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INSIGHT · MEDICAL MALPRACTICE

The 90-Day Notice of Intent: How Medical Malpractice Cases Die at the Mailbox

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California Code of Civil Procedure § 364 mandates 90 days' notice before commencing professional negligence actions against health care providers, creating strict tolling and timing rules.

I.

The Notice Requirement: CCP § 364

Code of Civil Procedure § 364 requires that, before filing a complaint for professional negligence against a health care provider, the plaintiff serve a notice of intent to commence the action. The notice must be served at least 90 days before filing. This requirement is not discretionary — failure to comply creates a defense to the complaint, and courts have dismissed actions where the notice was deficient or untimely.

The statute's purpose is ostensibly to encourage pre-litigation settlement discussions. In practice, it functions as a procedural gauntlet that requires careful compliance in every medical malpractice case.

II.

Content Requirements

The notice must include the legal basis of the claim, the type of loss sustained (including the specific injuries suffered), and the nature of the damages being sought. While § 364 does not prescribe a rigid format, the notice must contain enough factual specificity to put the provider on notice of the claims.

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Courts have developed a fact-specific analysis for sufficiency. A notice that states only "professional negligence" without identifying the specific treatment episode, the alleged breach, or the resulting injury is vulnerable to a defense challenge. Best practice is to include the dates of treatment, the identity of the providers involved, and a narrative description of the negligent acts and resulting harm.

III. The Tolling Effect

Service of the § 364 notice tolls the applicable statute of limitations for 90 days. Under CCP § 340.5, the limitations period for medical malpractice is one year from discovery (with a three-year outer limit from the date of injury). The 90-day tolling extends this period, ensuring the plaintiff is not penalized for complying with the notice requirement.

The tolling applies only if the notice is actually served — a notice that is defective or never served does not trigger tolling, and the plaintiff may find the limitations period expired during the 90-day wait.

IV. The Woods v. Young Edge Case

Woods v. Young, 53 Cal.3d 315 (1991), addressed the situation where the statute of limitations is set to expire within 90 days. If the plaintiff discovers the injury with fewer than 90 days remaining on the clock, must they still wait the full 90 days before filing? The Supreme Court held that § 364 permits the plaintiff to file the complaint simultaneously with — or even before — the notice in this narrow circumstance. The notice must still be served, but the timing requirement yields to the limitations period.

V. Substantial Compliance

The substantial-compliance doctrine provides a safety valve for notices that deviate from § 364's requirements but nonetheless achieve the statute's purpose. Courts apply a functional test: did the notice give the provider sufficient information to evaluate the claim and pursue prelitigation settlement? If so, technical defects may be excused.

However, substantial compliance has limits. A notice that omits the plaintiff's identity, the provider's identity, or any description of the alleged negligence is unlikely to survive a defense motion. Practitioners should treat substantial compliance as a fallback, not a planning tool.

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