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Break the law, don't harm your client

DON'T FOLLOW CCP § 364 IN YOUR MEDICAL MALPRACTICE CASES

This is going to be a controversial article. My advice is to break the law. My suggestion is to willfully refuse to follow a statute that dictates that the State Bar of California "shall" investigate the attorney's noncompliance. I am advocating not following a statute where the consequences "shall be grounds for professional discipline." Perhaps this article will come back to haunt me at a future State Bar disciplinary hearing and I will regret writing it.

But what I am concerned about far more is my obligation and duty to my client. I care more about not blowing my client's medical-malpractice case because the case is deemed untimely. Code of Civil Procedure section 364, which is poorly written and internally inconsistent, is nothing more than a legal-malpractice trap and my advice is to simply not follow it. There is little to no benefit of sending out a section 364 letter, but the downside is a complete bar to your client's case.

This is the first article I know of that advocates willfully failing to follow section 364. Unlike many of our defense attorney counterparts, we tend to be rule followers. In fact, many esteemed older medical-malpractice attorneys vehemently disagree with me and will religiously follow section 364. My advice is don't. Don't jeopardize your client's case. Just file your client's case within the one-year statute of limitations and do not bother sending out any "intent-to-sue" letter.

What is section 364?

Under section 364, subdivision (a), "No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action."

Pursuant to section 364, subdivision (d): "If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice."

In sum, section 364 requires a litigant pursuing a medical-malpractice action to provide at least 90 days of notice to a healthcare defendant before initiating a lawsuit. If the letter is sent within the last 90 days of the statute of limitations, a plaintiff has an extra 90 days to file the lawsuit.

First, it is important to recognize that on its face, section 364 is completely nonsensical. It is impossible to literally follow the rules articulated in section 364. As the Honorable Stanley Mosk correctly explained in his concurrence in *Woods v. Young* (1991) 53 Cal.3d 315, 321, section 364 is a "contradictory and ineffectual statutory scheme." In fact, section 364 is so poorly worded and internally inconsistent that the California Supreme Court in *Woods* simply refused to apply the language of the statute and instead had to effectively rewrite the statute for the Legislature.

Part of MICRA

We are all aware of the infamous cap on noneconomic damages under the Medical Injury Compensation Reform Act of 1975 ("MICRA"). However, MICRA is not just the cap. There are other unjust MICRA provisions, such as the short one-year statute of limitations (Code Civ. Proc. § 340.5); the abolition of the collateral-source rule in relation to health insurance (Civ. Code, § 3333.1, subd.(a)); the defendant's right to periodize payments even if you do win (Code Civ. Proc.,

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§ 667.7); and the limitation on attorney fees (Bus. Prof. Code, § 6146).

Section 364 is just another poorly worded part of the overall disaster that is MICRA. While recent Assembly Bill 35 has done wonders to right many of the wrongs in relation to several of MICRA's provisions, section 364 remains untouched.

As recognized in *Woods*, a literal following of section 364 and its 90-day extension from the date of the letter would "lead to incongruous results." It would be impossible for a litigant to both provide *at least* 90 days of notice while also filing within the applicable statute of limitations if a litigant is within the last 90 days of the statute of limitations period. The lawsuit would have to be filed a day late.

Accordingly, despite the language of the statute, *Woods* held that the statute of limitations is *tolled* (not just extended) for 90 days as long as the notice is provided within the last 90 days of the statutory period. In other words, as long as the letter is sent within the last 90 days of the statute of limitations, the plaintiff has a total of one year and 90 days to file the action.

The fact that the statute itself is impossible to obey supports simply not following it. (See *Woods*, *supra* at p.457 ["[W]hen applied literally, section 364(d) accomplishes nothing."].)

What are the consequences for not following section 364?

Unlike a Certificate of Merit for engineering cases under Code of Civil Procedure section 411.35 or a DFEH letter in certain employment cases, an "intent to sue" letter under section 364 is *not* a jurisdictional requirement. Failure to comply does not act as a bar against your client's case.

A companion provision to section 364, section 365 of the Code of Civil Procedure, states: "Failure to comply with [section 364] shall not invalidate any proceedings of any court of this state, nor shall it affect the jurisdiction of the court to render a judgment therein." Hence, as long as you file your client's case within the time limits of Code of Civil Procedure section 340.5, there is *no* downside to your client in failing to comply the section 364.

Section 365 also states: "However, failure to comply with such provisions by any attorney at law shall be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such cases brought to its attention."

On its face, this is scary. Section 365 states that an attorney who fails to comply with section 365 "shall" (i.e., must) be investigated by the State Bar. Likewise, failure to comply "shall" be grounds for professional discipline.

Yet, in the 48 years since MICRA was passed, I am not aware of a single attorney who has ever been disciplined or cited for failing to follow section 364. I have repeatedly, willfully, and openly refused to follow section 364. Again, given the fact that following the literal language of section 364 is actually impossible, I would argue that there would be no possible grounds for discipline given the refusal to follow section 364.

In sum, as long as you file the lawsuit within the statute of limitations, there is no downside in refusing to follow section 364.

Unbeknownst to the patient's attorney, the "intent-to-sue letter" may not provide the 90-day extension and the client's case is time-barred

The biggest potential downside of following section 364 is that it can operate to render your client's case untimely, wholly barring the case.

Section 364 subdivision (d) only provides the 90-day extension "[i]f the notice is served within 90 days of the expiration of the statute of limitations." Hence, if a plaintiff diligently serves the 90-day notice *before the* last 90 days of the statutory period, there is *no* 90-day extension on the statute of limitations. Accordingly, an attorney who sends an early letter is doing nothing but potentially harming her client.

This is yet another senseless part of section 364, which punishes a diligent plaintiff while rewarding a dilatory one. As Judge Mosk explains: "It is difficult to believe that the Legislature deliberately intended such an inexplicable result." (*Woods* [concurrence] at p. 332.].)

If notice is sent before the last 90 days of the statute, a second notice within the last 90 days has *no impact* on the statute of limitations and does not provide the extra time to file the lawsuit. By far the biggest risk is when a plaintiff, without her attorney's knowledge, previously sent correspondence to the healthcare provider complaining about the substandard care. This correspondence can be deemed to be a section 364 notice.

This is because section 364, subdivision (b) provides that "no particular form of notice is required" as long as the letter provides the legal basis of the claim and nature of the injuries suffered. Even letters sent by facsimile, without any prior agreement permitting such method of service, constitutes a valid section 364 letter. (See *Jones v. Catholic Healthcare West* (2007) 147 Cal.App.4th 300, 309.) While there are no cases on point, emails or even client-portal messages could qualify as section 364 letters and invalidate a subsequently sent letter.

In *Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 387, a plaintiff spoke to an attorney about suing a neurosurgeon for malpractice. That attorney sent the "intent-to-sue" letter two months after the malpractice, intending to take the patient's case. Several months later, the attorney informed the patient that he could not pursue the lawsuit due to financial and medical problems.

After undergoing another brain surgery to fix residual issues from the malpractice, the patient hired a second lawyer, who agreed to take the patient's case. The lawyer, unaware that the prior lawyer had sent a letter, sent another letter within the last 90 days of the statute. The lawyer then, believing he had the additional 90 days to file the lawsuit,

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filed the complaint 14 months after the malpractice occurred.

The Court of Appeal affirmed the trial court's granting of the neurosurgeon's motion for summary judgment. The court explained that "the tolling provision of section 364(d) applies only to plaintiffs who have served their original notice of intent to sue within 90 days of the expiration of the applicable limitations period." Given that the (ineffective) legislative purpose behind section 364 is to encourage settlements prior to filing suit, a second notice has no impact on the statute of limitations. The result was a brain-damaged plaintiff whose case was time-barred as a matter of law.

In *Kumari v. The Hospital Committee for the Livermore-Pleasanton Areas* (2017) 13 Cal.App.5th 306, 308, a patient fell and broke her right shoulder when she was left unattended after undergoing a C-section and with considerably low hemoglobin levels. A few months after the incident, the patient herself sent a letter accusing the hospital of malpractice and requesting compensation for her injuries. The letter did not reference section 364 and the patient was unaware of the existence of section 364.

The plaintiff thereafter hired an attorney, who was unaware of the client's earlier letter. The attorney sent a section 364 letter and relied on the extra 90 days of the statute. The hospital moved for summary judgment, arguing that the plaintiff's own letter constituted a section 364 letter and, thus, her attorney's letter was ineffective. The trial court granted summary judgment, finding that the patient's own letter qualified as a section 364 letter.

The Court of Appeal affirmed, finding the patient's case untimely and holding that "the second section 364 letter notice was surplusage and the complaint was time-barred." If your client even sent an email to the defendant healthcare provider alleging negligence and demanding compensation, your 364 letter *will not* serve to extend the statute.

Other risks of a letter being ineffective

Even if your client did not send a letter previously, there are other risks of relying on the 90-day provision of section 364. A letter sent to an incorrect address or a typographical error on the address by support staff may completely bar a plaintiff's claim.

In *Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, physician negligence resulted in the death of a young child. The parents' attorneys sent letters to the physicians but addressed the letters to the hospital where the plaintiff was treated rather than the physicians' offices. The physicians, despite having staff privileges at the hospital, never received the letter. Instead, the hospital's risk management department instructed its staff to return the letters, but the wrong letters were returned to the parents' attorneys.

Even under these facts, notice was deemed to be insufficient under section 364 as the method did not result in actual notice. The Court of Appeal explained that "a plaintiff cannot rely on a hospital to forward section 364, subdivision (a) notices to individual physicians where . . . the plaintiff has knowledge of the identity and location of the physicians." Thus, the parents' claim was untimely. (See also *Godwin v. City of Bellflower* (1992) 5 Cal.App.4th 1625 [holding that service on a hospital was insufficient as to physicians].)

Notably, the *Hanooka* court also held that a plaintiff's attorney could not use the provisions of Code of Civil Procedure section 473 regarding excusable neglect to remedy an error in a section 364 notice: "We hold that appellants cannot extend the medical malpractice statute of limitations, section 340.5, by applying section 473 to the notice provision of section 364."

A similar result occurred in *Derderian v. Dietrick* (1997) 56 Cal.App.4th 892, 894, in which an emergency-room physician allegedly committed malpractice in treating a patient who passed away a few days later. The plaintiffs' attorney sent a section 364 letter to the address on a bill the physician's medical group sent the family. The Court of Appeal held that the notice was insufficient. In doing so, the Court explained: "Clearly the burden of taking adequate steps likely to accomplish actual notice must fall on the potential plaintiff."

An intent to sue must also provide "the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered." (§ 364, subd. (b).) There is always a risk that a letter that is too conclusory or contains different theories than those advanced in litigation may be deemed an ineffective letter. (*McGovern v. BHC Fremont Hospital, Inc.* (Cal. Ct. App., Dec. 21, 2022, No. A161051) 2022 WL 18107709, at *5 [finding that the letter at issue in that case "lacked the requisite elements to establish compliance with section 364 and therefore cannot be deemed a notice of intent pursuant to that statute."].)

Even when a plaintiff prevails on appeal, both the plaintiff and her attorney still lose. In the recent decision of *McGovern, supra*, 2022 WL 18107709, at *6, the Court of Appeal held that the trial court erred when it considered a litigation hold and evidence preservation letter as a section 364 letter. The trial court granted summary judgment on timeliness when it improperly believed that the litigation hold letter invalidated a second section 364 letter sent within the last 90 days of the statute.

And in *Selvidge v. Tang* (2018) 20 Cal.App.5th 1279, the court found that the trial court erred in granting a motion for summary judgment when the letter was sent to a physician's registered address with the medical board that did not provide actual notice because it was not his address for treating patients. In *Silver v. McNamee* (1999) 69 Cal.App.4th 269, 272, the court held that the trial court erred in granting summary judgment against the plaintiff when the physician did not receive actual notice, since the certified letters were returned undelivered. Due in part to the poorly worded statute, time and time again, trial courts err on section 364 issues. (See,

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e.g., *Anson v. County of Merced* (1988) 202 Cal.App.3d 1195; *Edwards v. Superior Court* (2001) 93 Cal.App.4th 172, 177; *Russell v. Stanford University Hospital* (1997) 15 Cal.4th 783, 787.)

But what exactly did the plaintiff achieve in these cases? The plaintiff's case in each matter was delayed months or years while her case went through the appellate process. Furthermore, appellate attorney fees in medical malpractice actions arguably cannot be asserted as costs and instead eat directly into the 33% post-cost contingency fee under Business and Professions Code section 6146. (*Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583 ["[S]ection 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal after judgment, and the limitation may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees."].) (*Editor's note*: *Yates* left unaddressed the situation where the client independently retains a second lawyer to handle the appeal.)

Why even risk the possibility of a case being untimely due to a defective 364 letter?

Medical malpractice cases rarely settle prior to litigation; the section 364 letter only benefits the defense

The legislative purpose behind section 364 was to "decrease the number of such actions by establishing a procedure to encourage the parties to negotiate outside the structure and atmosphere of the formal litigation process." (*Edwards v. Superior Court* (2001) 93 Cal.App.4th 172, 178.) Likewise, many plaintiffs' attorneys mistakenly believe that medical-malpractice cases settle prior to litigation. Medical-malpractice cases are not like general personal-injury cases. The overwhelming majority of medical-malpractice cases settle only after a lengthy litigation process.

At our firm, we describe the medical-malpractice case that settles in pre-litigation as a "unicorn." Our firm's attorneys have decades of experience on both sides litigating medical-malpractice matters and have handled hundreds of cases. Yet, over these decades, the total number of cases that have settled prior to litigation is fewer than 10. Recently, we have seen medical-malpractice insurance companies and hospitals refuse to even entertain settlement on our cases involving retained forceps and sponges, operating on the incorrect leg, pouring acid instead of solution in an ear, and administering medication meant for a different patient.

There are many reasons for this. The physician-reporting requirements in Business and Professions Code section 801.01, which require that settlements be reported to the California Medical Board make pre-litigation settlement very difficult. Moreover, unlike in general litigation, even the most egregious cases in medical malpractice are defensible given most jurors' positive views of healthcare providers, the complexity of the cases, and the willingness of defense experts to support their own colleagues. Of course, the MICRA cap on general damages also disincentivizes insurance companies and hospitals to settle pre-litigation.

In fact, at least one major medical-malpractice insurance carrier permits settlements only after a lengthy and protracted claims-review process, which only occur quarterly and by their own policy do not occur before litigation.

Thus, there is absolutely no benefit to serving a 364 letter. The only thing you are doing by sending the letter is giving the insurance company and defense attorneys more time to prepare a defense, obtain documents, and retain experts.

Assembly Bill 35's changes to the MICRA cap under Civil Code section 3333.2 allow for $40,000 yearly increases for living plaintiffs and $50,000 yearly increases in wrongful death cases for 10 years. However, it is not the date of filing that controls in relation to increases, but rather the date of the judgment or arbitration award. (See Civ. Code, § 3333.2, subd. (g).) Therefore, there is little reason to use a section 364 letter to try and get into the next calendar year.

Only send the letter if you really need the extra time to evaluate the case

The *only* time you should ever send out a section 364 letter is when the client comes to you late in the statutory period and you truly need the extra 90 days to evaluate the case.

When sending a letter to a physician, do not send the letter to the hospital where the physician works, even if that was the only location your client received treatment. *Always* send the letter to the physician's address registered with the California Medical Board, which is publicly available online with the California Department of Consumer Affairs at https://www.breeze.ca.gov/ Even if the physician does not receive the letter, this is effective service. (See *Selvidge, supra*, Cal.App.5th 1279.)

Make sure the letter is specific and detailed enough to provide "the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered." (§ 364, subd. (b).) A conclusory letter that just states that the provider committed malpractice is at real risk of being deemed invalid.

Do not wait until the last possible day to send the letter. As held in *Woods*, as long as the letter is sent in the last 90 days of the statute, there is a full 90-day tolling, so that the plaintiff has a total of one year and 90 days to send the letter. Give yourself some breathing room to account for typographical errors on the letter, unexpected staff illness, or other potential issues with the letter.

Typically, I include litigation-hold language in my section 364 letter. Lastly, our office sends section 364 letters by certified mail so that we have evidence that the letter was sent.

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