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PRE-SUIT ACTIVITIES AND PLEADINGS

I. SCREENING POTENTIAL CASES

- A. Due to the time and financial commitment necessitated by medical malpractice cases, choosing the wrong case can be devastating to any legal practice. Having a systematic plan to evaluate potential malpractice cases helps to move the decision making process along in a timely step by step process and hopefully eliminate rash or sympathetic decisions. During the first contact potential cases can usually be classified in one of three categories which will dictate the next step: IMMEDIATE REJECTION; NEED MORE INFORMATION; VERIFICATION.
1. A decision to immediately reject a potential case can sometimes be made on a legal basis. Examples are:
 - a. Statute of limitation has expired
 - b. Insufficient damages to justify handling even assuming full liability
 - c. Situations where the Courts have ruled no such claims exist such as a Wrongful life claim, stillbirth cases, employment or insurance physicals where there is no doctor patient relationship, etc.
 - d. Conflict of interest
 2. Most potential cases fall into the need more information category. Considerable time, effort, and money must be put into properly evaluating cases including those that eventually will be rejected.
 3. Resist the temptation to immediately conclude a potential case is a winner at the early stages of the evaluation process, it may cloud your analysis and ruin your objectivity. All records must be reviewed and scrutinized to verify the facts as the potential client perceived them. All too often the client is less than accurate, or forgets to inform you of a prior condition or simply fails to understand the nature of the medical care and treatment received. Better to be skeptical than sorry!

II. CLIENT INTERVIEW

- A. Prior to requesting medical records or commencing litigation, it is essential that a thorough interview be conducted with the client. Information obtained should always include the following:
1. Complete names, addresses and telephone numbers;
 2. Date of birth;
 3. Date of death, if wrongful death action;
 4. Social security number;
 5. Marital status (is there a derivative spousal action?);
 6. Names and ages of children;
 7. Name and address of employer;
 8. Length of time unable to work;
 9. Date(s) alleged malpractice was committed;
 10. Description or narrative of alleged negligence;
 11. Description of injuries sustained;
 12. Names and addresses of all potential defendants;
 13. Names and addresses of all potential witnesses to the incident in question, conversations or elements of damages;
 14. A DETAILED PAST AND PRESENT MEDICAL HISTORY, INCLUDING:
 - a. Health status
 - b. Names and address of all treating physicians
 - c. Name and address of family physician
 - d. Dates of all visits to hospital emergency room
 - e. Dates of all hospital admissions
 - f. Dates of all medical treatments /doctors visits. Names and dates of any medical procedures. Names of prescriptions/medications. Subjective vs. objective findings. Diagnosis/Prognosis
 - g. Complete description of the medical condition, which gave rise for the medical treatment resulting in malpractice.
 - h. Medical treatment which was necessitated due to the

malpractice.

i. Extended medical history of the immediate family members (father, mother, siblings, etc. looking for potential genetic predispositions) This information can have a bearing on both liability as well as damages.

j. When plaintiff alleges a psychiatric or emotional condition get all related records no matter how remote, such as:

school counseling records
marriage counseling records
employment records
any formal psychiatric treatment records

15. Identify potential liens. See Teichman v. Community Hospital of Western Suffolk 87 NY2d 514 and its progeny. Gather all information concerning how medical bills were paid, such as:

- a. Workers' Compensation
- b. Basic and supplemental auto no-fault or underinsurance
- c. Medicaid or Medicare
- d. Private health insurance coverage (check for existence of subrogation clauses)

III. COMPUTER RESEARCH

A. Computer research is a valuable asset in gathering information about the potential defendants and as well as gaining insight into the medical issues. There are hundreds of site that are available to assist in evaluating a potential case. Some examples are:

- 1. Searching the web for background information on doctors and hospitals
 - a. New York State Health Department Office of Professional Misconduct: <http://www.health.state.ny.us/nysdoh/opmc/main.htm>

- b. American Board of Medical Specialties Certified Doctor Verification Service: <http://www.certifieddoctor.com>
 - c. American Medical Association Online Doctor Finder: <http://www.ama-assn.org/aps/amahg.htm>
2. Medical research on the web
- a. Medline Free Research: <http://www.healthgate-com/HealthGate>
 - b. Med Surf: <http://www.medsurf.com>
 - c. New England Journal of Medicine: <http://www.nejm.org>
 - d. NYS Hospitals: http://www.hanys.org/pub_comm/facility/county_nm_hm
 - e. Virtual Hospital: <http://www.vh.radiology.uiowa-edu/providers>
 - f. Yahoo Medicine: <http://www.yahoo.com/health/medicine>

IV. OBTAINING MEDICAL RECORDS

- A. Proper authorizations must be obtained from either the patient/client or the person who has been legally appointed to act on behalf of the patient/client.
- 1. All authorizations should be submitted in notarized form.
 - 2. Parent or guardian must sign authorizations for child under the age of 18 years.
 - 3. In wrongful death action, must proceed through Surrogate's Court in order to have estate representative appointed who is empowered to sign all authorizations.
 - 4. Health care providers in NYS (examining, consulting, treating physicians and hospitals) are limited to fee of \$.75 per page per PHL SS17-18

Exceptions: Ambulance services are not considered to be "providers" under PHL §517-18. If records are requested in certified form, the \$.75 per page fee limitation does not apply and the provider

may charge a higher fee

- B. Records to be obtained include:
1. All treating physicians
 2. Emergency room records (specify date treated)
 3. Hospital admission records (specify date admitted)
 4. Radiology and nuclear medicine films (Note: the actual films for CT scans, MRI's, x-rays, etc. are not part of the patient's medical records and are usually requested separately through either the radiology department or the nuclear medicine department)
 5. In cases involving injury at birth, you will need the fetal heart monitoring strips.
 6. Ambulance service records
 7. Family physician
 8. School health records
 9. Visiting nurses
 10. Pharmacy records
 11. Autopsy, pathology and toxicology reports. If you will be getting your own to examine slides, you may need to order new cuts from the original block.
 12. Therapy records (physical therapy, occupational therapy, speech therapy, special education etc.)

V. IDENTIFYING DEFENDANTS

- A. When is a hospital, PC, HMO, or individual health care provider responsible for the negligent acts of another health care provider?
1. Doctrine of respondeat superior

A defendant will be responsible for the negligent acts of their employees under common law principles of employer/employee relationship. **However, never assume that doctors, nurses or technicians are employees of hospitals PC, HMO's, etc.**

Medicine is a business and, as such, has its own business structure and classification of personnel. Examples of different medical personnel and their relationship to hospitals are:

- a. Attending physicians - generally not employed by hospital but have privileges to admit and treat patients in the hospital.
- b. Private physicians - usually are not hospital employees but may have contract with hospital to share fees in exchange for free office space and office support personnel with hospital facilities.
- c. Staff physicians - usually are hospital employees.
- d. Residents and interns - usually are hospital employees but may be paid by one hospital and work in other hospitals as part of staffing agreement between facilities.
- e. Medical students - usually "employed" by medical school, which often is a separate corporate entity from the hospital.
- f. Consulting physicians - could be any one of, or a combination of, attending, private, staff, resident/intern.
- g. Specialty groups, (E.R. physicians, radiology, anesthesiology, etc.) Hospitals are increasingly entering into contracts with independent companies or medical groups to staff various departments of the hospital. Therefore, physicians in these departments are often employed by a separate company and not directly by the hospital. See, Mduba doctrine below.
- h. Nurses/technicians - generally are hospital employees who take directions from the patient's attending M.D. An attending physician is not vicariously responsible for the negligent acts of a nurse not in his employ unless the act giving rise to the injury is one requiring close supervision and instruction. See Banks v. Barkoukis 231 Ad 2d 598 where the surgeon was not held liable for a nurse who adjusted a surgical light which then fell striking the patient because it was not an act which requires close "medical" supervision.

- i. Private duty nurses - may or may not be employees of the hospital.
 - j. Ambulance services generally are not employees of hospitals.
 - k. Midwives, Nurse Practitioners, Nurse Anesthetist, Therapist, Social Workers and other specialist are not always employees of hospitals or attendings and may actually be independent medical practitioners. Even when they are employees, you may consider naming them as defendants since they may have their own insurance policies.
 - l. HMO designated physicians may or may not be an employee of the HMO. The general rules of employee/employer relationship will apply to determine this status, but many times the physician has a relationship with the HMO whereby the physician agrees to treat the patient if the HMO refers the patient and the doctor will agree to accept the HMO's reimbursement/payment schedule. See Ingraham v. Carroll 90 NY2d 592 where the patient was referred by her HMO to defendant doctor whose office was in Vermont and the court held that the fact that the doctor agreed to see the NY HMO's patients in his office in Vermont did not confer jurisdiction on the NY courts, since the doctor was not an employee of the HMO and he always saw the patients in Vermont.
 - m. Many doctors are doing business under assumed business names that are not corporate entities and are not properly recorded as D/B/As in the appropriate clerk's offices. Also many hospitals are running clinics that are not in and of themselves separate legal entities, but are mere subdivisions of the hospital corporation. Be very careful that the appropriate defendant is identified, named and served. Always check the answer to determine if any such affirmative defenses are raised and correct the error as soon as possible.
2. The Mduba Doctrine. (Mduba v. Benedictine Hosp., 1976, 52 AD2d 450, 384 NYS2d 527).

Patient died in the emergency room of Benedictine Hospital. Administrator sued the hospital, claiming the emergency room physician's negligence resulted in decedent's death. Hospital maintained that the doctor was not its employee, but was an independent contractor hired to staff hospital's emergency room.

Trial court dismissed the complaint on the basis that the E.R. physician

was an independent contractor. Third Department reversed and ordered a new trial upon two theories: (1) that the test to be employed is one of control in respect to the manner in which the work is to be done. Juries should exam and decide whether contract between hospital and medical group provides hospital with sufficient degree of control over manner in which work is to be done. If so, hospital is liable. (2) **If defendant hospital undertook to treat decedent for a charge and to furnish the doctors and staff to render the treatment, hospital is under a duty to do so effectively.** If patients entering the hospital may properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital, then these patients are not bound by "secret limitations as are contained in a private contract between the hospital and the doctor". Hospitals will therefore be responsible for those whom they employ, even if they are independent contractors, to perform the services hospitals have undertaken.

See also Ryan v. N.Y.C. Health and Hospital Corp. AD2d 633 NYS2d 500; Gunther v. Staten Island Hospital 226 AD2d 427; Nobel v. Porter 188 AD2d 1066; Agustin v. Beth Israel Hospital 185 AD2d 203; Soltis v. State 172 AD2D 919.

In order to avoid the imposition of liability, some medical facilities (i.e. emergency rooms, clinics, etc.) are positing signs in the waiting areas indicating that certain medical personnel and services (e.g.: ER physicians, x-ray personnel, laboratory departments) are not affiliated with or employees of the medical facility. These notices will describe the relationship as one an independent entity who simply perform services within the facility. The signs are an attempt to inform prospective plaintiffs so as to defeat the Mduba Doctrine. If they can establish that the prospective plaintiff read the notice this can defeat an otherwise valid assumption that the negligent party (ER physician, x-ray technician, etc.) was an employee of the facility.

3. Independent Contractor

In Kavanaugh v. Nussbaum, 71 NY2d 535, the Court of Appeals definitively ruled that a physician who designates another doctor to "cover" for him/her is not liable for the covering doctor's own negligence in treating the referring physician's patient. In that the case the patient's regular obstetrician was unavailable when the plaintiff mother developed complications. The regular obstetrician had made arrangements for one of his colleagues (no business connection between the two doctors) to cover for him. After a full trial, and based upon the jury's responses to special interrogatories, the Court refused to impose vicarious liability upon the referring OB for the culpable acts of the covering physician. Vicarious liability,

they pointed out, is based upon the notion that one party has control over the other party. "In the absence of some recognized traditional legal relationship such as partnership, master servant, agency, or apparent authority (sometimes referred to as agency by estoppel), between physicians in the treatment of a patient can be no imposition of liability on one physician for the negligence of another. Specifically, the Court said that the simple relationship of otherwise independent physicians taking turns covering for one another does not make the physicians partners or even joint ventures. The Court recognized that physicians cannot be available on a 24-hour basis to provide medical care when patients need it, and to impose vicarious liability upon them for the acts of a physician they arranged to cover when they are unavailable would have a dampening effect upon patients having available appropriate physicians when needed.

In order to defeat this finding it's necessary to show that there is apparent authority of control or facts to prove actual control by one over the other.

This doctrine, however, does not apply to situations where both doctors are acting jointly in the treatment/diagnosis of the same patient.

4. Clearly contraindicated medical treatment
Hospital employees may be liable where attending physicians' treatment is clearly contraindicated. Most often the only duty of the hospital's employees (nursing staff, interns and medical students, technicians, etc.) is to follow the orders of the plaintiffs attending physician. However, where the attending orders a course of treatment that is clearly contraindicated, the hospital employee may have an independent duty to the plaintiff to intercede and can be found liable for failure to do so. See Nevarez v. N.Y.C. Health and Hospital Corp., AD; 670 NYS 2d 486 where an expectant mother in labor was allowed to wait almost 3 hours after the receptionist called her OB who advised the hospital staff he could not immediately come and to have the mother wait. After he arrived and examined the patient he ordered her to be transferred to another hospital and the patient had to wait another 2 hours for the ambulance. The Appellate Division second department reinstated the jury's verdict against the hospital.

5. "United in interest"
 - a. CPLR 203 (b): "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the summons is served upon defendant".
 - b. The "united in interest" doctrine was carefully reviewed by the Court

of Appeals in Mondello v. New York Blood Center, 1992, 80 NY2d 219, 590 NYS2d 19.

In Mondello, a husband brought a wrongful death action on behalf of estates of his wife and infant daughter against hospital and physicians. Husband subsequently served amended complaint naming blood collection center as additional defendant, and center moved to dismiss on limitations grounds. The Supreme Court granted center's motion to dismiss, and husband appealed. The Appellate Division reversed. On appeal, the Court of Appeals, Bellacosa, J., held that hospital and blood collection center were not so "united in interest" that amended complaint adding center as defendant related back to filing of original complaint against hospital.

The Court endorsed the "relation back" test formulated by the Second Department in Brock v. Bua: The Brock test examines whether (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well.

c. Court. Of Appeals, in Raschel v. Rish, 1986, 69 Ny2D 694, 512 NYS2d 22, held that a hospital and a doctor with admitting privileges are not "united in interest". The Court stated "mere affiliation" (as opposed to an employment relationship) cannot be the basis for a hospital's vicarious liability,

6. Malpractice during physicals required by others (i.e., defense medical exams, insurance physicals, workers' comp. exams)

There must be a doctor-patient relationship between the doctor and the plaintiff before the doctor owes a duty of care to the plaintiff. Where the doctor is hired by another to examine and render an opinion to the other person (and not to diagnose or treat the plaintiff) the doctor owes no duty to the plaintiff and will not be held liable to plaintiff for failure to correctly diagnose or recommend treatment. Exceptions may arise where the doctor affirmatively renders treatment or provides advice, which is incorrect or injures the plaintiff during the exam. See Evangelista v. Zolan 247 AD2d 508; 669 NYS 2d 325.

Also there is no claim available against a school district for failure to diagnose scoliosis during an examine performed pursuant to Educational Law Section 905 because the statute was deemed not to create a private right of recovery.

7. Duty owed to parents when treating pediatric patients.

Under certain circumstances a pediatrician may have a duty of reasonable care directly to the parents even when the doctor/patient relationship is between the child and the doctor. See Tenuto v. Lederle Laboratories 90 NY2d 17. Here, the pediatrician treated the infant with a vaccine without giving the parents an appropriate warning that there may be a risk of illness.

8. Liability of individual physicians for negligence of employees of P.C.

A physician shareholder of a P.C. may be personally liable for the negligence of the P.C. employees (technicians, nurses, nurse practitioners, midwives) if the physician does or should have provided "direct supervision and control" over the employees. See Business Corporation Law 1505(a):

Each shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation.

VI. AUTOPSIES

A. When is an autopsy done?

1. County Law Sec. 673: A coroner (or medical examiner) has jurisdiction and authority to investigate the death of every person dying within his county, or whose body is found within the county, under the following circumstances:

- a. A violent death;
- b. Death caused by unlawful act or criminal neglect;
- c. Suspicious or unexplained death;

- d. Death caused by suspected criminal abortion;
 - e. Death unattended by physician, or where no physician can certify the cause of death;
 - f. Death of a person confined in a public institution other than hospital or nursing home.
- 2. Autopsies are frequently performed upon request of the treating physician with consent of family or at the request of the family.
- B. Getting a copy of autopsy report.

County Law 677(3)(b):

- 1. Available "upon application" by personal representative, spouse or next of kin of the deceased; OR
- 2. Available via order of a court of record or justice of the supreme court to "any person who is or may be affected in a civil or criminal action by the contents of the (coroner's) record ... or any person having a substantial interest therein..."
 - a. Records of autopsies performed by coroner or medical examiner on a patient in the hospital do not become part of the hospital's patient record. Opinion-Atty. Gen. 1984-46 (informal).
 - b. Autopsy reports are not public records within the meaning of Public Officers Law Sec. 66, and are not available for inspection except under circumstances described in County Law 677. Opinion-Atty. Gen. 1972-179 (informal).

VII. DEATH CERTIFICATES

- A. In death actions, death certificates must be obtained. Important information including the cause of death is contained in the certificate. All information contained therein is prima facie evidence of facts contained therein Rule 4520 CPLR.
- B. Certified copies of death certificates are admissible into evidence at trial. It is important to ensure theory of liability and cause of death is consistent with in-

formation contained on the death certificate. When autopsies are not performed, the death certificate takes on even more importance.

VIII. LEARNING THE MEDICINE

Using the internet, even those of us who are basically computer illiterate, can obtain significant amounts of basic information on any topic of medicine. Whether it's learning what a specific medical syndrome is, its etiology or treatment, within a few minutes significant information can be obtained with little to no cost. This basic medical knowledge can prove to be a significant help in evaluating a potential medical malpractice claim.

IX. EVALUATING THE CASE

- A. Medical negligence actions are very difficult to prove and very costly. You must carefully consider the preliminary information you obtain and determine whether the end result is going to warrant the time and expense which must be put into the case. You should consider the following questions prior to committing yourself to accepting a medical negligence action:
1. What is the potential for damages, assuming liability is proved?
 2. Does the case simply involve a bad result?
 3. Is negligence provable on the basis of the medical records, or does it require proof of controverted facts?
 4. Can negligence be firmly established based on a known standard of care or will the existence of the standard itself be questioned?
 5. Who are the parties? Is it actually a medical negligence case or does it involve a defective products?
 6. Is the theory of liability based solely on informed consent?
 7. Can causation be proved?
 8. Is the claim solely based on elective cosmetic surgery?
 9. What motivates the plaintiff to bring the case?
 10. Is the attorney comfortable accepting the professional responsibility for legal management of the case and seeing the claim through to a verdict?

X. THEORY OF THE CASE

- A. As with any negligence case, the attorney should develop a theme or theory to the case. You cannot expect a jury to hear evidence in a "vacuum" and trust them to make sense of the plaintiff's claims. The attorney must weave the theory of the case throughout every aspect of the lawsuit and trial. The earlier the theory can be developed, the greater the chances of a successful outcome. The following elements should be considered in evaluating the theory of a medical negligence action:
1. **K.I.S.S.** -- Keep it simple, stupid.
 2. Develop a theory that is readily understandable. If your next door neighbor can't understand the basis of the claim in five minutes or less, chances are that a jury won't either.
 3. The more indignation you can raise by the theory of your case, the greater the chances of a successful outcome.
 4. The theory must fit with the mood and climate of when and where the case will be tried.
- B. Once the attorney has developed a theory, it must be tested against the expert's opinion, i.e., the technical proof of the case should conform and support the lay testimony, which establishes the theory of the case.

XI. THEORIES OF RECOVERY

- A. Emergency Medical Treatment and Active Labor Act (EMTALA)

This piece of Federal legislation (42 USC 1395 dd) some times referred to as "the anti-dumping statute" creates a private cause of action for civil damages. Generally, it provides that when a patient seeks treatment at an emergency room a hospital must provide appropriate medical screening examination to determine whether an emergency condition exist, and if so, must stabilize the patient and may not transfer the patient except under certain exceptions, until the condition stabilizes. See Almond v. Town of Messina 237 AD 2d 94.

B. Res Ipsa Loquitur

The general principals of res ipsa apply to medical negligence, but are sometimes difficult to apply in practice. Three elements are necessary 1) the event ordinarily does not occur except through negligence; 2) it was caused by the agency or instrumentality excessively in the defendant's custody or control; 3) must not have occurred through any actions or contributions on the plaintiff's part. See Kambat v. St Francis Hospital 89 NY2d 489 where the Court of Appeals held that plaintiff was entitled to a charge of res ipsa when she was discovered to have an 18 X 18 inch lap pad, partially imbedded in her bowel after abdominal surgery, in spite of the defendant's defense that the patient swallowed the pad. The Court sent it back for a retrial after a defense verdict but on retrial the jury once again found for the defendant Kombat v. St. Francis Hospital, N.Y. Jury Reporter, volume XVI, issue 1.

C. Lack of informed consent

This is a statutory cause of action in NYS governed by section 2805-d of the Public Health Law. The terms of which must be precisely followed to make out a valid cause of action. See Beard v. Brunswick 220 AD2d 550; 632 NYS2d 805; Laskowitz CIBA Vision Corp 215 AD2d 25; 632 NYS2d 845.

XII. NEW YORK CASE LAW LIMITATIONS ON THEORY OF RECOVERY IN MEDICAL MALPRACTICE

A. Wrongful Life

For policy reasons, the New York Court of Appeals has held that there is no actionable claim, on behalf of an infant, against a defendant doctor who negligently failed to inform parents of the risk of giving birth to a deformed or disabled child, which resulted in the parents' decision not to terminate the pregnancy. The decision is based solely upon policy grounds that a child does not have a fundamental right to be born as a whole functional human being as opposed to not being born at all (i.e. termination of pregnancy by abortion). However, the parents do have a valid claim for the extra cost of raising a handicapped child over and above the cost of raising a normal child. But, there is no recovery for the parent's psychic or emotional harm as a consequence of having an impaired infant. Becker v. Schwartz 46 NY2d 401.

B. Stillbirths

The Court of Appeals has held that there is no action which can be maintained for wrongful death of a fetus which is stillborn, even when it can be established that the stillbirth was caused through the negligence of a defendant doctor. Additionally, there is no claim which can be brought by the mother for emotional injuries caused by the harm done to her child in utero of which she did not learn until the birth, which occurs sometime after the harm was inflicted. The mother can only have a claim for damages if she can establish that she also was the object of malpractice and that she sustained an injury separate and apart from those which are normally incurred during labor and delivery. See Tebbutt v. Virostek 65 NY2d 931; Prado v. Catholic Medical Center of Brooklyn 145 AD2d 614.

XIII. EXPERTS

A. After obtaining all medical records, they should be reviewed as thoroughly as possible by legal staff in order to determine what medical specialist should review the records. Generally, all medical records must be submitted to a physician for review. Let the expert decide what is important and what is irrelevant. Attorneys should also summarize the allegations of negligence in order to focus the expert's attention upon the legally relevant portions of the case. Without this type of roadmap, the expert may needlessly consume significant amounts of time (and money) reviewing aspects of a patient's medical history that have no bearing upon the proposed lawsuit. However, care must be taken to balance the competing aspects of focusing the doctor's attention and giving the doctor sufficient freedom to explore all aspects of improper care and the consequences thereof.

B. How to obtain an expert:

1. The fastest way to obtain an expert is to contact one of several companies, which maintain large networks of medical personnel who are available to provide expert review and/or testimony. Examples of such groups are:

American Association of Medico-Legal Consultants
50 Sutton Place South
New York, NY 10022
212-371-9882

Rieback Medical-Legal Consultants

1859 North Pine Island Road
Suite 315
Fort Lauderdale, FL 33322
305-749-0105
305-749-0462 (FAX)

New England Medical Legal Consultants, Inc.
11 Beacon Street
Boston, MA 02108
617-720-4434
617-720-4611 (FAX)

Medident Consulting
4699 N. Federal Highway
Suite 209N
Pompano Beach, FL 33064
305-942-1751
800-258-2606
305-946-5691 (FAX)

Medical Advisors, Inc.
Mulberry Atrium
Suite 405
Philadelphia, PA 19103
215-496-9955
800-666-7045

Medical-Legal Review, Inc.
430 South Front Street
Columbus, OH 43215
614-224-8900
800-372-3332
614-224-9233 (FAX)

Medilex
175 East 96th Street
Suite 8H
New York, NY 10128
212-860-8700
212-860-8263 (FAX)

Medical Review Foundation, Inc.
Route 2, Box 642-E,
Summerland Key, FL 33042

800-336-0332

MedQuest, Ltd.
211 East 43rd Street
Suite 2002, New York, NY 10017
212-557-3733
212-692-9265 (FAX)

Medically Dedicated, Inc.
Suite 300B
1519 Connecticut Avenue, NW
Washington, DC 20036
202-588-1222 or 800-634-3744
202-588-1220 (FAX)

Dr. Steven E. Lerner & Associates
10 Woodrose Court
San Rafael, CA 94901-1594
415-453-6900

Technical-Advisory Service for Attorneys, (TASA)
Headquarters Office:
428 Pennsylvania Avenue
Fort Washington, PA 19034-3479
215-643-5252
215-643-5557 (FAX)

Medical Review Associates, Inc.
340 East 64th Street
New York, NY 10021

- C. Review prior cases to find which physicians have testified in similar cases. This can be done through the Jury Reporter or, if the case was appealed, by using computer searches such as Lexis.
- D. Perform an independent search to determine names of physicians who are considered to be national experts in the specific relevant field of medicine. This can be done by independently reviewing medical literature that identifies authors of important articles and texts, or by asking physicians or nurses who practice within a specific field of medicine. Also contacting medical schools or teaching hospitals can oftentimes result in locating the most appropriate expert.
- E. One resource which lawyers often fail to consider is the subsequent at-

tending physician. Since this person plays an integral part in attempting to correct or otherwise deal with the condition of the Plaintiff who may have been a victim of malpractice, it is wise to attempt a conference with the physician to determine the client's present status, the scope of damages and if possible what might have been done different before this physician became involved with the case.

- F. After an appropriate expert is selected make sure to send all records and transcripts. It may also be beneficial to focus the expert's attention to specific issues, especially when the records are voluminous. Care must be taken to point out aspects of the case with out inadvertently appearing to suggest a desired opinion. When the expert is prepared to discuss the case, make arrangements to meet with the physician if possible. Jurors are influenced by more than just the credentials of an expert. Before the meeting make a list of important topics and questions with reference to the medical records where appropriate to eliminate forgetting an important topic and to prevent fumbling during the meeting.

XIV. STATUTE OF LIMITATIONS AND CLAIMS AGAINST MUNICIPAL AND GOVERNMENT AGENCIES

- A. CPLR 214-a: For medical, dental and podiatric malpractice: two and one-half years.
- B. Exceptions
 - 1. Continuous treatment: The two and one-half years does not begin to run until "last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure".
 - a. There are two necessary elements:
 - (1) Continuous treatment must be for same condition;
 - and
 - (2) the treatment must be with the same doctor or facility.
 - b. Continuous treatment does not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. (CPLR 214a).
 - c. The continuous treatment doctrine has been narrowly ap-

plied by the Court of Appeals. In Nvkorchuk v. Enriclues, 1991, 78 NY2d 255, 573 NYS2d 434, patient went to gynecologist for routine examination. Doctor noticed a lump on her breast, which he concluded, was not malignant but he indicated that he would have to "keep an eye on it." Plaintiff had routine checkups with this physician, as well as medical treatment for unrelated conditions, for a period of several years. Eventually the patient was diagnosed with breast cancer and she alleged that the defendant failed to properly make the diagnosis and/or to properly monitor the condition. The Court of Appeals rejected the theory of continuous treatment, holding that the plaintiff merely underwent routine checkups and that merely "keeping an eye" on a lump did not constitute a course of treatment for the lump and, therefore, the continuous treatment doctrine did not apply. See also Young v. N.Y.C. Health and Hospitals Corp., 91 NY2d 291, and Allende v. N.Y.C. Health and Hospitals Corp. 90 NY2d 333.

- d. Also in 1991, the Court held no "continuous treatment" was established with respect to an IUD when the patient, after having the IUD inserted, returned to the same doctor for routine gynecological examinations. Massie v. Crawford, 78 NY2d 516, 577 NYS2d 223.

- 2. Foreign object: "Where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier." (CPLR 214-a) . The statute also notes that the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid.

- a. In Rockefeller v. Moront, 1993, 81 NY2d 560, the Court of Appeals held that to be "foreign", the object must be one which was left in the body without any continuing treatment purpose, such as temporary surgical devices.

- 3. CPLR 208 (Infancy and mental incompetence)

- a. As a general rule, if a cause of action accrues in favor of an infant, the statute of limitations is tolled until the infant reaches his 18th birthday. However, if the claim is for medical malpractice, the maximum time within which to com-

mence the action is 10 years from accrual of the claim.

- b. If the med/mal cause of action accrues to a plaintiff under a disability because of insanity, the two and one-half years does not begin to run until the disability ends. However, the maximum extension afforded by the statute is 10 years, measured from the day the cause of action accrues.
- c. The ten-year toll for infancy cannot be tacked on to other tolling provisions. See, Matter of Daniel J. v. N.Y.C.H. & H.C., 77 NY2d 630. There, the Court noted that the maximum ten year period for an infant to sue "runs from the date of the negligent act or omission and not from the date of the termination of. any continuous treatment."

4. Wrongful death: 2 years

- a. Statute of limitations is two years, running from the date of decedent's death. (EPTL Sec. 5-4.1) In order for the action to be maintained, the statute also requires the decedent to have died at a time when, had he lived, he could have sued for his own personal injuries. Therefore, if the underlying cause of action expires before decedent dies, decedent's survivors may not maintain a wrongful death action.

5. The Municipal Defendant - Notices of Claim.(i.e. County run hospitals or health clinics)

- a. A municipal defendant, pursuant to General Municipal Law Sec. 50-d, may be sued for medical malpractice, but the plaintiff must comply with notice requirement (within 90 days of accrual of claim) of GML 50-e(l)(a).
- b. Permission to file late notice of claim (GML, 50-e(5)) will often be granted by the courts in actions for medical malpractice, such as was the case in Matter of West v. New York City Health and Hospitals Corp 195 AD2d 517, 600 NYS2d 268 (1993, 2d Dep't).

In West, the parents of an injured infant filed a claim five years after the birth of the child at the defendant hospital. The court held the appellant (hospital) had actual knowledge of the essential facts constituting the claim of malpractice within 90 days of the alleged malpractice, as they provided prenatal care to the mother, delivered the infant, and provided

treatment in a neurology clinic for over a year after the infant's birth. In essence, the defendant had ample documentation of the event through the patient's medical records, which were created by the defendant. Moreover, the appellants failed to show that they were prejudiced by the delay.

- c. After Notice of Claim has been filed, an action must be commenced within one year and ninety days after the event; except that wrongful death actions shall be commenced within two years after death (GML 550-i (1)).
6. State facilities: Notice of Intention to File Claim and Notice of Claim. (i.e. State Psychiatric Hospitals or Clinics or treatment to a prisoner while in a state prison).
 - a. In malpractice claims to be brought against a state facility, the provisions of the Court of Claims Act must be complied with. Under Section 10(3) of the Court of Claims Act, a claim to recover damages for injuries caused by the negligence or unintentional tort of an officer or employee of the State, while acting as an officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall file within such time, a written notice of intention to file a claim, in which event the claim shall be filed with two years after the accrual of the claim.
7. Suits against Federal Government (i.e. V.A. Hospital)
 - a. The provisions of the Federal Tort Claim Act (passed in 1946) must be complied with, providing that claims by injured parties shall initially be submitted (within 2 years after such claim accrues) to the appropriate federal agency before suit is actually brought. If settlement is not achieved at the administrative level (or six months has elapsed from the time of filing with no action taken), the claimant may bring suit in a U.S. District Court, where the action is tried to the court sitting without a jury.
 - b. The alleged federal tortfeasor must have been an employee of the government at the time of the alleged wrongful act or omission and the employee must have been acting within the scope of his or her employment.

XV. COMPLAINTS AND BILLS OF PARTICULARS

- A. Requirements for complaints. See sample Complaint in appendix.
1. Appropriate Certificate of merit signed by attorney must be attached to Complaint (CPLR 3012-a);
 2. In any action for medical, dental or podiatric malpractice, a certificate, executed by the attorney, must state either:
 - a. The attorney has reviewed the facts of the case and consulted with at least one physician in a medical malpractice case, or dentist in dental malpractice action, or podiatrist in podiatric malpractice action, who is licensed to practice their profession and who the attorney believes is knowledgeable in the relevant issues and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis to commence action; OR
 - b. The attorney was unable to obtain a consultation because of limitations of time and that a certificate could not be obtained before SOL expired, BUT the certificate is required to be filed within ninety days after service of complaint; OR
 - c. Attorney was unable to obtain consultation required in order to certify merit because he has made three separate good faith attempts with three separate physicians, dentists or podiatrists, and none would agree to a consultation.
 - d. Where attorney intends to rely solely on doctrine of res ipsa loquitur this requirement is inapplicable.
- B. Demand for relief in complaint:
1. In medical or dental malpractice action, complaint, counter-claim, cross-claim, interpleader complaint, or third-party complaint shall contain a prayer for general relief, which shall not state the amount of damages to which the pleader demands himself entitled CPLR 3017-(c). If the action is brought in Supreme Court, the pleading shall state that the amount of damages sought exceeds the jurisdictional limits of all lower courts, which would otherwise have jurisdiction. The party against whom the action for medical or dental malpractice is brought may at any time request a supplemental demand setting forth total damages to which a pleader deems himself

entitled. Under such circumstances, the supplemental demand shall be provided with fifteen days of the request.

2. Notice of medical Malpractice Action must be filed by plaintiff within 60 days of receipt of defendant's Answer, (CPLR 3406) (The notice is designed to trigger the scheduling of a pre-trial conference that will expedite the action. The Court of Appeals has held that the plaintiff's omission to serve a timely notice under CPLR 3406(a) can be punished with money sanctions, but not a dismissal).
3. Completed Request for Judicial Intervention (along with \$75.00 fee) must be filed with Notice of Medical Malpractice action.

(SEE SAMPLE FORMS IN APPENDIX TO THIS OUTLINE)

C. Bills of Particulars

1. When plaintiff is served with a demand for a bill of particulars, the general requirements of CPLR 3041, et seq, apply. Under Rule 3043, CPLR, specific items may be asked in personal injury actions, including medical malpractice actions. Under subdivision (a)(3), a defendant may ask for a general statement of the acts or omissions constituting the negligence claim.
2. When do defendant's demands become impermissible? Does plaintiff have to respond to questions such as "state what medical specialty plaintiff claims should have been consulted, state what procedures that were performed will be claimed to be unnecessary; set forth what medications should have been prescribed; state in detail what surgical procedure should have been undertaken, providing in detail the sequence to be followed by the surgeon."
 - a. In medical malpractice actions, demands and requests for bills of particulars which seek evidentiary material and expert medical opinion testimony are improper demands. Dellaglio v. Paul, 673 NYS 2d 212, Rockefeller v. Hwang, 1 AD2 817, Wadler v. Stern, 124 AD2d 725, McKenzie v. St. Elizabeth Hospital, 81 AD2d 1003. These cases stand for the proposition that if an item demanded in a bill of particulars calls for evidentiary material or requires knowledge beyond the ken of lay persons, the demands are improper. A bill of particulars in a medical malpractice action, as in any action for personal injuries, requires only a "general statement of the acts or omissions constituting the negligence claimed." CPLR

3043 (a)(3). "We apprehend no beneficial reason to put the plaintiff in a malpractice action (who most often is less likely than the defendant to have knowledge of proper "surgical procedures", "medicines", and "tests") to a greater burden than plaintiffs in other types of personal injury actions. As has often been stated, the purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial, but not to provide evidentiary material." Koughlin v. Festin, 385 NYS2d 166.

3. Plaintiff should always serve a demand for bill of particulars as to the defendant's affirmative defenses, i.e.:
 - Culpable conduct
 - Assumption of risk
 - Want of care
 - Contributory negligence
 - Lack of personal jurisdiction

Check above affirmative defenses with regard to any allegations made against parent or guardian of an infant plaintiff

4. Always demand identification of any co-tortfeasors.
5. BOP's must be verified by the client unless client resides outside of the county where his/her attorney maintains offices. In that event, attorney may verify on behalf of the client.
6. Never underestimate the need to be thorough in the Bill of Particulars. If a theory of negligence is not properly explored and stated either in the Complaint or Bill of Particulars, the trial Justice may well preclude the Plaintiff from offering proof on that theory at trial.

(SEE SAMPLE FORMS IN APPENDIX TO THIS OUTLINE)

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF

**MOTHER PLAINTIFF
and FATHER PLAINTIFF,
Individually, and as
Parents and Natural
Guardians of
INFANT PLAINTIFF,**

Index No.

Plaintiffs,

-against-

SUMMONS

**DEFENDANT OB,
DEFENDANT OB, P.C.,
DEFENDANT C.N.M., and
DEFENDANT HOSPITAL,**

Defendants.

To the above-named Defendant(s):

DEFENDANT OB, (address)

DEFENDANT OB, P.C., (address)

DEFENDANT C.N.M., (address)

DEFENDANT HOSPITAL, by serving the Secretary of State of New York.

You are hereby Summoned and required to serve upon the plaintiffs' attorneys an Answer to the Complaint in this action within twenty days after the service of this summons, exclusive of the day of service, or within thirty days after service is complete if this Summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated:

POWERS & SANTOLA, LLP
Attorneys for Plaintiff(s)
39 N. Pearl St., 2nd Floor
Albany, New York 12207-2785
518-465-5995

Trial is desired in the County of _____ . The basis of venue designated above is that
plaintiffs reside in the County of _____, State of New York.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF

**MOTHER PLAINTIFF
and FATHER PLAINTIFF,
Individually, and as
Parents and Natural
Guardians of
INFANT PLAINTIFF,**

Index No.

Plaintiffs,

-against-

COMPLAINT

**DEFENDANT OB,
DEFENDANT OB, P.C.,
DEFENDANT C.N.M., and
DEFENDANT HOSPITAL,**

Defendants.

Plaintiffs, **MOTHER PLAINTIFF and FATHER PLAINTIFF, Individually, and as Parents and Natural Guardians of Infant Plaintiff**, by and through their attorneys, **POWERS & SANTOLA, ESQS.**, as and for a Complaint herein, allege that, at all times hereinafter mentioned:

1. Plaintiffs, **MOTHER PLAINTIFF and FATHER PLAINTIFF**, are residents of County, State of New York.
2. Plaintiffs, **Mother Plaintiff and Father Plaintiff**, are the natural mother and father of the **INFANT PLAINTIFF**.
3. **INFANT PLAINTIFF** was born on February 13, 1994, at Defendant Hospital, defendant herein.

4. Defendant OB, was and is licensed to practice the profession of medicine in the State of New York.

5. Defendant OB, engaged in the practice of obstetrical and gynecological medicine.

6. Defendant OB, held himself out to the parents of INFANT PLAINTIFF as being a physician who confined his medical practice to the specialty of obstetrics and gynecological medicine.

7. Upon information and belief, Defendant OB, P.C., is a professional corporation organized and existing by virtue of the laws of the State of New York.

8. Upon information and belief, Defendant OB, was an employee and principal of the defendant, Defendant OB, P.C.

9. Upon information and belief, Defendant OB, has a medical office located at , County, New York.

10. Upon information and belief, Defendant C.N.M., is a nurse duly licensed in the State of New York.

11. Defendant C.N.M., held herself out to the plaintiffs to be a qualified midwife.

12. Upon information and belief, Defendant C.N.M., was a certified nurse midwife.

13. Upon information and belief, at all times herein mentioned, the defendant, Defendant C.N.M., was an employee of the Defendant OB.

14. Upon information and belief, at all times herein mentioned, the defendant, Defendant C.N.M., was an employee of the defendant, Defendant OB, P.C.

15. Upon information and belief, at all times herein mentioned, the defendant, Defendant C.N.M., was permitted to act as a midwife in the State of New York only under the direct supervision of a licensed physician.

16. Upon information and belief, at all times herein mentioned, the defendant, Defendant C.N.M., was acting under the supervision of the Defendant OB.

17. Upon information and belief, at all times herein mentioned, the defendant, Defendant C.N.M., acted as, and otherwise performed services as, a midwife.

18. Defendant Hospital, is a corporation organized and existing by virtue of the laws of the State of New York.

19. Defendant Hospital, maintains its principal place of business in the City of _____, County of _____, State of New York.

20. Defendant Hospital, was and is engaged in conducting the business of operating a hospital in the City of _____, County of _____, State of New York.

21. In the furtherance of its business, Defendant Hospital, through its employees, agents and/or designees, would examine, diagnose, treat and provide health care to patients admitted to its hospital.

22. Upon information and belief, in the furtherance of its business of operating a hospital, the Defendant Hospital, would hire and otherwise assign various interns and/or residents to perform services for patients admitted at its hospital.

23. Upon information and belief, the Defendant Hospital, granted privileges to certain physicians to admit their patients into its hospital.

24. Upon information and belief, the Defendant Hospital, granted privileges to

Defendant OB, to admit his patients into its hospital.

AS AND FOR A FIRST CAUSE OF ACTION

Plaintiffs repeat and reallege all of the allegations in this Complaint marked and designated "1" through "24" with the same force and effect as if herein set forth at length, and further alleges that:

25. In approximately the month of July, 1993, Defendant OB, diagnosed MOTHER PLAINTIFF as being pregnant and agreed to provide obstetrical medical care to her, which services included the delivery of the expected infant.

26. Thereafter, at various times during Mother Plaintiff's pregnancy, Defendant OB, examined and provided gynecological and/or obstetrical advice to the plaintiff.

27. From approximately July 5, 1993, through February 13, 1994, the Defendant OB, provided pre-natal care to Mother Plaintiff and her unborn infant.

28. From approximately July 5, 1993, through February 13, 1994, the Defendant OB, P.C., provided pre-natal care to Mother Plaintiff and her unborn infant.

29. In approximately the month of July, 1993, Defendant C.N.M., diagnosed that MOTHER PLAINTIFF was pregnant and agreed to provide obstetrical medical care to her, which services included the delivery of the expected infant.

30. Thereafter, at various times during Mother Plaintiff's pregnancy, defendant, Defendant C.N.M., examined and provided gynecological and/or obstetrical advice to the plaintiff.

31. From approximately July 5, 1993, through February 13, 1994, the defendant, Defendant C.N.M., provided pre-natal care to Mother Plaintiff and her unborn infant.

32. On February 12, 1994, at approximately 1:00 P.M., Mother Plaintiff experienced a spontaneous rupture of the placental membranes.

33. Thereafter, pursuant to the instructions of the defendants, Defendant C.N.M., and/or Defendant OB, Mother Plaintiff presented herself to Defendant Hospital on February 12, 1993, at approximately 5:00 P.M., but shortly thereafter MOTHER PLAINTIFF was discharged home.

34. On February 12, 1993, at approximately 9:00 P.M., Mother Plaintiff returned to Defendant Hospital and, at this time, she was admitted under the services of the defendants, Defendant C.N.M., DEFENDANT OB.

35. Upon admission to the hospital, Defendant OB, was designated as Mother Plaintiff's primary physician.

36. Upon admission to the hospital, Defendant C.N.M., was designated as Mother Plaintiff's nurse midwife.

37. Shortly after her admission to the hospital, Mother Plaintiff was examined by Defendant C.N.M., at which time said defendant gave various medical instructions and orders to those individuals attending to the care and treatment of Mother Plaintiff at Defendant Hospital.

38. From the time that Mother Plaintiff was admitted to Defendant Hospital until the time she was discharged, Defendant C.N.M., gave certain instructions, directions and orders to various individuals who were attending to the care and treatment of Mother Plaintiff at the hospital.

39. At approximately 8:50 A.M. on February 13, 1993, the infant was delivered

vaginally by the Defendant C.N.M.

40. Upon information and belief, Defendant OB, was not in attendance at Defendant Hospital during Mother Plaintiff's course of labor.

41. Upon information and belief, Defendant OB, was not in attendance at Defendant Hospital during Mother Plaintiff's delivery of the infant.

42. Upon his delivery, the INFANT PLAINTIFF was not breathing and had no heartbeat.

43. In the delivery room, the infant required prolonged resuscitation measures.

44. At the time of the infant's delivery, no physician was immediately in attendance.

45. Following his birth, the INFANT PLAINTIFF was admitted to the Neonatal Intensive Care Unit at Defendant Hospital where he required extensive medical care and treatment to minimize, alleviate and/or treat the conditions he was suffering from.

46. That the defendants, individually, and jointly and severally through their agents, servants, employees, associates and/or subcontractors, carelessly and negligently rendered medical care and treatment to the plaintiff, Mother Plaintiff, which was not in accordance with good and accepted medical practices.

47. That the defendants, individually, and jointly and severally through their agents, servants, employees, associates and/or subcontractors, carelessly and negligently rendered medical care and treatment to the INFANT PLAINTIFF, which was not in accordance with good and accepted medical practices.

48. That the INFANT PLAINTIFF has sustained catastrophic and permanent

personal injuries as a direct and proximate result of the negligence of the defendants, acting either individually or jointly.

49. As a result of the negligence of the defendants, INFANT PLAINTIFF has been severely and permanently injured, has required and will continue to require in the future further medical care, aid, attention, treatment and special services. He has and will continue to incur pain, suffering, disability and immense psychological and emotional injury and damages. He suffers from a loss of enjoyment of life and loss of quality of life, has been and will be permanently handicapped, has suffered impairment of cognitive abilities, will lose considerable sums of money by virtue of an inability to either obtain employment or reach the level of employment he otherwise would have been able to sustain, and will require life-long supervision, care and attention. Additionally, he will incur the damages and injuries which normally follow such occurrences as set forth in this complaint.

50. By reason of the foregoing, INFANT PLAINTIFF has been substantially damaged and said damages exceed the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

AS AND FOR A SECOND CAUSE OF ACTION

Plaintiffs repeat and reallege those allegations of the Complaint marked and designated "1" through "24" and "25" through "49" with the same force and effect as if herein set forth at length and further allege:

51. That at no time during the aforesaid care and treatment were the infant plaintiff's parents ever advised, either orally or in writing, of the possible risks and dangers, or of the possibility of permanent damage occurring to the infant plaintiff's brain and/or

body with regard to the care being rendered, nor were the infant's parents ever advised that the infant plaintiff may suffer severe and personal damages and, had the defendants or any of their agents, servants, employees, associates and/or subcontractors informed or advised the plaintiffs, Mother Plaintiff and Father Plaintiff, of the possible risks and dangers involved, they would not have been lulled into a false sense of security and would not have consented to the treatment rendered which resulted in damages to the infant plaintiff in the manner aforesaid.

52. That a reasonably prudent person in the plaintiffs' position would not have undergone or allowed the treatment had they been fully informed, and such a lack of informed consent is a further proximate cause of the plaintiffs' injuries and damages for which recovery is sought.

53. That the damages sustained by the infant plaintiff and his parents are in excess of the jurisdictional limits of all the lower courts which would otherwise have jurisdiction of this action.

AS AND FOR A THIRD CAUSE OF ACTION

Plaintiffs repeat and reallege those allegations of the Complaint marked and designated "1" through "24", "25" through "49", "51" and "52" with the same force and effect as if herein set forth at length and further allege:

54. That plaintiffs, Mother Plaintiff and Father Plaintiff, are the parents and natural guardians of Infant Plaintiff and, as such, are responsible for the necessities and support of the infant plaintiff and are entitled to his services, society and companionship.

55. That plaintiffs, Mother Plaintiff and Father Plaintiff, by reason of the negli-

gence of the defendants herein, have incurred, and in the future will continue to incur, a loss of income and expenses for the medical care and treatment, rehabilitation, hospitalization, therapies, education and institutionalization of the infant plaintiff and, further, have been deprived of the services, society, and companionship of their son, Infant Plaintiff.

56. By reason of the foregoing, Mother Plaintiff and Father Plaintiff have been substantially damaged and said damages exceed the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

WHEREFORE, plaintiffs demands judgment against the defendants:

a. On the First Cause of Action, in a sum of money having a present value which exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction of this matter;

b. On the Second Cause of Action, in a sum of money having a present value which exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction of this matter;

c. On the Third Cause of Action, in a sum of money having a present value which exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction of this matter;

d. Together with the costs and disbursements of this action.

DATED:

Attorney signature
Address

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF

**MOTHER PLAINTIFF
and FATHER PLAINTIFF,
Individually, and as
Parents and Natural
Guardians of
INFANT PLAINTIFF,**

Index No.

Plaintiffs,

-against-

CERTIFICATE OF MERIT

**DEFENDANT OB,
DEFENDANT OB, P.C.,
DEFENDANT C.N.M., and
DEFENDANT HOSPITAL**

Defendants.

STATE OF NEW YORK

COUNTY OF

DANIEL R. SANTOLA, being duly sworn, deposes and says:

1. That I am an attorney admitted to practice law before the Courts of the State of New York and I maintain an office for the practice of law at 39 N. Pearl St., 2nd Floor, Albany, New York 12207-2785.
2. That I have reviewed the facts of the case and have consulted with at least one physician who is licensed to practice medicine in this State.
3. That I reasonably believe said physician is knowledgeable in the relevant issues involved in this particular action.

4. That I have reasonably concluded, based upon such review and consultation, that there is a reasonable basis for the commencement of this action.

5. That this certification is being made pursuant to Section 3012-a(a) of the Civil Practice Law and Rules.

DANIEL R. SANTOLA

Sworn to before me this _____
day of _____, 200__.

Notary Public

Malpractice Calendar No. _____ Reserved for _____
Clerk's use

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

**MOTHER PLAINTIFF and
FATHER PLAINTIFF, Individually, and
as Parents and Natural Guardians of
Infant Plaintiff,**

Index No.

Plaintiffs,

-against-

**NOTICE OF MEDICAL
MALPRACTICE ACTION**

**DEFENDANT OB,
DEFENDANT OB, P.C.,
DEFENDANT C.N.M., and
DEFENDANT HOSPITAL,**

Defendants.

Please take notice that the above action for medical malpractice was commenced by service of a summons on July 22, 1996; that issue was joined therein on August 5, 1996; and that the action has not been dismissed, settled or otherwise terminated.

1. Full name and address and age of each plaintiff:
2. Full name and address of each defendant:
3. State the alleged medical specialty of each individual defendant, if known:
4. The claim is for (please check):

Medical malpractice
 Podiatric malpractice
 Dental malpractice

5. The dates and places claim arose:

6. The substance of the claim is:

7. (The following items must be checked):

Proof is attached that authorizations to obtain medical, dental and hospital records have been served upon the defendants in the action.

Demand has not been made for such authorizations.
(strike out if inapplicable).

Copies of the summons, notice of appearance, all pleadings and the bill of particulars, if one has been served, are attached.

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

A request for such information has not been made.

Such information is not available.

8. State the name, addresses and telephone numbers of counsel for all parties.

POWERS & SANTOLA, LLP
Attorneys for Plaintiffs
39 North Pearl Street
Albany, New York 12207
(518)465-5995

DATED: _____, 200____.

Daniel R. Santola, Esq.
POWERS & SANTOLA, LLP
Attorneys for Plaintiff
39 N. Pearl St., 2nd Floor
Albany, New York 12207
(518)465-5995

STATE OF NEW YORK
SUPREME COURT

COUNTY OF

**MOTHER PLAINTIFF
and FATHER PLAINTIFF,
Individually, and as
Parents and Natural
Guardians of
INFANT PLAINTIFF**

Index No. 4174-96

**VERIFIED BILL OF
PARTICULARS**

Plaintiffs,

-against-

**DEFENDANT OB,
DEFENDANT OB, P.C.,
DEFENDANT C.N.M., and
DEFENDANT HOSPITAL,**

Defendants.

TO: Defendant, **DEFENDANT OB, DEFENDANT OB, P.C.**

Plaintiffs, **Mother Plaintiff and Father Plaintiff Individually, and as Parents and Natural Guardians of Infant Plaintiff**, as and for their verified bill of particulars in response to the demand of the defendant, **DEFENDANT OB, DEFENDANT OB, P.C.**, dated August 21, 1996, state as follows:

AS TO THE FIRST CAUSE OF ACTION:

1. State the first and last dates on which it is claimed the defendants treated or advised for the conditions complained of herein.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary mate-

rial or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

However, without the foregoing objection, plaintiffs can state that, upon information and belief, Mother Plaintiff came under the care and treatment of the defendant, Defendant Hospital, on or about February 12, 1994. Further, upon information and belief, Mother Plaintiff came under the care and treatment of the Defendants, M.D., Defendant, M.D., P.C., and Defendant, C.N.M., during the month of July, 1993. However, plaintiffs will rely upon the information contained within each defendant's medical chart as to the exact dates.

2. State where each treatment or advice was rendered or given.

ANSWER: Upon information and belief, the incidents complained of occurred at Defendant Hospital, _____, _____, New York, and/or at the business offices of the Defendant OB, and/or Defendant OB, P.C., located in _____, New York.

3. State the condition or conditions which the defendants undertook to treat.

ANSWER: The Defendant OB, Defendant M.D. P.C., commenced their care and treatment of plaintiff Mother Plaintiff in July of 1993 as a result of her pregnancy. From the same period of commencement the defendants were also providing care and treatment to the Infant Plaintiff and continued to care for and treat both plaintiffs up until a time after the infant's birth.

4. Each and every act of omission and commission constituting the negligence and medical malpractice with which the plaintiff charges the answering defendants.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

However, without waiving the foregoing objection, plaintiffs can state that, at this time, they will contend that the Defendant M.D. and Defendant OB, P.C. was negligent in

the following manner:

- (a) In failing to recognize that Mother Plaintiff was undergoing a complicated labor and delivery;
- (b) In failing to take the appropriate measures to ensure that Mother Plaintiff received optimal obstetrical care, including that her case be handled by an experienced obstetrician, as opposed to a nurse-midwife and/or an inexperienced obstetrician;
- (c) In failing to take timely and appropriate steps to reassure fetal well-being shortly after an external fetal heart monitor was employed;
- (d) In failing to employ the use of an internal fetal heart monitor;
- (e) In removing the external monitor despite the fact that the fetal heart monitor readings were not reassuring;
- (f) In allowing the external monitor to remain off of the patient for unacceptably long periods of time;
- (g) In failing to take appropriate, timely, corrective measures when it was known, or should have been known, that the fetal heartbeat was poor and that the fetus was being deprived of oxygenation;
- (h) In failing to take the appropriate steps to ensure fetal well-being;
- (i) In failing to appropriately and timely intercede with medical treatment and/or diagnostic techniques to ensure fetal well-being;
- (j) In failing to recognize that the fetus was experiencing distress;
- (k) In failing to use, employ and/or ensure good quality fetal heart-rate tapes;
- (l) In failing to promptly recognize and understand the warning signs which

were demonstrated on the external fetal monitor readings;

(m) In failing to take the timely and appropriate steps to alleviate the fetal distress before significant and irreversible damage occurred;

(n) In failing to be aware of the quality and fluctuations of the fetal heartbeat at timely and proper intervals;

(o) In failing to properly recognize, diagnose, treat and prevent late and variable and sustained decelerations and loss of variability of the cardiac rate, as shown on the fetal heart monitor strips of the infant plaintiff;

(p) In failing to implement procedures to correct the fetal heart-rate pattern, oxygenation and/or to utilize utero-fetal resuscitation measures;

(q) In failing to take the appropriate steps to ensure the fetus was receiving proper blood flow and oxygenation;

(r) In failing to obtain a scalp Ph reading from the fetus;

(s) In permitting Mother Plaintiff to continue with her labor when the health care providers were not provided with reassuring fetal heart rates, conditions or oxygenation;

(t) In failing to conform to accepted standards for the use of fetal heart-rate tapes at the time and place and under the circumstances then existing;

(u) In failing to immediately hospitalize, or arrange for the immediate hospitalization of Mother Plaintiff upon receiving her first report of the early stages of labor;

(v) In failing to appropriately and timely discuss with Mother Plaintiff whether or not a Caesarean section was warranted, recommended or suggested;

(w) In failing to timely initiate a course of action for preparing the operating room

for an emergency Caesarean section;

(x) In failing to take the appropriate steps to contact a pediatrician to ensure his/her presence at the moment of delivery;

(y) In failing to contact the neonatal intensive care team to ensure its presence at the delivery;

(z) In failing to ensure the appropriateness of management of meconium aspiration;

(aa) In failing to take the appropriate steps to ensure that adequate suctioning was performed by experienced medical personnel;

(bb) In allowing and/or permitting the deterioration of the metabolic equilibrium of the child;

(cc) In failing to ensure immediate post-birth assistance was available from pediatric experts and/or specialists;

(dd) In failing to ensure the appropriate pediatric staff was available upon delivery of the plaintiff so as to adequately and timely treat the presence of meconium;

(ee) In failing to respond to an initial request for post-birth assistance;

(ff) In failing to provide immediate post-birth assistance and care to the infant plaintiff;

(gg) In failing to timely and properly intubate the infant plaintiff;

(hh) In allowing Defendant C.N.M. to provide nurse-midwifery services at Defendant Hospital to a woman other than an uncomplicated woman in labor, in contravention of her approval by the said hospital and/or the New York State Health Department;

(ii) In allowing Defendant C.N.M. to provide nurse-midwifery services at Defendant Hospital without the supervision of the Defendant, M.D.;

(jj) In allowing Defendant C.N.M. to provide unsupervised or improperly supervised nurse-midwifery services at Defendant Hospital when she did not have the authorization and/or the approval to do so;

(kk) In allowing Defendant C.N.M. to provide medical services to a patient at Defendant Hospital in contravention of her permission and/or approval by the hospital and/or the State of New York by allowing her to directly manage the case, and to make decisions as to the timing of vaginal examinations, fetal monitoring and admission orders, all in contravention of the permission and authority granted to Defendant C.N.M. by the New York State Health Department and/or Defendant Hospital's rules and regulations.

5. Describe in detail those surgical procedure(s) performed by the answering defendants which were (a) improperly performed; (b) contraindicated and/or (c) unnecessary.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81

A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

6. If claimed, state the complaints, signs and symptoms that the answering defendants ignored.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

Additionally, the information requested is contained in the plaintiff's and infant plaintiff's medical records and is particularly within the defendants' knowledge.

7. If claimed, identify the medications by generic and/or chemical name which the answering defendants failed to administer or prescribe or which the answering defen-

dants improperly administered or prescribed.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

8. If claimed, identify the illness, disease or condition which the answering defendants failed to diagnose or misdiagnosed.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215

A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

9. Specify in detail each and every injury and each and every item of damage which the plaintiff sustained and/or suffered as a result of the negligence and/or medical malpractice of the answering defendants.

ANSWER: Upon information and belief, the infant plaintiff has sustained the following injuries, together with the consequences thereof: Insult, injury and damage to his central nervous system, including the infant's brain, resulting in irreversible brain damage and the complications and sequelae arising therefrom. This damage is permanent and has in the past, and will continue in the future, to impair the ability of Infant Plaintiff to function. Infant Plaintiff has a seizure disorder and cerebral palsy, is mentally retarded, has severely delayed development and will have severely and permanently impaired learning, speech and motor skills. Further, these damages will impact on the infant's psychological and emotional well-being.

The infant plaintiff's injuries, complications and sequelae also include, but are not limited to, the following:

- (a) Anoxic brain injury;
- (b) Severe brain damage;
- (c) Perinatal hypoxia;

- (d) Birth asphyxia;
- (e) Coma;
- (f) Meconium aspiration;
- (g) Cardio-pulmonary arrest;
- (h) The need for emergent, intensive and prolonged resuscitation efforts;
- (i) The need for intubation;
- (j) Edema of the brain and central nervous system;
- (k) Microcephaly;
- (l) Hypertonia;
- (m) Inspiratory stridor;
- (n) Neonatal seizure disorder;
- (o) Spastic quadriparesis;
- (p) Infantile spasms of the extremities;
- (q) Tremors of the upper and lower extremities;
- (r) Joint rigidity;
- (s) Severe cortical impairment;
- (t) Amblyopia;
- (u) Strabismus;
- (v) Hearing disorder;
- (w) Scoliosis of the spine;
- (x) Severe neuro-motor abnormalities;

- (y) Severe delays in all areas of physical development;
- (z) Severe delays in all areas of mental development;
- (aa) Repeated and frequent episodes of respiratory infections; including croup, pneumonia and bronchitis;
- (bb) Necessity for adenoidectomy;
- (cc) Necessity for bilateral hernia repair;
- (dd) Repeated and frequent fevers;
- (ee) Fracture of the left arm;
- (ff) Eating and swallowing disorders, including esophageal reflux;
- (gg) Severe cognitive deficits;
- (hh) Lifelong inability to obtain or retain gainful employment;
- (ii) Permanent inability to perform any activities of daily living;
- (jj) Permanent loss of independence;
- (kk) Loss of quality of life;
- (ll) Loss of enjoyment of life.

10. Specify in detail each and every injury plaintiff claim(s) to be permanent as a result of the alleged negligence and/or medical malpractice of the answering defendants.

ANSWER: The full extent of all of the injuries suffered by Infant Plaintiff, and the causes and effects thereof, are not yet known to his physicians or parents because of his infancy. However, upon information and belief, all of the infant plaintiff's injuries, along with the consequences thereof, are severe and permanent in nature.

11. Specify in detail each and every injury or illness from which the plaintiff sus-

tained or suffered and for which the plaintiff sought treatment by the defendants prior to the alleged malpractice of the defendants.

ANSWER: Upon information and belief, the plaintiff Mother Plaintiff was not suffering from any injury or illness at the time she was treated by the answering defendants prior to the acts of negligence alleged in the complaint. Upon information and belief, the plaintiff Mother Plaintiff sought treatment from the answering defendants solely as a result of her pregnancy.

12. Specify in detail the length of time the plaintiff was:

- (a) Totally disabled;
- (b) Partially disabled.

ANSWER: (a) and (b) The infant plaintiff has been totally disabled since birth and, upon information and belief, will remain totally and permanently disabled for the duration of his life.

13. Specify in detail the length of time the plaintiff was confined to each of the following:

- (a) Hospital;
- (b) Bed;
- (c) Home.

ANSWER: (a)-(c) Following his birth, the infant was confined to Defendant Hospital from February 13, 1994, through February 24, 1994. Thereafter, he was confined to Defendant Hospital on the following dates: _____; _____; and _____; Defendant Hospital

_____.

Further, the child has been confined to his bed or home on an intermittent basis depending on the severity of his condition or symptoms on any given day. The plaintiffs cannot specify in detail each and every day of such confinement.

Upon information, the infant plaintiff will remain permanently incapacitated from any gainful employment for the duration of his life.

14. Specify in detail each and every expense which plaintiff has incurred and will incur as a result of the negligence and/or malpractice of the answering defendants, further specifying the names and addresses of each person with whom such expense has been incurred and will be incurred for:

- (a) Physicians;
- (b) Medical supplies;
- (c) Hospital expenses;
- (d) Nurses services;
- (e) Other care or treatment;
- (f) Total amount of such expenses claimed.

ANSWER: (a)-(f) The infant plaintiff has been examined or treated by the health care providers named below on the dates shown.

Hospital #1
Dates of Treatment: 02/13/94-02/24/94; 12/30/94-1/2/95; 2/25/95-3/9/95;
5/11/95-5/14/95
Amount of Bill(s): \$36,966.89

Hospital #2
Dates of Treatment: 12/29/94-12/30/94
Amount of Bill(s) Unknown

Provider #1

Dates of Treatment: 2/28/94; 3/19/94; 4/4/94; 4/12/94;
4/15/94; 4/21/94; 5/5/94; 5/17/94;
5/23/94; 5/24/94; 6/3/94; 6/6/94;
6/9/94; 6/29/94; 8/18/94; 8/30/94;
9/9/94; 9/15/94; 9/26/94; 10/17/94;
11/7/94; 11/12/94; 12/8/94; 1/4/95;
1/13/95; 1/14/95; 1/16/95; 1/19/95;
1/19/95; 1/25/95; 1/27/95; 2/9/95;
2/22/95; 2/24/95; 2/25/95; 3/14/95;
3/16/95; 3/17/95; 3/20/95; 3/27/95;
4/5/95; 5/10/95; 5/15/95; 5/16/95;
5/24/95; 5/30/95; 6/13/95; 6/16/95;
6/26/95; 6/29/95; 6/30/95; 7/11/95;
7/13/95; 8/11/95; 10/8/95; 10/12/95;
1/5/96; 2/5/96; 3/18/96; 4/1/96;
4/8/96; 6/4/96; 6/12/96; 7/22/96

Amount of Bill(s): \$4,590.90

Provider #2

Dates of Treatment: 2/28/95; 3/10/95; 3/14/95; 3/21/95; 5/4/95

Amount of Bill(s): Unknown

15. Identify by name and address each hospital at which plaintiff was seen, treated or confined due to the injuries claimed and specify the dates of each confinement and the date of any out-patient treatment.

ANSWER: The infant plaintiff has been examined or treated by the hospitals below on the dates shown:

Hospital #1

Dates of Treatment: 02/13/94-02/24/94; 12/30/94-1/2/95; 2/25/95-3/9/95;
5/11/95-5/14/95

Amount of Bill(s): \$36,966.89

Hospital #2

Dates of Treatment: 4/6/94; 4/13/94; 5/18/94; 5/23/94; 6/8/94; 6/12/94;

	12/9/94; 2/1/95; 2/19/95; 5/18/95; 6/29/95; 10/8/95; 7/9/96
Amount of Bill(s):	\$3,916.25
Hospital #3	
Dates of Treatment:	12/29/94-12/30/94
Amount of Bill(s)	Unknown

16. Identify by name and address each physician who treated plaintiff for the injuries claimed and specify the dates and places of each treatment.

ANSWER: See previous answers.

17. Specify in detail each law, statute, ordinance, rule and regulation which the plaintiff will claim defendants violated and describe in detail each violation.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

18. State each plaintiff's date of birth.

ANSWER: Plaintiffs' dates of birth are as follows:

Mother Plaintiff:

Father Plaintiff:

Infant Plaintiff:

19. State each plaintiff's current resident address and each plaintiff's residence address at the time of each occurrence.

ANSWER: Plaintiffs' current resident address is:

20. State each plaintiff's social security number.

ANSWER: Plaintiffs' social security numbers are as follows:

Mother Plaintiff:

Father Plaintiff:

Infant Plaintiff:

21. If there are any claims of vicarious liability against the answering defendants herein, state the names of each and every person who performed the acts or failed to act and if the names are not known, describe them by personal appearance or occupation with sufficient clarity to assist in identification.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary material or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d

806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

However, without waiving their objection to this question, the plaintiffs state as follows: the defendant, Defendant OB, Defendant OB, P.C. is vicariously liable by virtue of the actions and/or inactions of the defendant physician and/or corporation, and any other employees, agents, officers, etc. of these defendants as may be identified in medical records and during the course of discovery in this matter.

Plaintiffs hereby reserve the right to supplement their response to this question as additional information becomes known throughout the discovery process.

AS TO THE SECOND CAUSE OF ACTION:

22. Repeats each and every paragraph of the demand herein numbered "1" through "21" inclusive.

ANSWER: See Previous Answers.

23. Describe in detail each and every way in which the plaintiff's allege the answering defendants failed to secure the plaintiff's informed consent for the care and treatment referred to in the plaintiff's complaint.

ANSWER: Plaintiff(s) object(s) to this demand as being improper in that it fails to comply with the provisions of Rule 3043(a) of the CPLR and/or calls for evidentiary mate-

rial or information in the form of, or to be gleaned from, expert testimony and, therefore, such demand is overly broad, improper and beyond the scope of a bill of particulars. See: Felock v. Albany Medical Center Hospital, 1999 WL 81312, (3rd Dept., 1999); Liddell v. Cree, 233 A.D.2d 593, 649 N.Y.S.2d 101 (3rd Dept., 1996); Dellagio v. Paul, 250 A.D.2d 806, 673 N.Y.S.2d 212 (2nd Dept., 1998); Heyward v. Ellenville Community Hospital, 215 A.D.2d 967, 627 N.Y.S.2d 167, (3rd Dept., 1995); McKenzie v. St. Elizabeth Hospital, 81 A.D.2d 1003, 440 N.Y.S.2d 109 (2nd Dept. 1981); Rockefeller v. Hwang, 106 A.D.2d 817, 484 N.Y.S.2d 206 (3rd Dept. 1984); Wadler v. Stern, 124 A.D.2d 725 (2nd Dept. 1986); Patterson v. Jewish Hosp. & Med. Center of Brooklyn, 94 Misc.2d 680, 405 N.Y.S.2d 194, *aff'd* 65 A.D.2d 553, 409 N.Y.S.2d 124 (2nd Dept., 1978).

AS TO THE THIRD CAUSE OF ACTION:

24. Repeats each and every paragraph of the demand herein numbered "1" through "23" inclusive.

ANSWER: See previous answers.

25. The length of time plaintiff they were deprived of the society, service and companionship of their infant son.

ANSWER: Plaintiffs, _____, claim a complete and permanent loss of the infant's companionship, society, affection and service. Further, Mr. & Mrs. _____ are claiming pecuniary losses, the amount of which are not presently known to the plaintiffs. However, it will be claimed that their losses will continue and increase throughout the normal life expectancies of Mother Plaintiff and Father Plaintiff.

Furthermore, it will be alleged that the plaintiffs' losses include the reasonable care,

treatment and services that will be needed by Mother and Father Plaintiff throughout the span of their normal life expectancy. Their losses will include all of the individual services which are normally and customarily provided in caring for elderly individuals, whether they are healthy, infirm, or disabled, and which adult children customarily provide for their parents. The services that would have been provided by Infant Plaintiff would have increased over the years and would have included services such as providing routine maintenance to his parents' home; ensuring that his parents were receiving the appropriate medical care and attention; that their finances were being managed properly and appropriately; that their activities of daily living were being provided, whether through direct services provided by Infant Plaintiff, or by outside professionals; that their transportation needs were provided for; that emergency services would be available; that appropriate leisure activities would be maintained and provided; that appropriate supervision would be provided for his parents when needed; that adequate meals were prepared and given; and that necessary preparations would be made for living arrangements suitable to his parents' health, age and condition.

The plaintiffs will rely upon the testimony of an appropriate economic expert to provide detailed information with regard to the dollar amounts of these losses.

26 State the date and place of birth of Infant Plaintiff.

ANSWER: Infant Plaintiff was born on _____ at Defendant Hospital.

DATED:

Attorney signature
Address

VERIFICATION

STATE OF NEW YORK

COUNTY OF

MOTHER PLAINTIFF and FATHER PLAINTIFF being duly sworn, deposes and says that they are the plaintiffs in the within action; that deponents have read the foregoing Verified Bill of Particulars and know the contents thereof; that the same is true to deponents' own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, deponents believe it to be true.

MOTHER PLAINTIFF

FATHER PLAINTIFF

Sworn to before me this _____
of _____, 200____.

Notary Public