitations for an action alleging personal injuries, including medical malpractice, is two years after the cause of action accrued. NJS 2A:14-2. The two-year statute of limitations may be tolled
under certain circumstances such as infancy or insanity or under the discovery rule.

[2] Calculating Statutes of Limitations in Wrongful Death Cases

An action for the wrongful death of a decedent must be filed within two years after decedent’s death, unless the death resulted from murder, aggravated manslaughter or manslaughter, for which the action may be filed at any time. NJS 2A:31-3.


A medical malpractice action by or on behalf of a minor for injuries sustained by the minor at birth may be commenced at any time prior to the minor’s 13th birthday. If the minor’s parents or guardians do not commence a medical malpractice action prior to the minor’s 12th birthday, the minor or a person designated by the minor to act on the minor’s behalf may file the action. NJS 2A:14-2.

If a person entitled to file a medical malpractice action is under 21 years old or insane at the time the cause of action accrues, such person may file his action within two years of reaching full age or sane mind. NJS 2A:14-21. However, a medical malpractice action by or on behalf of a minor for injuries sustained by the minor at birth, on or after July 7, 2004, must be commenced prior to the minor’s 13th birthday as provided in NJS 2A:14-2. NJS 2A:14-21.

The age-of-majority statute, NJS 9:17B-1 – 9:17B-3, effectively reduced the age at which the statutes of limitations referred to in NJS 2A:14-21 are tolled from 21 to 18. See Green v. Auerbach Chevrolet Corp., 127 N.J. 591, 600, 606 A.2d 1093 (1992) (resolving 20 years of uncertainty over whether age-of-majority statute was intended to change age until which personal injury limitations period is tolled). Thus, a minor now reaches full age at age 18. See Green v. Auerbach Chevrolet Corp., 127 N.J. 591, 600, 606 A.2d 1093 (1992).

If an injured person dies before filing a medical malpractice action belonging to him or her, and the cause of action was not yet barred as of the date of death, the two-year limitation period will not bar the action until at least six months following the death. In other words, if a medical malpractice action would become barred less than six months after the injured person’s death, the limitations period will be extended to six months from the date of death. NJS 2A:14-23.1.
Applying Discovery Rule to Determine when Cause of Action Accrues

A medical malpractice cause of action generally accrues on the date that the alleged act or omission occurs. *Baird v. American Medical Optics*, 155 N.J. 54, 65, 713 A.2d 1019 (1998) (discovery rule and the exercise of reasonable diligence). Courts, however, have created the discovery rule to prevent the limitations period from running when a patient reasonably is unaware that the patient has been injured, or that an injury is due to the fault or neglect of an identifiable person or entity. *Baird v. American Medical Optics*, 155 N.J. 54, 66, 713 A.2d 1019 (1998); see also *Caravaggio v. D’Agostini*, 166 N.J. 237, 245, 765 A.2d 182 (2001) (knowledge of fault and injury).

Once a patient knows or has reason to know that he or she has been injured and that the injury is due to the fault or neglect of an identifiable person or entity, the patient’s claim has accrued. *Caravaggio v. D’Agostini*, 166 N.J. 237, 245, 765 A.2d 182 (2001). The discovery rule delays accrual of a cause of action until the patient discovers, or reasonably should have discovered that the patient may have a basis for a claim. *Baird v. American Medical Optics*, 155 N.J. 54, 66, 713 A.2d 1019 (1998).

The essential elements in determining whether the discovery rule applies are knowledge not only of the injury, but also that another is at fault for the injury. This, however, does not mean that the statute is tolled until a patient has knowledge of a specific legal basis or cause of action. *Caravaggio v. D’Agostini*, 166 N.J. 237, 245, 765 A.2d 182 (2001).

When a patient knows that an injury occurred and that the injury is due to the fault of another, the patient has a duty to act. However, where a patient knows that an injury occurred and knows that it is the fault of another, but reasonably is unaware that a third party may also be responsible, the cause of action against the third party does not accrue until the patient learns of the third party’s complicity. *Caravaggio v. D’Agostini*, 166 N.J. 237, 249-250, 765 A.2d 182 (2001).


Exercising Requirements of Tort Claims Act

The New Jersey Tort Claims Act, NJS 59:8-1, *et seq.*, governs suits
against public entities, including public hospitals. That act requires an injured person to present a tort claim to a public entity no later than 90 days after accrual of the cause of action. The injured person then may file suit six months after the entity received notice of the claim. This provision of the act is tolled if the injured person is an infant or incompetent. NJS 59:8-8. See also Ch. 5 above (Governmental Liability).

- **Timing:** While notice of a tort claim is due within 90 days of accrual of the cause of action, if more than 90 days but less than one year has elapsed, the injured person may apply to the Superior Court to file a notice of late claim. To succeed on a late application, the injured person must demonstrate sufficient reasons for the failure to file a timely notice of claim and also that the public entity has not been substantially prejudiced by the delay. NJS 59:8-9.

A notice of claim must include the following information:

1. Name and address of claimant;
2. Address to which the person presenting the claim wishes notices to be sent;
3. Date and location of the occurrence that gave rise to the claim;
4. General description of injury, damage or loss sustained;
5. Name(s) of public entity or employee that caused the injury; and
6. Amount claimed as of date the claim is presented.

NJS 59:8-4. See also Ch. 5 above (Governmental Liability).

- **Warning:** A public entity has the right to adopt its own notice of claim form, which must be completed by tort claimants. NJS 59:8-6. If time permits, an attorney suing a public entity should contact the entity directly to inquire about the claim form before submitting a notice of claim.

§ 7.14 Examining Charitable Immunity Act

Another consideration for suits against hospitals is the Charitable
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Immunity Act, NJS 2A:53A-1, *et seq.* That act provides that any nonprofit corporation, society or association organized exclusively for hospital purposes is not liable for damages in excess of $250,000, together with interest and costs of suit. NJS 2A:53A-8.

§ 7.15 Examining Good Samaritan Laws

New Jersey also has a “good samaritan” law, NJS 2A:62A-1. That act provides that a person, including a physician or other health care professional, who in good faith renders emergency care at the scene of an emergency or accident or while transporting a victim thereof to a hospital or other facility, shall not be liable for civil damages due to acts or omissions during such emergency care.

§ 7.16 Examining Workers’ Compensation

When a worker is treated for a work-related condition or injury by a medical practitioner, who is an employee of the injured worker’s employer-owned and -operated health care facility, the injured worker’s exclusive remedy for alleged malpractice is in the Division of Workers’ Compensation. The injured worker cannot maintain a tort action for medical malpractice in the Superior Court. *See Hawksby v. DePietro*, 165 N.J. 58, 61, 754 A.2d 1168 (2000) (New Jersey Workers’ Compensation Act precluded medical malpractice action).

§ 7.17 Considering Comparative and Contributory Negligence

Contributory negligence no longer bars recovery by an injured person, provided that the injured person’s negligence was not greater than defendant’s negligence. However, comparative negligence does apply and any damages sustained by the injured person shall be reduced by the percentage of negligence attributed to the injured person. NJS 2A:15-5.1.

In all negligence and strict liability actions, including medical malpractice actions, the jury will be asked to determine the full value of plaintiff’s damages, i.e., the amount of damages that would be recoverable by plaintiff regardless of any consideration of fault. NJS 2A:15-5.2(a)(1). The jury then will be asked to determine the percentage of negligence or fault of each party, which shall total 100%. NJS 2A:15-5.2(a)(2).

§ 7.18 Examining Entire Controversy Doctrine

While the entire controversy doctrine no longer requires mandatory
party joinder, parties still must disclose the names of all non-parties who should be or are subject to joinder in the action. Parties who fail to comply with the disclosure obligations may be sanctioned by the court. Pressler, Comment to N.J. Ct. R. 4:30A (Gann).

The entire controversy doctrine continues to require that, generally, all claims that form the controversy between the parties be included in a single action. The doctrine does not apply to preclude a second action if the first action did not result in an adjudication on the merits. The doctrine also does not apply to bar claims that are either unknown, unarisen or unaccrued at the time of the first action. Pressler, Comment to N.J. Ct. R. 4:30A (Gann).

§ 7.19 Examining Consequences of Failure to File Affidavit of Merit

When an action for personal injuries is filed against certain licensed persons, including physicians, plaintiff must provide an affidavit of a licensed person providing that a reasonable probability exists that defendant's care deviated from acceptable professional standards. NJS 2A:53A-27. In the medical malpractice setting, the term “licensed person” includes:

1. Physicians;
2. Dentists;
3. Podiatrists;
4. Registered nurses;
5. Chiropractors;
6. Physical therapists;
7. Registered pharmacists; and
8. Health care facilities.


The person making the affidavit cannot have any financial interest in the outcome of the case. NJS 2A:53A-27. In medical malpractice actions, the affiant cannot be compensated on a contingency fee basis. NJS 2A:53A-41.

The affiant must be licensed as a physician or other health care professional in the United States. NJS 2A:53A-41. If defendant is a specialist and the care in question involves that specialty, the affiant shall have specialized in that same specialty at the time of the occurrence. NJS 2A:53A-41. If defendant is board certified and the care in question involves
that specialty, then the affiant must be either or both of the following:

1. Credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, in question; or

2. A specialist who is board certified in the same specialty and during the year before the occurrence in question must have devoted a majority of his or her professional time to either the active clinical practice of the same health care profession in which defendant is licensed or specializes or the instruction of students in an accredited school or clinical research program in the same health care profession in which defendant is licensed or specializes.

NJS 2A:53A-41.

If defendant is a general practitioner, then the affiant must have devoted a majority of his or her professional time to:

1. Active clinical practice as a general practitioner, or that encompasses the medical condition or that includes performance of the procedure in question;

2. Instruction of students in an accredited school or clinical research program in the same health care profession as defendant; or

3. Both.

NJS 2A:53A-41.

The plaintiff may apply to the court to waive the same specialty or board certification requirements. See NJS 2A:53A-41; see also § 7.04[1][c] above and § 7.24 below.

§ 7.20 Considering Other Defenses in Medical Malpractice Cases

[1] Filing Affidavit of Non-Involvement

A defendant physician, who was misidentified or not involved in plaintiff’s care and treatment, may have the action dismissed against that physician by filing an affidavit of noninvolvement with the court. NJS 2A:53A-40(a). The affidavit must state, in detail, facts showing that the physician:

1. Was misidentified or otherwise not involved in plaintiff’s care and treatment;
2. Was not required to provide for plaintiff’s care and treatment; and
3. Could not have caused the alleged malpractice in any way.


Plaintiff or a co-defendant has the right to challenge the affidavit of noninvolvement by filing a motion and affidavit contradicting the statements made in the affidavit of noninvolvement. NJS 2A:53A-40(b). If the court determines that statements made in the affidavit of noninvolvement were false or inaccurate, the court shall immediately reinstate the claims against that defendant. NJS 2A:53A-40(c).

**Warning:** If a physician files a false or inaccurate affidavit of noninvolvement, the court will impose sanctions upon that physician including, but not limited to, reasonable attorneys’ fees and expenses incurred by the other parties as a result of the physician’s false or inaccurate affidavit. NJS 2A:53A-40(c). The court also will refer the matter to the Attorney General and the appropriate licensing board. NJS 2A:53A-40(c). The same sanctions will be imposed on a plaintiff or a co-defendant who falsely objects to an affidavit of noninvolvement. NJS 2A:53A-40(d).

[2] **Considering Other General Defenses**

Other defenses that generally apply in civil actions also apply in medical malpractice actions, that is, lack of jurisdiction, insufficiency of service of process, failure to state a claim upon which relief can be granted. N.J. Ct. R. 4:6-2.
PART V: PLEADING MEDICAL MALPRACTICE ACTIONS

§ 7.21 CHECKLIST: Pleading Medical Malpractice Actions

☐ File complaint in Superior Court of New Jersey, Law Division.


☐ Determine venue based on whether defendant is governmental entity or person.

  Authority: N.J. Ct. R. 4:3-2(a).


☐ Plead allegations necessary for general medical malpractice cause of action.

  ○ Identify all parties.

  ○ allege that plaintiff was patient of defendant.

  ○ allege that defendant deviated from standard of care.

  ○ allege that defendant’s breach caused plaintiff’s damages.

  ○ allege that plaintiff suffered damages generally and include request for punitive damages, if applicable.

  ○ If hospital is defendant, allege that individual defendant was employee of hospital and assert claim for vicarious liability.

  ○ Include certification regarding other actions and parties.

  ○ Designate trial counsel.


  Forms: Form CLI 7.721.01, Complaint for Medical Malpractice


☐ Consider additional allegations and/or causes of action, such as:

  ○ Lack of informed consent cause of action.

  Authority: Largey v. Rothman, 110 N.J. 204, 540 A.2d 504

**Forms:** Form CLI 7.721.02, Complaint for Informed Consent in Medical Malpractice

**Discussion:** See § 7.22[3] below.

- Heightened standard of care for defendants who are specialists.

**Authority:** Schueler v. Strelinger, 43 N.J. 330, 344, 204 A.2d 577 (1964).

**Discussion:** See § 7.22[4] below.

- Wrongful Death Act and/or Survivor Act (if patient is deceased).

**Authority:** Smith v. Whitaker, 160 N.J. 221, 734 A.2d 243 (1999).

**Forms:** Form CLI 7.721.03, Complaint for Wrongful Death and Survival in Medical Malpractice

**Discussion:** See § 7.22[5] below.

- Fraudulent concealment of medical records.


**Discussion:** See § 7.22[6] below.

- Alteration or destruction of medical records.

**Authority:** NJS 2C:21-4.1; N.J. Admin. Code § 13:35-6.5(b).

**Discussion:** See § 7.22[7] below.

- Sexual misconduct by physician.


**Discussion:** See § 7.22[8] below.
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○ Patient’s pre-existing condition.


☐ Amend complaint if necessary to add, delete or change parties or causes of action.

○ As of right before defendant answers complaint.

○ Written consent of defendant or leave of court is necessary after answer has been served.


☐ File case information statement with complaint, receive track assignment notice and apply for change of case track, if necessary, within 30 days.


Forms: Form CLI 7.721.04, Civil Case Information Statement (CIS) (Appendix XII-B) (N.J. Official Form)


☐ Serve defendants within 15 days of track assignment notice and file proof of service with court.


Discussion: See § 7.23 below.

☐ Prepare and serve Affidavit of Merit upon defendant within 60 days after defendant answers complaint.


Forms: Form CLI 7.703.01, Affidavit of Merit for Medical Mal-
practice

Discussion: See § 7.24 below.

☐ Prepare, file and serve answer to plaintiff’s medical malpractice complaint within 35 days after service of summons and complaint upon defendant.

○ Respond to each allegation of complaint.

○ Raise all applicable affirmative defenses.


○ Assert cross-claims or third-party claims seeking contribution and indemnification from other defendants or new parties generally within 90 days after service of summons and complaint upon defendant.


☐ Consider viability of motion to dismiss based on:

○ Lack of jurisdiction.

○ Insufficient process or service of process.

○ Failure to state claim upon which relief can be granted.

○ Failure to join party without whom action cannot proceed.


○ Plaintiff’s failure to provide an appropriate Affidavit of Merit.


☐ File case information statement with answer and apply for change of case track, if necessary.

§ 7.22 Drafting Complaint in Medical Malpractice Action

[1] Considering Jurisdiction and Venue

A medical malpractice action is filed in the Superior Court, Law Division. Generally, venue may be laid in the county in which:

1. Cause of action arose;
2. Any party to the action resides at time the action is filed; or
3. Summons was served on nonresident defendant.


If, however, the action is filed against a municipality, county, public agency or official, venue must be laid in the county in which the cause of action arose. N.J. Ct. R. 4:3-2(a)(2).

[2] Pleading Negligence

A medical malpractice complaint should set forth the:

1. Basis for jurisdiction and venue;
2. Identities of all parties;
3. Fact that plaintiff was a patient of defendant;
4. Fact that defendant breached his or her duty to plaintiff by deviating from applicable standard of care;
5. Fact that defendant’s breach proximately caused plaintiff’s injuries; and
6. Fact that plaintiff suffered damages as a result.


Strategic Point: When pleading a medical malpractice action, a practitioner generally should include fictitious names for unknown or
later discovered defendants, that is, other physicians or nurses who assisted known defendants or otherwise attended to plaintiff.

When a hospital is included as a defendant in the complaint, plaintiff generally asserts that the hospital is vicariously liable for the negligence of its employees, including physicians and nurses, under the doctrine of respondeat superior. A plaintiff must assert that the physician or nurse was an employee of the hospital or was impliedly held out as such at the time plaintiff was treated.

Claims for unliquidated damages, including medical malpractice claims, shall include a demand for damages generally without specifying the amount. N.J. Ct. R. 4:5-2.

Warning: A medical malpractice plaintiff who seeks to recover punitive damages must request punitive damages in the complaint. NJS 2A:15-5.11.

The complaint must include a certification as to whether the matter is the subject of any other action or proceeding and whether any non-parties should be joined. N.J. Ct. R. 4:5-1(b)(2). Plaintiff also may designate trial counsel in the complaint. N.J. Ct. R. 4:5-1(c).

Forms: Form CLI 7.721.01, Complaint for Medical Malpractice

[3] Pleading Lack of Informed Consent


This claim is premised on fact that before a physician may operate upon or otherwise treat a mentally competent, adult patient, the physician must first get the patient’s informed consent. The purpose of this legal requirement is to protect each person’s right to self-determination in matters of medical treatment. *Largey v. Rothman*, 110 N.J. 204, 207, 540 A.2d 504 (1988).

To establish a lack of informed consent, plaintiff must show the following:

1. Physician failed to comply with applicable standard for disclosure;
2. Undisclosed risk occurred and harmed plaintiff;
3. Reasonable person under the circumstances would not have consented and submitted to the operation or surgical procedure had he or she been so informed; and
4. Operation or surgical procedure was a proximate cause of plaintiff's injuries.


Our courts apply the “prudent patient” or “materiality of risk” standard to determine whether the physician obtained patient’s informed consent, that is, whether the physician complied with disclosure requirements. *Largey v. Rothman*, 110 N.J. 204, 212-213, 540 A.2d 504 (1988). Medical information or risk of a medical procedure is material when its nature is such that, in the circumstances, a reasonable patient would be likely to attach significance to it in deciding whether or not to submit to the treatment. *Largey v. Rothman*, 110 N.J. 204, 211-212, 540 A.2d 504 (1988).

In addition to establishing that a physician failed to comply with the applicable standard for disclosure, informed consent cases also require a plaintiff to prove that such failure was the proximate cause of the plaintiff’s injuries. *Largey v. Rothman*, 110 N.J. 204, 215, 540 A.2d 504 (1988). The plaintiff proves proximate causation by showing that a prudent person in plaintiff’s position would have decided differently if adequately informed by the physician. Causation is shown by demonstrating that adequate disclosure reasonably would cause a prudent person to decline the treatment due to the risk or danger that resulted in harm. *Largey v. Rothman*, 110 N.J. 204, 211-215, 540 A.2d 504-216, 110 N.J. 204, 540 A.2d 504 (1988).

**Forms:** Form CLI 7.721.02, Complaint for Informed Consent in Medical Malpractice

[4] Claiming Physician as Specialist

Another common claim in a medical malpractice action is that the physician is a specialist in a certain field of medicine and, thus, must have and exercise the degree of care, knowledge and skill ordinarily had and exercised by the average specialist in the field. *Schueler v. Strelinger*, 43 N.J. 330, 344, 204 A.2d 577 (1964).
[5] Pleading Wrongful Death Claims Versus Survivor Claims

When the patient has died, a medical malpractice action may be brought under the Survivor Act, NJS 2A:15-3, or the Wrongful Death Act, NJS 2A:31-1 et seq., or both. Although both actions arise from decedent’s death, they serve different purposes and provide remedies to different parties. *Smith v. Whitaker*, 160 N.J. 221, 231, 734 A.2d 243 (1999) (differences between claims under two statutes).

A wrongful death claim is designed to compensate a decedent’s heirs for the pecuniary losses caused by decedent’s death as a result of defendant’s tortious conduct. *Smith v. Whitaker*, 160 N.J. 221, 231, 734 A.2d 243 (1999); see § 7.48[1] below. A wrongful death action is brought by either decedent’s executor or by the administrator of decedent’s estate, if decedent died intestate. Conversely, the Survivor Act preserves to decedent’s estate any cause of action that decedent would have had if decedent had survived. *Smith v. Whitaker*, 160 N.J. 221, 233, 734 A.2d 243 (1999).

When filing such a complaint, a practitioner should remember that the limitations period will often be different for wrongful death claims and survivor claims. *See* § 7.12[2] above.

**Forms:** Form CLI 7.721.03, Complaint for Wrongful Death and Survival in Medical Malpractice

[6] Pleading Fraudulent Concealment of Medical Records

Physicians have a duty to provide a true and complete copy of patient’s medical treatment records upon a request from patient or patient’s representative. *See Rosenblit v. Zimmerman*, 166 N.J. 391, 766 A.2d 749 (2001). If physician fails or refuses to provide medical records for a patient, a claim for fraudulent concealment may be maintained by showing the following:

1. Physician had legal obligation to disclose evidence in connection with pending litigation;
2. Evidence was material to litigation;
3. Plaintiff could not reasonably obtain evidence from another source;
4. Physician intentionally withheld, altered or destroyed evidence to disrupt litigation; and
5. Plaintiff was damaged.


[7] Alleging Alteration or Destruction of Medical Records

Physicians must keep patient’s medical records for seven years from date of last entry in records. Corrections or additions to existing medical records may be made if each change or addition is clearly identified, dated and initialed by licensee. N.J. Admin. Code tit. 13, § 35-6.5(b).

A person who purposefully destroys, alters or falsifies any medical record in order to deceive or mislead any person, is guilty of a crime of the fourth degree. NJS 2C:21-4.1.

[8] Alleging Sexual Misconduct


[9] Demonstrating Pre-Existing Condition

If the patient had a pre-existing condition when the patient came under the defendant’s care, the patient must establish that defendant’s negligence increased the risk of harm posed by the pre-existing condition. Scafidi v. Seiler, 119 N.J. 93, 104, 574 A.2d 398 (1990) (increased risk of harm and lost chance for recovery); see also Reynolds v. Gonzalez, 172 N.J. 266, 281-283, 798 A.2d 67 (2002) (increased risk of harm and substantial factor standard). Plaintiff must show that this increased risk of harm was a substantial factor in producing the injuries and damages. Scafidi v. Seiler, 119 N.J. 93, 104, 574 A.2d 398 (1990); see also Reynolds v. Gonzalez, 172 N.J. 266, 281-283, 798 A.2d 67 (2002). However, defendant’s deviation need not be the only cause, nor even a primary cause, to be deemed a substantial factor. It need only be relevant and significant in bringing about the ultimate injury. Reynolds v. Gonzalez, 172 N.J. 266, 288, 798 A.2d 67 (2002).

In cases where defendant’s negligence accelerated or worsened the patient’s pre-existing condition, defendant is responsible for all of the patient’s injuries, unless the patient’s injuries are capable of reasonable
apportionment. If the injuries can be apportioned, then defendant is responsible for only the amount of the ultimate harm or the value of the lost chance for recovery caused by that defendant’s negligence. *Scafidi v. Seiler*, 119 N.J. 93, 113-114, 574 A.2d 398 (1990).

The burden of proving that the patient’s pain, suffering and injury are capable of some reasonable apportionment lies with defendant. If defendant cannot show that the patient’s pain, suffering and injury could have been attributable solely to the pre-existing condition, then defendant is liable for all of plaintiff’s damages. *Scafidi v. Seiler*, 119 N.J. 93, 113-114, 574 A.2d 398 (1990).

### [10] Amending Pleadings

Plaintiff may amend a medical malpractice complaint to add, delete or change parties or causes of action as a matter of course at any time before defendant serves a responsive pleading. N.J. Ct. R. 4:9-1. Thereafter, plaintiff must have either defendant’s written consent or leave of court, which shall be freely given in the interest of justice. N.J. Ct. R. 4:9-1. Plaintiff must attach a copy of the proposed amended complaint to the motion for leave to file an amended complaint. N.J. Ct. R. 4:9-1.

**Warning:** Although leave to amend a complaint should be freely granted, a trial court retains discretion to deny the motion where the amendment fails to state a cause of action or is so meritless that a motion to dismiss would be granted, or where the motion is made too late in the litigation, that is, on the eve of or at trial. *Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239, 256-57, 696 A.2d 744 (App. Div. 1997) (leave to amend will be refused when new claim would not be sustainable as matter of law); *Morales v. Academy of Aquatic Sciences*, 302 N.J. Super. 50, 56, 694 A.2d 600 (App. Div. 1997) (refusing to permit amendment on eve of trial).


A case information statement in the form set forth in Appendix XII to the Rules of Court shall be attached to a medical malpractice complaint. N.J. Ct. R. 4:5-1(b)(1).
§ 7.23 NEW JERSEY PERSONAL INJURY LITIGATION 7-38

Medical malpractice actions generally are assigned to Track III. Within 30 days of receiving the track assignment notice from the Court, plaintiff may apply for a change of track assignment by filing a certification of good cause. N.J. Ct. R. 4:5A-2. Thereafter, track assignment will be changed only by motion of the court or a party. N.J. Ct. R. 4:5A-2.

Forms: Form CLI 7.721.04, Civil Case Information Statement (CIS) (Appendix XII-B) (N.J. Official Form)

§ 7.23 Serving Process in Medical Malpractice Action

The summons in a medical malpractice action shall be issued within 15 days of the date of the track assignment notice. N.J. Ct. R. 4:4-1. The summons and complaint shall be personally served upon defendant by the sheriff, a private process server or any other competent adult not having a direct interest in the litigation. N.J. Ct. R. 4:4-3(a). If personal service cannot be effected despite a reasonable and good faith attempt, which shall be described in the proof of service, service may be made by sending the summons and complaint to defendant’s residence or business simultaneously by certified mail, return receipt requested, and by regular mail. N.J. Ct. R. 4:4-3(a). Plaintiff shall file proof of service promptly with the court. N.J. Ct. R. 4:4-7.

§ 7.24 Filing Affidavit of Merit in Medical Malpractice Action

A plaintiff in a medical malpractice action must serve an Affidavit of Merit on each defendant. See §§ 7.04[1][c] and 7.19 above.

Timing: Plaintiff must serve Affidavit of Merit within 60 days after defendant files an answer to plaintiff’s complaint. NJS 2A:53A-27. Plaintiff may request a 60-day extension, if necessary, upon a showing of good cause. NJS 2A:53A-27.

Forms: Form CLI 7.703.01, Affidavit of Merit for Medical Malpractice

§ 7.25 Responding to Complaint in Medical Malpractice Action

[1] Drafting Answer and Affirmative Defenses

An answer shall set forth defendant’s defenses to each claim asserted in
complaint and shall admit or deny each of plaintiff’s allegations. N.J. Ct. R. 4:5-3. If defendant is without knowledge or information sufficient to know whether an allegation is true or false, defendant should so state and that will be deemed to be a denial of the allegation. N.J. Ct. R. 4:5-3. Allegations which are not denied are deemed to be admitted. N.J. Ct. R. 4:5-5.

Timing: Defendant shall serve an answer to a medical malpractice complaint within 35 days after service of summons and complaint upon that defendant. N.J. Ct. R. 4:6-1(a). A party served with a counterclaim or cross-claim shall serve an answer thereto within 35 days after service upon that party. N.J. Ct. R. 4:6-1(a). Parties may agree in writing to an extension of up to 60 days of the time to serve responsive pleading. N.J. Ct. R. 4:6-1(c).

An answer separately shall set forth each affirmative defense such as laches, res judicata, statute of limitations, waiver, comparative negligence, charitable immunity and governmental immunity. N.J. Ct. R. 4:5-4.


A medical malpractice defendant may assert a cross-claim against a party as of right within 90 days of service of original complaint or of service of complaint upon party against whom a cross-claim is asserted. N.J. Ct. R. 4:7-5(c). Thereafter, a cross-claim may be asserted only by leave of court, which shall be freely granted. N.J. Ct. R. 4:7-5(c).

A cross-claim may include a claim that the latter party is liable to the cross-claimant for all or part of a claim asserted in complaint. N.J. Ct. R. 4:7-5(a). To assert a claim for contribution or indemnity, defendant shall make a general demand for contribution or indemnity just before the signature line of the answer under the heading “Claim for Contribution” or “Claim for Indemnity.” N.J. Ct. R. 4:7-5(b). If a claim for contribution or indemnity is made, the answer shall be served on party against whom such relief is sought and no responsive pleading is required. N.J. Ct. R. 4:7-5(b).

If defendant seeks to file a claim against a non-party to the action, defendant must file a third-party complaint against that party. N.J. Ct. R. 4:8-1(a). Defendant must file and serve summons and third-party complaint, along with a copy of plaintiff’s complaint, within 90 days of service.
of defendant’s original answer. N.J. Ct. R. 4:8-1(a). Defendant must serve a copy of third-party complaint upon plaintiff within five days of service upon third-party defendant. N.J. Ct. R. 4:8-1(a). After expiration of 90 days, a third-party complaint may be served only upon leave of court and defendant must attach a copy of proposed third-party complaint to the motion. N.J. Ct. R. 4:8-1(a).


[3] Moving to Dismiss

In lieu of filing an answer, defendant may file a motion to dismiss or a motion for summary judgment. N.J. Ct. R. 4:6-1(b). If the motion is denied or its disposition postponed, defendant shall file an answer within 10 days after notice of court’s action. N.J. Ct. R. 4:6-1(b).

The following defenses may be made by motion with briefs:

1. Lack of subject matter jurisdiction;
2. Lack of personal jurisdiction;
3. Insufficiency of process;
4. Insufficiency of service of process;
5. Failure to state claim upon which relief can be granted; and
6. Failure to join party without whom action cannot proceed.


Defendant may also file a motion to dismiss if plaintiff fails to provide defendant with an adequate Affidavit of Merit. See NJS 2A:53A-29.

⚠️ Warning: The defenses of lack of personal jurisdiction, insufficiency of process, insufficiency of service of process are waived if they are not raised by motion within 90 days after service of defendant’s
answer, provided that defense was raised in the answer and no previous motion has been made. N.J. Ct. R. 4:6-3, 4:6-7.

[4] Filing Case Information Statement and Assigning Case Track

A case information statement in the form set forth in Appendix XII to the New Jersey Court Rules shall be attached to defendant’s first pleading. N.J. Ct. R. 4:5-1(b)(1).

A defendant who wishes to change the track assignment shall file and serve a certification of good cause with the first pleading. Thereafter, the track assignment will be changed only by motion of the court or a party. N.J. Ct. R. 4:5A-2.

Forms: Form CLI 7.721.04, Civil Case Information Statement (CIS) (Appendix XII-B) (N.J. Official Form)
PART VI: CONDUCTING DISCOVERY IN MEDICAL MALPRACTICE ACTIONS

§ 7.26 CHECKLIST: Conducting Discovery in Medical Malpractice Actions

☐ Examine time for completion and extension of discovery.
   ○ Consider following issues:
     • Generally, court initially allows 450 days for discovery in medical malpractice actions, which period runs from date first answer is filed.
     • Joinder of new party automatically extends discovery period for 60 days.
     • If all parties agree, 60 day extension of discovery, sought prior to expiration of discovery period, may be obtained by notifying court.
     • If parties cannot agree or longer extension is sought, motion must be filed and made returnable prior to expiration of discovery period.


   Discussion: See § 7.27 below.

☐ Serve and answer interrogatories.
   ○ Consider following issues:
     • In addition to form interrogatories mandated by court, each party may serve 10 supplemental interrogatories.
     • Parties to medical malpractice action are deemed to have been served with form interrogatories.
     • Plaintiff’s answers to Form A and A(1) interrogatories are due within 30 days after service of defendant’s answer.
     • Defendant’s answers to Form C and C(3) interrogatories are due within 60 days after service of defendant’s answer.
     • Any party may seek court’s assistance when another party is delinquent in responding to interrogatories.

Forms: Form CLI 7.726.01, Uniform Interrogatories (Form A) All Personal Injury Cases Answered by Plaintiff (Appendix II) (N.J. Official Form)
Form CLI 7.726.02, Uniform Interrogatories (Form A1) Medical Malpractice Cases Answered by Plaintiff (Appendix II) (N.J. Official Form)
Form CLI 7.726.03, Uniform Interrogatories (Form C) All Personal Injury Cases Answered by Defendant (Appendix II) (N.J. Official Form)
Form CLI 7.726.04, Uniform Interrogatories (Form C1) Automobile Accident Cases Answered by Defendant (Appendix II) (N.J. Official Form)

Discussion: See § 7.28 below.

- Serve and respond to requests for production of documents.
- Consider following issues:
  - Request may be served upon plaintiff at any time and may be served upon defendant with or after service of summons and complaint.
  - Response should be served within 35 days, except that defendant may serve response within 50 days after service of summons and complaint.
  - Parties have continuing duty to amend their responses if they obtain additional responsive documents.
  - Any party may seek court’s assistance when another party is delinquent in responding to request for production of documents.


Forms: Form CLI 7.726.05, Request for Production of Documents from Plaintiff
Form CLI 7.726.06, Request for Production of Documents from Physician
Form CLI 7.726.07, Request for Production of Documents
from Hospital

Form CLI 7.726.08, Letter to Physician Requesting Production of Documents

Form CLI 7.726.09, Letter to Hospital Requesting Production of Documents

**Discussion:** See § 7.29[1] below.

- Parties have right to examine medical records relevant to action.

  **Authority:** NJS 2A:84A-22.1, 2A:84A-22.4, 2A:82-41.

  **Discussion:** See § 7.29[2] below.

- Parties have right to discover relevant insurance agreements.

  **Authority:** N.J. Ct. R. 4:10-2(b).

  **Discussion:** See § 7.29[3] below.

- Patients have right to discover factual information contained in incident and peer review committee reports, including what treatment they received and what happened to them, however, committee’s opinions, analysis and findings generally are not discoverable.


  **Discussion:** See § 7.29[4] below.

- Plaintiffs have right to examine surveillance video tapes taken of them and to depose persons who filmed them.


  **Discussion:** See § 7.29[5] below.

☐ Notice and conduct depositions.

☐ Consider following issues:
Deposition notice must include time, which must be at least 10 days away, and place for deposition and name and address, or general description, of person to be deposed.

Deposition notice may include request to produce documents.

**Authority:** N.J. Ct. R. 4:14-1, 4:14-2.

**Discussion:** See § 7.30[1] below.

The only objections permitted at deposition are to form of question or to assert privilege, right to confidentiality or limitation included in court order.

**Authority:** N.J. Ct. R. 4:14-3, 4:14-4.

**Discussion:** See § 7.30[1] below.

If expert or treating physician resides or works in New Jersey and deposition is not taken at witness’ residence or office, party conducting deposition must pay witness’ travel time and expenses.

If expert or treating physician does not reside or work in New Jersey, party on whose behalf witness will testify must either produce witness in county where action is venued or at another agreeable location or pay reasonable travel and lodging expenses incurred by other parties to attend out-of-state deposition.

Videotaped deposition may be taken for discovery purposes or for use at trial, however, if videotape is intended for use at trial, deposition shall not be noticed until 30 days after witness’ report has been provided.

**Authority:** N.J. Ct. R. 4:14-7, 4:14-9.

**Discussion:** See § 7.30[2] below.

Defendant physician may be asked for basis of his or her conduct and whether that conduct deviated from accepted practice.

**Authority:** Myers v. St. Francis Hospital, 91 N.J. Super.
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**Discussion:** See § 7.30[3] below.

- Deposition of non-party witnesses may be compelled by subpoena, which may include request for production of documents.
- Deposition of non-party, New Jersey resident should take place in county in which the witness either resides or works.
- Deposition of non-party, out-of-state resident should take place either in county where witness was served or within 40 miles of service.
- Party subpoenaing out-of-state witness must reimburse witness for out-of-pocket expenses and loss of pay.

**Authority:** N.J. Ct. R. 4:14-7.

**Discussion:** See § 7.30[4] below.

☐ Serve and answer demand for admissions.

☐ Consider following issues:

- Demand for admissions may be served on plaintiff at any time and on defendant with or after service of summons and complaint.
- Demand that is not answered within 30 days is deemed to be admitted, however, defendant is not required to respond until 45 days after service of summons and complaint.

**Authority:** N.J. Ct. R. 4:22-1, 4:23-1.

**Discussion:** See § 7.31 below.

- If objections are made, requesting party may seek assistance from the court.

**Authority:** N.J. Ct. R. 4:22-1, 4:23-1.

**Discussion:** See § 7.31 below.

☐ Request physical or mental examination of plaintiff.

Discussion: See § 7.32 below.

☐ Discover information regarding expert witnesses.

☐ Consider following issues:

- Parties must disclose name, address and qualifications of their expert witnesses and must provide copies of their experts’ reports.


- Doctrine of res ipsa loquitur creates inference of defendant’s negligence where: incident was one that ordinarily does not happen absent negligence; agent or instrumentality causing incident was within defendant’s exclusive control; and there is no indication that plaintiff was negligent.


- Common knowledge doctrine, which is exception to general rule that expert testimony is required to establish standard of care, applies when defendant’s negligence is readily apparent to average lay person.


- Expert’s net opinion, which is bare conclusion unsupported by factual evidence, is inadmissible.


Consider filing motion for summary judgment.

Be aware of following:

- Although motions for summary judgment may be filed at any time, it is often best to wait until majority of discovery is complete.
- Moving party must give 28 days notice and must submit brief and statement of material facts with citations to record.
- Opposition and any cross-motions must be submitted 10 days before motion's return date and should include responding statement of material facts and certification.
- Motion will be granted if there exists no genuine issue as to any material fact and moving party is entitled to judgment as matter of law.


Discussion: See § 7.34 below.

§ 7.27 Considering Time for Completion and Extension of Discovery

Medical malpractice actions generally are assigned to Track III, which provides 450 days for discovery running from the date the first answer is filed or 90 days after first defendant is served, whichever occurs first. N.J. Ct. R. 4:24-1(a). The joinder of a new party to an existing medical malpractice action extends the discovery period for 60 days. N.J. Ct. R. 4:24-1(b).

Parties to an action may agree to extend the time for discovery for an additional 60 days, by filing a signed stipulation with the court or by applying to the Civil Division Manager or team leader by telephone followed with a confirming letter or by letter copied to all parties. N.J. Ct. R. 4:24-1(c). A consensual extension of discovery must be sought prior to expiration of discovery period. N.J. Ct. R. 4:24-1(c).

If parties cannot agree or a longer or extension is sought, a motion must
be filed with the court and made returnable prior to end of discovery period. A party’s proposed order for an extension of discovery shall describe in detail the additional discovery to be conducted. N.J. Ct. R. 4:24-1(c).

§ 7.28 Serving and Answering Interrogatories in Medical Malpractice Action

Parties to medical malpractice actions are limited to the interrogatories set forth in Forms A, A(1), C and C(3) of Appendix II to the Court Rules, however, each party may propound 10 supplemental questions, without subparts, without leave of court. N.J. Ct. R. 4:17-1(b)(1).

A defendant served with a medical malpractice complaint shall be deemed to have been served with Form C and C(3) interrogatories. N.J. Ct. R. 4:17-1(b)(2). A medical malpractice plaintiff served with an answer to the complaint shall be deemed to have been served with Form A and A(1) interrogatories. N.J. Ct. R. 4:17-1(b)(2).

Timing: Defendant’s answers to Form C interrogatories are due within 60 days after service of defendant’s answer to the complaint. N.J. Ct. R. 4:17-1(b)(2). Plaintiff’s answers to Form A interrogatories are due within 30 days after service of defendant’s answer. N.J. Ct. R. 4:17-1(b)(2).

Strategic Point: If a party refuses to answer an interrogatory, the propounder may, within 20 days of being served with answers, move to compel an answer to the question. N.J. Ct. R. 4:17-5(a). If the court finds that either party acted frivolously or for purposes of delay, the court may order payment of reasonable attorneys’ fees incurred in either making or resisting the motion. N.J. Ct. R. 4:17-5(d). If a party fails to respond to interrogatories at all, the propounder may move to dismiss or suppress the delinquent party’s pleading without prejudice. N.J. Ct. R. 4:23-5(a)(1). If the court enters an order of dismissal or suppression without prejudice and the delinquent party fails to respond for 90 days, the party entitled to discovery may move to dismiss or suppress the pleading with prejudice. N.J. Ct. R. 4:23-5(a)(2).
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Forms: Form CLI 7.726.01, Uniform Interrogatories (Form A) All Personal Injury Cases Answered by Plaintiff (Appendix II) (N.J. Official Form)

Form CLI 7.726.02, Uniform Interrogatories (Form A1) Medical Malpractice Cases Answered by Plaintiff (Appendix II) (N.J. Official Form)

Form CLI 7.726.03, Uniform Interrogatories (Form C) All Personal Injury Cases Answered by Defendant (Appendix II) (N.J. Official Form)

Form CLI 7.726.04, Uniform Interrogatories (Form C1) Automobile Accident Cases Answered by Defendant (Appendix II) (N.J. Official Form)

§ 7.29 Serving and Responding to Request for Production of Documents in Medical Malpractice Action

[1] General Requirements Regarding Requests for Production of Documents

Any party may serve a request on any other party to produce or make available for inspection and copying any document or tangible thing within the scope of N.J. Ct. R. 4:10-2 or to permit entry upon land or property under party’s possession or control. N.J. Ct. R. 4:18-1(a). A request may be served upon plaintiff at any time, and may be served upon defendant with or after service of summons and complaint upon that defendant. N.J. Ct. R. 4:18-1(b).

Timing: A response to a request for production of documents shall be served within 35 days, except that defendant may serve a response within 50 days after service of summons and complaint upon that defendant. N.J. Ct. R. 4:18-1(b).

A party producing documents shall produce them as they are kept in the usual course of business or shall organize and label documents to correspond to requests. N.J. Ct. R. 4:18-1(b). Parties have a continuing duty to amend their responses after obtaining additional documents responsive to the request. N.J. Ct. R. 4:18-1(b).
Strategic Point: The party requesting documents may file a motion to dismiss, suppress or compel with respect to any objection, failure to respond or failure to permit inspection. N.J. Ct. R. 4:18-1(b), 4:23-5(c). If a party fails to respond at all to a request for production of documents, propounder may move to dismiss or suppress the delinquent party’s pleading without prejudice. N.J. Ct. R. 4:23-5(a)(1). If the court enters an order of dismissal or suppression without prejudice and the delinquent party fails to respond after 90 days, the party entitled to the discovery may move to dismiss or suppress the pleading with prejudice. N.J. Ct. R. 4:23-5(a)(2).

Forms: Form CLI 7.726.05, Request for Production of Documents from Plaintiff
Form CLI 7.726.06, Request for Production of Documents from Physician
Form CLI 7.726.07, Request for Production of Documents from Hospital
Form CLI 7.726.08, Letter to Physician Requesting Production of Documents
Form CLI 7.726.09, Letter to Hospital Requesting Production of Documents

[2] Seeking Production of Medical Records

While interaction between physician and patient is protected by the physician-patient privilege, bringing a medical malpractice claim serves to waive that privilege. NJS 2A:84A-22.1, 2A:84A-22.4. The same is true for hospital records. NJS 2A:82-41. Thus, the defendant in a medical malpractice action has the right to obtain plaintiff’s treating physician and hospital records. The defendant must have plaintiff sign medical authorizations in order to obtain records.

[3] Seeking Production of Insurance Agreements

A party may discover the existence and contents of any insurance policy or agreement that may be used to satisfy part or all of a judgment in the
§ 7.29[4]  NEW JERSEY PERSONAL INJURY LITIGATION 7-52

medical malpractice action or to indemnify or reimburse payments made under a judgment. The phrase “insurance agreement” does not include applications for insurance. This rule, however, does not make insurance information admissible as evidence at trial. N.J. Ct. R. 4:10-2(b).

[4] Seeking Production of Incident Reports and Self-Critical Analysis

If the hospital conducted an investigation regarding the incident in question, plaintiff should obtain copies of all incident reports, notes, records or writings describing the investigation and its results. The hospital likely will refuse plaintiff’s request citing the privilege of self-critical analysis. *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 691 A.2d 321 (1997) (discussion of conditional privilege of self-critical analysis).

The New Jersey Supreme Court declined to adopt the privilege of self-critical analysis as a full privilege and, instead, opted for a case-by-case balancing of interests. *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 544-547, 691 A.2d 321 (1997). In each case, the court should balance the individual’s right to the information against the public interest in the confidentiality of the file. While confidentiality concerns may outweigh competing interests in disclosure, particularly where the information is available from another source, certain interests are strong enough and involve important enough public policies to outweigh the confidentiality concerns under most circumstances. *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 548, 691 A.2d 321 (1997).


[5] Examining Surveillance Video Tapes

Plaintiffs have the right to examine surveillance video tapes taken of them and to depose the persons who filmed them. *Jenkins v. Rainner*, 69 N.J. 50, 350 A.2d 473 (1976). The defendant, however, is entitled to depose

§ 7.30 Noticing and Taking Depositions in Medical Malpractice Action

[1] Taking Deposition of Party to Action

Depositions in a medical malpractice action are subject to the same rules as depositions in other civil actions. Leave of court is required only where plaintiff seeks to take a deposition less than 35 days after service of the summons and complaint upon defendant. N.J. Ct. R. 4:14-1. The notice shall include the time and place for the deposition, which shall be reasonably convenient for all parties, and the name and address of the person to be deposed or, if name is not known, a general description sufficient to identify the person. N.J. Ct. R. 4:14-1. The notice to depose a party also may include a request for the production of documents. N.J. Ct. R. 4:14-2(d).

Timing: A party seeking to take a deposition must give at least 10 days notice in writing to all parties to the action. N.J. Ct. R. 4:14-2(a).

The objections permitted during a deposition are very limited. An attorney may object to the form of a question or to assert a privilege, a right to confidentiality or a limitation included in a court order. N.J. Ct. R. 4:14-3(c). An objection to the form of a question must include a statement as to why the form is objectionable so that the interrogator may revise the question. N.J. Ct. R. 4:14-3(c). An attorney cannot instruct a witness not to answer a question unless the objection is privilege, a right to confidentiality or a limitation included in a court order. N.J. Ct. R. 4:14-3(c).

An attorney cannot communicate with his or her witness during the deposition while testimony is being taken, except to assert a claim of privilege, a right to confidentiality or a limitation included in a court order. N.J. Ct. R. 4:14-3(f). Because the rule includes the phrase, “while testimony is being taken,” it does not apply to breaks during the deposition or overnight. Pressler, Comment to N.J. Ct. R. 4:14-4(f) (Gann).

An attorney may contact the court at any time during the deposition if the deposition is being conducted or defended in bad faith or in a manner...
calculated to unreasonably annoy, embarrass or oppress the witness or a party. N.J. Ct. R. 4:14-4. The party taking the deposition shall bear the cost thereof and of promptly furnishing a copy of the transcript to the witness, if the witness is an adverse party, or if not, to any adverse party. N.J. Ct. R. 4:14-6(c).


If an expert or treating physician resides or works in New Jersey and the deposition is not taken at the witness’ residence or office, the party taking the deposition must pay for the witness’ travel time and expenses. N.J. Ct. R. 4:14-7(b)(2). If an expert or treating physician does not reside or work in New Jersey, the proponent of the witness must either produce the witness, at the proponent’s expense, in the county where the action is pending or at another place where all parties agree or pay the reasonable travel and lodging expenses incurred by all parties to attend the witness’ out-of-state deposition. N.J. Ct. R. 4:14-7(b)(2).

A party may take a videotaped deposition for discovery purposes or for use at trial. N.J. Ct. R. 4:14-9. A typewritten transcript of the deposition is still required. N.J. Ct. R. 4:14-9(c). The party taking the deposition shall provide a copy to one adverse party, who shall make it available for inspection and copying to all other parties. N.J. Ct. R. 4:14-9(d). All out-of-pocket expenses shall be paid by the party taking the videotaped deposition. N.J. Ct. R. 4:14-9(g).

If a videotaped deposition of a treating physician or expert is intended for use in lieu of trial testimony, it shall not be noticed until 30 days after that witness’ report has been provided to all parties. N.J. Ct. R. 4:14-9(a). Where a videotaped deposition is to be used at trial in lieu of testimony, all evidentiary objections shall, to the extent possible, be made during the deposition. N.J. Ct. R. 4:14-9(f). A party making evidentiary objections shall move for rulings on its objections within 45 days after the deposition. N.J. Ct. R. 4:14-9(f).

[3] Seeking Testimony Regarding Defendant’s Opinions

At defendant’s deposition, plaintiff’s counsel may ask defendant physician for the basis of his or her conduct and whether that conduct deviated from accepted medical practice. See Myers v. St. Francis Hospital, 91 N.J. Super. 377, 384, 220 A.2d 693 (App. Div. 1966).
Taking Deposition of Non-Party Witnesses

The deposition of a non-party witness may be compelled by subpoena. The subpoena also may include a request for the production of documents. N.J. Ct. R. 4:14-7(a). The deposition of a New Jersey resident should be scheduled in the county where the witness either resides or works. N.J. Ct. R. 4:14-7(b)(1). The deposition of an out-of-state resident subpoenaed in New Jersey should be scheduled for either the county in which the witness was served or within 40 miles of service. The party subpoenaing a witness must reimburse the witness for the out-of-pocket expenses and loss of pay, if any, incurred in attending the deposition. N.J. Ct. R. 4:14-7(b)(1).

Serving and Answering Demand for Admissions in Medical Malpractice Action

A party may serve a written request for the admission of the truth of any matters of fact within the scope of discovery. A request may be served upon plaintiff at any time, and may be served upon defendant with or after service of summons and complaint upon that defendant. N.J. Ct. R. 4:22-1.

Timing: A demand for admission is deemed to be admitted unless the party to whom the request is made serves a written answer or objection within 30 days. However, defendant shall not be required to serve an answer until 45 days after being served with the summons and complaint. N.J. Ct. R. 4:22-1.

If an objection is made, the reasons for it must be stated. N.J. Ct. R. 4:22-1. An answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot admit or deny the matter. The answering party may not assert lack of information or knowledge as a reason for the failure to admit or deny, unless the party states that reasonable inquiry was made and the information is insufficient. N.J. Ct. R. 4:22-1.

The party requesting the admissions can move to determine the sufficiency of the answers or objections. N.J. Ct. R. 4:22-1. If the court determines that an objection is unjustified, it shall order the party to answer that request. If the court determines that an answer is insufficient, it can order that the matter is admitted or that an amended answer be served. The
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party prevailing on the motion may make an application for counsel fees. N.J. Ct. R. 4:22-1.

§ 7.32  Considering Independent Medical Examinations in Medical Malpractice Action

Defendant in a medical malpractice action may require plaintiff to submit to a physical or mental examination by serving a notice stating when, where and by whom the examination will be conducted. N.J. Ct. R. 4:19.

● Timing: A defendant seeking a physical or mental examination of the plaintiff must give plaintiff at least 45 days notice of the examination. N.J. Ct. R. 4:19.

When a plaintiff is examined by a psychiatrist or psychologist, the plaintiff has the right to record the examination by an unobtrusive recording device. B.D. v. Carley, 307 N.J. Super. 259, 704 A.2d 979 (App. Div. 1998). Plaintiff is also entitled to receive a copy of the examining physician’s report. Pressler, Comment to N.J. Ct. R. 4:19 (Gann).

§ 7.33  Examining Expert Testimony in Medical Malpractice Action

[1] Using Expert Testimony to Establish Elements of Action

Expert testimony is generally necessary in a medical malpractice action to establish the following:

1. Applicable standard of care;
2. Defendant’s breach or deviation from that standard of care; and
3. That the deviation proximately caused plaintiff’s injuries.


A party must disclose the name, address and qualifications of each person whom party plans to call at trial as an expert witness, including a treating physician who is expected to testify. N.J. Ct. R. 4:10-2(d), 4:17-1. A party also must provide a copy of the expert’s report. N.J. Ct. R. 4:10-2(d), 4:17-4(e). An expert’s report shall contain a statement of the
expert’s opinions and the basis therefor, the facts and data considered in forming the opinions, the expert’s qualifications including a list of all publications authored within the past 10 years, and whether and what compensation has been or is to be paid for the expert’s report and testimony. N.J. Ct. R. 4:17-4(e).


The doctrine of res ipsa loquitur, which is based on the probability that an accident could not have occurred without the defendant’s negligence, can sometimes apply to a medical malpractice claim. Roper v. Blumenfeld, 309 N.J. Super. 219, 230, 706 A.2d 1151 (App. Div.), certif. denied, 156 N.J. 379, 718 A.2d 1208 (1998) (elements and applicability of doctrine of res ipsa loquitur). For example, if a surgical sponge was left inside a patient after an operation, it is reasonable to say that someone was probably negligent. Roper v. Blumenfeld, 309 N.J. Super. 219, 230, 706 A.2d 1151 (App. Div.), certif. denied, 156 N.J. 379, 718 A.2d 1208 (1998).

Res ipsa loquitur creates an inference of defendant’s negligence when the following elements are shown:

1. The incident that produced injury was one that ordinarily does not happen unless someone was negligent;
2. The agent or instrumentality that caused the incident was within defendant’s exclusive control; and
3. There is no indication that injury was the result of plaintiff’s own voluntary act or neglect.


Unlike the doctrine of common knowledge, res ipsa loquitur requires expert testimony to the effect that the medical community recognizes that injury would not have occurred without negligence. Plaintiff is not required to eliminate with certainty all other possible causes, all that is needed is evidence from which a reasonable person could say that on the whole it is more likely than not that negligence caused the incident. Roper v. Blumenfeld, 309 N.J. Super. 219, 231, 706 A.2d 1151 (App. Div.), certif. denied, 156 N.J. 379, 718 A.2d 1208 (1998).

In addition to offering a res ipsa loquitur opinion, plaintiff’s expert often will also attempt to offer an opinion as to the standard of care and deviation
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The doctrine of common knowledge is an exception to the general rule that expert testimony is necessary to establish the standard of care. *Estate of Chin v. St. Barnabas*, 160 N.J. 454, 468, 734 A.2d 778 (1999) (common knowledge exception in medical malpractice cases). In some medical malpractice actions, jurors’ common knowledge is sufficient to enable them to determine defendant’s negligence without the benefit of an expert’s specialized knowledge. The doctrine of common knowledge may be invoked where defendant’s carelessness is readily apparent to anyone of average intelligence and experience. *Estate of Chin v. St. Barnabas*, 160 N.J. 454, 468-469, 734 A.2d 778 (1999).


The net opinion rule focuses on the expert’s failure to explain a causal connection between the incident complained of and the resulting injury. Where an expert offers a net opinion, the expert is not aiding the jury and is acting as nothing more than an additional juror. *Jimenez v. GNOC, Corp.*, 286 N.J. Super. 533, 540, 670 A.2d 24 (App. Div.), certif. denied, 145 N.J. 374, 678 A.2d 714 (1996).

§ 7.34 Examining Motions for Summary Judgment in Medical Malpractice Action

A motion for summary judgment may be filed at any time, except that plaintiff must wait until 35 days after service of the summons and complaint. N.J. Ct. R. 4:46-1. A party moving for summary judgment must
serve and file its moving papers at least 28 days before the return date of the motion. N.J. Ct. R. 4:46-1. A party opposing a summary judgment motion or filing a cross-motion must serve and file its papers at least 10 days before the motion’s return date. N.J. Ct. R. 4:46-1.

A motion for summary judgment must be supported by a brief and a statement of material facts. N.J. Ct. R. 4:46-2(a). Certifications may also be filed. N.J. Ct. R. 4:46-2(a). The statement of material facts shall set forth, in numbered paragraphs, each material fact to which movant asserts there is no genuine issue together with a citation to the record for each assertion. N.J. Ct. R. 4:46-2(a).

A party opposing a summary judgment motion must file a responding statement either admitting or disputing each fact in movant’s statement of material facts. N.J. Ct. R. 4:46-2(b). When a fact is disputed, a citation to record must be provided. N.J. Ct. R. 4:46-2(b). An opposing party may also include additional facts that the party asserts are material and to which there exists a genuine issue and citations to the record to support those additional facts. N.J. Ct. R. 4:46-2(b). A party defending a summary judgment motion should file one or more certifications setting forth the specific facts as to which there exists a genuine issue. N.J. Ct. R. 4:46-5(a). An opposing party cannot rest merely upon allegations or denials of the pleadings. N.J. Ct. R. 4:46-5(a).

A motion for summary judgment will be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.J. Ct. R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 666 A.2d 146 (1995). Generally, summary judgment will not be granted when discovery is incomplete. See, e.g., Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A.2d 237 (1988). Thus, while a motion for summary judgment may be made at any time under the court rules, it is often advisable for practitioners to wait until discovery is complete.

The vast majority of summary judgment motions in medical malpractice actions are filed by defendants. Medical malpractice plaintiffs rarely file motions for summary judgment because there are virtually always genuine issues of material fact involved in proving their cases. Summary judgment motions filed by medical malpractice defendants often involve the sufficiency of plaintiff’s expert testimony, that is, whether plaintiff’s expert opinion is a net opinion. Summary judgment motions also may relate to defenses such as the Tort Claims Act.
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PART VII: PREPARING FOR TRIAL IN MEDICAL MALPRACTICE ACTIONS

§ 7.35 CHECKLIST: Preparing for Trial in Medical Malpractice Actions

- Exchange pretrial information and provide court with copies of those materials, as well as any stipulations, proposed voir dire questions, proposed jury instructions and proposed jury verdict form.

**Authority:** N.J. Ct. R. 4:25.

**Discussion:** See § 7.36 below.

- Prepare admissions and stipulations.

  **Discussion:** See § 7.37 below.

- Prepare and submit proposed voir dire questions to court.


  **Forms:** Form CLI 7.735.01, Voir Dire Request

  **Discussion:** See § 7.38 below.

- Prepare and submit proposed request to charge to court, which shall include references to Model Jury Charges.


  **Forms:** Form CLI 7.735.02, Model Jury Charge for Alteration of Medical Records

  Form CLI 7.735.03, Model Jury Charge for Common Knowledge

  Form CLI 7.735.04, Model Jury Charge for Duty and Negligence

  Form CLI 7.735.05, Model Jury Charge for Fraudulent Concealment of Medical Records

  Form CLI 7.735.06, Model Jury Charge for Informed Consent

  Form CLI 7.735.07, Model Jury Charge for Medical Judgment
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Form CLI 7.735.08, Model Jury Charge for Pre-Existing Condition

Form CLI 7.735.09, Model Jury Charge for Wrongful Birth or Life

**Discussion:** See § 7.39 below.

☐ Prepare and submit proposed jury verdict form to court.


**Forms:** Form CLI 7.735.10, Jury Verdict Form for Informed Consent

Form CLI 7.735.11, Jury Verdict Form for Medical Malpractice

Form CLI 7.735.12, Jury Verdict Form for Pre-Existing Condition

Form CLI 7.735.13, Jury Verdict Form for Two Defendant Doctors

**Discussion:** See § 7.40 below.

☐ Prepare and submit trial briefs on novel or difficult issues.

**Authority:** N.J. Ct. R. 4:25-1(c).

**Discussion:** See § 7.41 below.

☐ Prepare motions in limine on any special evidentiary issues.

**Authority:** N.J. Ct. R., Appx. XXIII(4), Pre-trial Information Exchange.

**Discussion:** See § 7.42 below.

☐ Examine experts at trial.

☐ Consider following issues:

- Proposed expert witness can be qualified by knowledge, skill, experience, training or education.

- Proposed expert witness will be examined to determine whether witness is qualified.

- Expert testimony in medical malpractice actions must be
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couched in terms of reasonable medical certainty or probability.


**Discussion:** See § 7.43 below.

☐ Use medical references and other materials at trial.


**Discussion:** See § 7.44 below.

☐ Establish compensatory damages in medical malpractice action.

☐ Consider following issues:

- Compensatory damages consist of past and future medical expenses, past and future lost wages and pain and suffering.
- Damages in wrongful death action are limited to actual financial loss resulting from decedent’s death, plus decedent’s hospital, medical and funeral expenses.


**Discussion:** See § 7.45[1] below.

☐ Consider punitive damages in medical malpractice action.

☐ Be aware of following issues:

- Award of punitive damages must be reasonable.
- Punitive damages may not exceed $350,000 or five times amount of compensatory damages awarded against that defendant.

**Authority:** NJS 2A:15-5.14.

**Discussion:** See § 7.45[2] below.
Consider issues involved in settling medical malpractice actions.


**Discussion:** See § 7.46 below.

§ 7.36 Examining Court Rules Applicable to Medical Malpractice Action

N.J. Ct. R. 4:25 governs pretrial conferences and exchange of information. N.J. Ct. R. 4:25-1 discusses in detail the pretrial conference and pretrial order. In cases that have not been pre-tried, parties shall exchange the pretrial information listed in Appendix XXIII to the court rules. N.J. Ct. R. 4:25-7(b); N.J. Ct. R. Appx. XXIII(4), Pretrial Information Exchange. Parties also shall provide the court, prior to the opening statements at trial, the following:

1. Copies of any pretrial information exchange materials and any objections thereto;
2. Any stipulations reached on procedural, evidentiary and substantive issues;
3. Any proposed voir dire questions;
4. List of proposed jury instructions; and
5. Proposed jury verdict form.

N.J. Ct. R. 4:25-7(b).

§ 7.37 Considering Admissions and Stipulations Applicable to Medical Malpractice Action

Generally, the parties are able to agree and stipulate to the existence of the physician-patient relationship and the extent of the treatment provided to plaintiff.

§ 7.38 Examining Voir Dire for Medical Malpractice Action

Parties may submit proposed voir dire questions to aid the court in questioning prospective jurors. N.J. Ct. R. 4:25-7, 1:8-3(a), 1:8-3(f). The
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court will hold a conference on the record to determine the areas of inquiry during the voir dire. N.J. Ct. R. 1:8-3(f). Attorneys may request additional questions of prospective jurors during the course of the voir dire as necessary and appropriate. N.J. Ct. R. 1:8-3(f).

**Forms:** Form CLI 7.735.01, Voir Dire Request

§ 7.39 Submitting Jury Charges in Medical Malpractice Case

Parties may submit written requests asking the court to charge the jury as set forth in the requests. N.J. Ct. R. 4:25-7, 1:8-7(a). The requests shall make specific reference to the Model Jury Charges, if applicable, or to applicable law. N.J. Ct. R. 4:25-7; N.J. Ct. R. 1:8-7(a). Copies of the requests shall be provided to all parties when they are submitted to the court. The court shall rule on the requests prior to closing arguments. N.J. Ct. R. 1:8-7(a).

In addition to general charges that apply to all or most civil actions, Model Jury Charge 5.36 applies specifically to medical malpractice actions. The subparts of Model Jury Charge 5.36 cover topics, including general negligence, informed consent and pre-existing conditions.

**Forms:** Form CLI 7.735.02, Model Jury Charge for Alteration of Medical Records
Form CLI 7.735.03, Model Jury Charge for Common Knowledge
Form CLI 7.735.04, Model Jury Charge for Duty and Negligence
Form CLI 7.735.05, Model Jury Charge for Fraudulent Concealment of Medical Records
Form CLI 7.735.06, Model Jury Charge for Informed Consent
Form CLI 7.735.07, Model Jury Charge for Medical Judgment
Form CLI 7.735.08, Model Jury Charge for Pre-Existing Condition
Form CLI 7.735.09, Model Jury Charge for Wrongful Birth or Life

§ 7.40 Submitting Jury Verdict Form in Medical Malpractice Case

Parties may submit a proposed jury verdict form, which is a list of the verdicts that may be properly found by the jury. N.J. Ct. R. 4:25-7, 1:8-8(a).

**Forms:** Form CLI 7.735.10, Jury Verdict Form for Informed Consent
Form CLI 7.735.11, Jury Verdict Form for Medical Malpractice
Form CLI 7.735.12, Jury Verdict Form for Pre-Existing Condition
Form CLI 7.735.13, Jury Verdict Form for Two Defendant Doctors

§ 7.41 Considering Trial Briefs in Medical Malpractice Case

Trial briefs are not required unless directed by the court. N.J. Ct. R. 4:25-1(c). However, if there is a novel or difficult issue involved in the case, practitioners should submit trial briefs to aid the court.

§ 7.42 Filing Motions in Limine in Medical Malpractice Case

Practitioners should prepare, file and serve any in limine motions that they plan to make at the beginning of trial. The motions should be supported by briefs. In limine motions are used to seek the admission of, or object to the anticipated admission, at trial of any exhibit or testimony. In limine motions and any responses thereto should be made at least two days prior to trial and will be heard and decided by the trial judge. N.J. Ct. R., Appx. XXIII(4), Pretrial Information Exchange.

§ 7.43 Examining Experts in Medical Malpractice Case

To present testimony at trial, a witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” N.J.R.E. 702. A preliminary examination of the witness is conducted to determine whether the witness possesses the requisite qualifications. A proposed expert witness may be subject to intense cross-examination regarding the expert’s background and experience.


An expert’s opinion may be based upon the following:

1. Expert’s personal observations;
2. Evidence admitted at trial; or
3. Inadmissible facts if they are of the type reasonably relied upon by experts in particular field.

N.J.R.E. 703.

An expert cannot offer a bare conclusion, unsupported by facts because
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that would be deemed an impermissible net opinion. See 7.32[4] above.

§ 7.44 Using Medical Reference and Other Materials in Medical Malpractice Case

Medical treatises may be used by practitioners during the examination or cross-examination of expert witnesses in medical malpractice actions. Excerpts from the text may be read into evidence or graphics shown to the jury where the publication is “established as a reliable authority by testimony or by judicial notice.” N.J.R.E. 803(c)(18); Jacober v. St. Peter’s Medical Ctr., 128 N.J. 475, 608 A.2d 304 (1992).

A text will qualify as reliable if it represents the type of material reasonably relied on by experts in the field. Jacober v. St. Peter’s Medical Ctr., 128 N.J. 475, 495, 608 A.2d 304, reconsideration granted on other grounds, 130 N.J. 586, 617 A.2d 1213 (1992). New Jersey courts have allowed practitioners to use publications such as manufacturer’s pamphlets on medical devices, package inserts for pharmaceuticals and the Physician’s Desk Reference during direct or cross-examination of experts. See Brambley v. McGrath, 347 N.J. Super. 1, 7, 788 A.2d 861 (App. Div. 2002); Morlino v. Medical Ctr., 152 N.J. 563, 578-582, 706 A.2d 721 (1998).

§ 7.45 Establishing Damages in Medical Malpractice Case

[1] Seeking Compensatory Damages

A plaintiff in a medical malpractice action is entitled to recover reasonable compensation for his or her injuries and losses including damages for the following:

1. Past medical expenses;
2. Future medical expenses;
3. Past lost wages;
4. Future lost wages; and
5. Pain and suffering.


In a wrongful death action, decedent’s survivors are entitled to recover damages representing actual financial loss suffered by survivors due to
decedent’s death. Financial loss is limited to monetary injuries resulting from decedent’s death, together with hospital, medical and funeral expenses incurred for decedent. *Smith v. Whitaker*, 160 N.J. 221, 231-232, 734 A.2d 243 (1999) (damages in wrongful death action); see also NJS 2A:31-5. Wrongful death damages do not include damages for decedent’s pain and suffering.

[2] Seeking Punitive Damages

A judge must determine whether an award of punitive damages is reasonable in order to punish defendant and to deter him from repeating such conduct. If a judge decides that the award is not reasonable, he or she may reduce the amount or eliminate such damages entirely. NJS 2A:15-5.14.

An award of punitive damages may not exceed $350,000 or five times the amount of compensatory damages awarded against that defendant. NJS 2A:15-5.14.

§ 7.46 Settling Medical Malpractice Action

When plaintiff settles with a joint tortfeasor, regardless of whether the settlement ends up being more or less than the settling defendant’s pro rata share of the total claim, the settlement will do the following:

1. Reduce the total claim by the settling defendant’s pro rata share; and

2. Bar an action for contribution against the settling defendant.

See *Theobald v. Angelos*, 44 N.J. 228, 232, 208 A.2d 129 (1965). The non-settling defendants will be liable for their pro rata share of the verdict.

However, when plaintiff settles with a named defendant, who is not found to be liable by the trier of fact, that settlement does not constitute benefits required to be deducted from the damages verdict. See *Johnson v. American Homestead Mortgage Co.*, 306 N.J. Super. 429, 436, 703 A.2d 984 (App. Div. 1997) (citing *Kiss v. Jacob*, 138 N.J. 278, 281-283, 650 A.2d 336 (1994)). The non-settling defendants will not receive any credit for the settlement and will be liable for the entire verdict.
XPP 7.3C.1 Patch #3 SPEC: SC_01444; nonLLP: 1447; XPP-PROD

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