

## 1999 Claims Training Course

### MEDICAL MALPRACTICE INVESTIGATION - FACTS

**Mr. James D. Wilson and Mr. Roger E. Honomichl**  
**U.S. Army Claims Service**

#### I. INTRODUCTION.

A. Medical malpractice cases are just like any other tort case -- they require proof of duty, breach of duty, causation, and injury -- except that they involve medical and health care personnel, require specialized knowledge and the use of expert assistance to investigate and evaluate the facts and evidence.

B. Evidence. Medical records, x-rays and special medical studies, computer-stored information, pathology material, medical equipment, personal notes and letters, and other documents are highly perishable. Thus, locate, retrieve, and safeguard all data and items associated with the treatment of the patient.

C. Timeliness. It is the key to any thorough and complete investigation. With the passage of time, witnesses become forgetful or partisan in their view of the events or the role they may have played in the patient's treatment. Timeliness in sequestering physical evidence is EXTREMELY important when equipment fails to perform properly, or a drug container is mislabeled or incorrectly dispensed. Most hospital supplies and some equipment items are designed to be discarded after a single use. The supplier or manufacturer should be immediately invited to participate in a joint inspection of the item in question. Do not permit the hospital personnel to return the item to the manufacturer for inspection.

D. Familiarity. Be familiar with your hospital, its organization, its personnel, and how and where data and documents are stored.

E. Reference Materials. Your office should contain basic reference materials, which may include:

1. Pertinent claims statutes, Federal Tort Claims Act (28 USC 1346(b), 2671-2680) and Military Claims Act (10 USC 2733).

2. Army Regulation (AR) 27-20, Claims.
3. Army Regulation (AR) 27-40, Litigation.
4. Army Regulation (AR) 37-108, (para 3-74), Appropriations, Operations and Maintenance, Army.
5. Army Regulation (AR) 40-3, Medical, Dental, and Veterinary Care.
6. Army Regulation (AR) 40-66, Medical Record Administration.
7. Army Regulation (AR) 40-68, Quality Assurance Administration.
8. Department of Army Pamphlet (DA Pam.) 27-162, Claims.
9. FTCA Handbook.
10. The Merck Manual and/or Harrison's Principles of Internal Medicine, or other general medical subject texts such as the "Appleton and Lange Medical Publications" book series (updated by publisher every four to five years).
11. Physicians' Desk Reference (PDR) or equivalent (updated by publisher yearly).
12. Medical Dictionaries (e.g., Taber's Cyclopedic Medical Dictionary; Dorland's Illustrated Medical Dictionary; or Stedman's Medical Dictionary; and Jablonski's Dictionary of Medical Acronyms and Abbreviations) (updated by publisher every three to four years).
13. Anatomy text or atlas (e.g., Gray's Anatomy of the Human Body; or Grant's Atlas of Anatomy; and McMinn & Hutchings' Color Atlas of Human Anatomy) (updated by publisher as needed).

F. Teaching Aids. Each medical treatment facility (MTF) has teaching aids for various operative and medical procedures. These include textbooks that have graphic step-by-step photographs and diagrams of medical and operative procedures, and videotapes of actual operative procedures. These aids should be reviewed prior to a factual investigation or interview of key medical personnel.

## II. BASICS OF INVESTIGATION.

A. Relationships. Establish a formal working relationship with the hospital staff. This can assist you in being alerted to potential claims. DA Pam 27-162, para 2-57a(2).

1. Together with your SJA, establish contact with the MEDCEN or MEDDAC Commander.

2. Visit the Quality Assurance (QA) (sometimes known as Quality Improvement) Coordinator and Risk Manager as often as necessary every week. Screen all incident reports (DA Form 4106), and PCEs. Discuss any other problems that have arisen.

3. Establish an arrangement whereby Patient Administration Division (PAD) sequesters records relevant to a claim or potentially compensable event (PCE), while affording you ready access.

4. Establish relationships with key hospital personnel, i.e., the Deputy Commander for Clinical Services (DCCS), Chief of Nursing, Inspector General (IG), if one exists, PAD Chief, Risk Manager, Patient Representative, and Chiefs of major medical departments and services (e.g., Surgery, Obstetrics Gynecology, Pediatrics, Radiology, Cardiology, Pathology, Emergency Medicine, Dental Activity, Pharmacy, Logistics Division and Medical Maintenance Branch).

5. Attend all Risk Management Committee and QA meetings. The Claims Judge Advocate should be a (non-voting) member of the committees.

6. Attend morning report to discover PCEs not otherwise reported.

7. Once a PCE has been identified, it should be promptly investigated before a claim is filed.

## B. Medical Records.

### 1. Evidence.

(a) You must obtain and secure evidence (i.e., original notes, records, documents, orders, x-rays, scans, etc.). The best evidence is the CONTEMPORANEOUS NOTES, SPECIAL STUDIES AND DOCUMENTS THAT WERE CREATED AT THE TIME THE TREATMENT WAS PROVIDED.

(b) This is the best evidence because it reflects the physicians' impartial impressions and medical care plan. It usually does not contain information other than medical conditions and recommended plans, and it normally does not contain self-serving statements. In effect, this is the purest form of evidence as to the facts and sequence of events.

(c) The records should be prescreened and sequestered through coordination with the Chief of PAD. The ACO or CPO should submit a written request to PAD to collect, assemble, and store the original records in a secured area.

(d) The records should bear a notation that the consent of the ACO or CPO is needed prior to retirement, destruction, transfer or release. DA Pam 27-162, para 2-57c.

2. Required Records to Secure. DA Pam. 27-162, Table 2-6, contains a list of

medical records you must secure as part of your investigation. There are numerous sources of these records in the hospital and many will not be contained in what is conventionally referred to as medical records. Furthermore, some official records may have been retired to the National Archives in St. Louis, Missouri, and will need to be obtained.

3. Relevance of Medical Records. You must determine which records focus on the period of time when the alleged injury occurred. Contact the claimant's attorney to discuss the allegations before your investigation begins, in order to insure what is being alleged will be investigated. DA Pam 27-162, para 2-57c.

4. Obtain Computer Printouts. On admissions, outpatient visits, lab reports, radiology and special diagnostic studies, and prescriptions obtained through the pharmacy.

5. Four copies of medical records (all outpatient records and all inpatient records relating to treatment associated with the alleged injury) are required (one copy each for you, the claimant, USARCS, and CCRB).

6. Certified Records. You should request in writing to PAD that the records be certified. Prior to certification, you should personally review the records and remove any quality assurance documents, extraneous documents that are not really medical records, as well as for clarity and completeness. (Consultation with the hospital QA coordinator, PAD, and/or the action officer at USARCS is advisable before removing any documents from the record.) AR 40-68, Chapter 3; AR 40-66.

7. Convenience and Administrative Files. These are unofficial files on patients maintained by individual health care providers or clinics for the physician's convenience; however, they are discoverable in litigation and they may be more comprehensive than the patient's outpatient record. Some clinics may be outside the hospital proper or at satellite installations, and should be routinely included in records retrieval efforts. DA Pam 27-162, para 2-57a. See Attachment A for sample requests.

8. Physician's personal notes and research files. DA Pam 27-162, para 2-57a(1).

(a) Private MFR's concerning treatment or discussions with the patient or patient's family.

(b) Letters to and from civilian consultants concerning the patient.

(c) Private photographs, 35mm slides and/or video tape of before and after treatment conditions and/or the procedure done on the patient (e.g., video of endoscopy or photograph of plastic surgery.)

(d) Personal computer files containing progress notes, personal notes, MFR's, Draft Medical Journal Articles.

9. Identify all health care facilities and providers.

(a) Be sure to ask the claimant or his counsel for all civilian medical records and names of civilian treating facilities and physicians. DA Pam 27-162, para 2-34i(6). If the claimant or counsel responds that the copying expense is too great, obtain a release or permission to obtain such records. DA Pam 27-162, Figure 2-33.

(b) If the records are lengthy, the ACO or CPO should screen them to determine what is necessary. Local funds for copying medical records should be locally available. DA Pam 27-162, para 2-57c(3).

10. Organize the medical records chronologically before you attempt to interpret them.

III. CONDUCTING THE INVESTIGATION.

A. When notified of a medical malpractice claim or a PCE:

1. have all of the patient's medical records secured;
2. have the appropriate number of copies made; and
3. immediately notify USARCS.

B. Identify Relevant Personnel. Review the records immediately and determine which hospital personnel are involved. Create a witness list that includes each person's present address, home of record, and next of kin. Service and department chiefs, the QA Office, the Graduate Medical Education Office, relevant corps branch assignment offices (Medical Corps, Dental Corps, Nurse Corps, Medical Service Corps) and the American Medical Association may prove helpful in locating witnesses. DA Pam 27-162, para 2-57d(2).

C. Review the medical records and create a detailed medical treatment chronology. See DA Pam 27-162, para 2-34i(6), 2-57d. The records contain many abbreviations unique to the medical field. AR 40-66 provides a list of authorized abbreviations. If the record contains unauthorized abbreviations or is illegible, have the HCP who prepared the record to furnish a legible version. The chronology should include the patient's medical condition, the date and type of treatment rendered and the name of the treating HCP(s). The entries may reveal gaps in the patient's treatment and provide clues to civilian treatment or visits omitted.

D. Establish the Sequence of Events Leading to the injury.

1. What happened and who was present when the incident occurred?
2. How, when and where did the incident occur?

### 3. Why did the incident occur?

E. Establish the Role of each Medical Provider. Was the HCP following orders of another, such as a more senior resident? There will often be a senior medical staff provider who will remain behind the scenes, but who is actually directing the treatment of the patient via the ward staff (i.e., intern, residents, fellows, medical students, registered nurses, etc.) Many times the senior medical officer will not write notes in the chart, and in the case of an operation, will not even be listed as being present in the operating room. DA Pam 27-162, para 2-57e.

F. Determine Employment Status of Providers. The employment status of the health care provider is often crucial to whether or to what extent the United States may be liable for the individual's conduct. DA Pam 27-162, para 2-57e(1). Various categories of health care providers are:

1. Active duty
2. Civilian employee
3. CHAMPUS Partnership
4. Contractor
5. Consultant
6. Volunteer

G. If the health care provider is not an employee of the Government, i.e., he is a CHAMPUS provider, contractor or consultant, certain actions need to be taken. DA Pam 27-162, para 2-57e(2)-(4).

1. Obtain copies of the following documents:
  - a. Credentials file
  - b. Contract or Partnership Agreement
  - c. Certificate of Insurance

2. Notify the Provider's Insurance Company. Send written notification to the provider's insurance company of the claim and the Army's position that the United States is not liable for their insured's conduct pursuant to the independent contractor exception under the Federal Tort Claims Act.

3. Notify the Claimant's Representative. You should notify the claimant's

representative, putting them on notice of the provider's independent contractor status, and that the health care provider is not a Federal employee (see Attachment B). Provide the attorney with information pertaining to the provider's insurance company. Be sure to inform the claimant's attorney as soon as possible, particularly before the applicable state statute of limitations has run.

4. Where the HCP is employed under a personal services contract which states that insurance is not required, contact your AAO for instruction before informing the claimant's attorney.

#### H. Use of Quality Assurance and Risk Management Investigations.

1. Claims personnel have access to quality assurance records because they are DOD employees whose duties require access. See 10 U.S.C. 1102, AR 40-68, and DA Pam 27-162, para 2-5e(2). **However**, quality assurance investigations should **never** be used as a substitute for a thorough claims investigation. At best, a quality assurance investigation may provide some insight into the medical care involved, the names of people that may need to be interviewed or re-interviewed, and leads or suggestions on other investigative steps that may be helpful. DA Pam 27-162, para 2-57f.

##### 2. Safeguard QA documents.

a. Do not disclose QA documents to claimants or their attorneys. Disclosure outside the Army is prohibited. 10 U.S.C. 1102. Do not show QA documents to any HCP. Doing so may vitiate the privilege if the HCP is called as a trial witness.

b. QA documents should not be provided to AUSA's on claims that go into litigation. If a specific request is made, the matter should be referred to the Torts Branch, Army Litigation Division.

##### c. Properly mark and segregate all QA documents.

d. As a general rule, AR 15-6 investigations are protected from release only if the investigation is conducted as a QA investigation and the witnesses are informed of this.

#### I. Use of Medical Experts. DA Pam 27-162, para 2-60.

1. You must establish the "standard of practice" in your investigation, or in other words, what is commonly done by most physicians when presented with the same medical condition/symptoms of the claimant. There are usually several valid medical treatments for each particular medical condition. For all medical procedures, there is an acceptable failure rate. A poor outcome due to the occurrence of a risk of the procedure is defensible [if the procedure risks have been adequately explained by the physician (informed consent)]. A poor outcome due to substandard care may be compensable. Utilization of an independent medical expert is usually necessary.

2. A review by a medical provider within the appropriate medical speciality on your hospital's staff is a good starting point. The review should be viewed critically in light of the propensity of colleagues to avoid criticism of one another's work.

3. Consultation Case Review Branch. When indicated, USARCS will forward a copy of a medical malpractice claim to CCRB for review. CCRB will assist in providing subspecialty consultations.

#### IV. INTERVIEWING HEALTH CARE PROVIDERS.

A. Do not interview a HCP until you understand the allegations and the standard of care to be applied in the claim. Be familiar with the facts and have a general understanding of the medical treatment involved. For general guidance, see DA Pam 27-162, para 2-61, 2-62.

B. Review the HCP's credential file and establish what privileges have been granted to the provider prior to the interview. Review the file for other factors which might impede the HCP's ability to perform (e.g., visual handicap, fine motor coordination, neurological condition, substance abuse problems). If there is an issue of HCP impairment, the HCP's own medical records should be obtained.

C. Medical Records. Always arrange the interview so that the provider has had an opportunity to review the medical record. Have two copies of the records present during the interview. Use your prepared medical records chronology in the interview to ensure all patient contacts are discussed.

D. Maintain a polite skepticism. Give the HCP an opportunity to explain his or her involvement in the case and interplay with other involved HCP's. Allow the HCP to relate the events to you without interruption. Afterwards you may begin asking your questions for clarification of events. Do not become confrontational or accusatory in your questions. Always allow the HCP to review the allegations (claim form) and any expert opinions the claimant has provided. Ask for the HCP's comments concerning the allegations and his opinion of the claimant's medical expert's opinion. The HCP may have some valid points to make in the defense of the allegations and the claimant's medical expert's opinion which will assist in the overall defense of the claim.

E. Prepare an MFR. Take notes during the interview and later prepare a memorandum based on your notes. Do not create a verbatim recording of the interview or have the provider provide a signed written statement but have the witness review your notes for accuracy. Primary care providers should be interviewed by the claims judge advocate and his or her claims investigator.

F. Establish the HCP's qualifications and background, and future plans.

1. All schooling and special graduate training.

2. Medical Specialties.
3. Board Certification, including date certified in each specialty.
4. Membership in professional organizations.
5. Hospital privileges and type of privileges (list all hospitals).
6. Hospital staff positions (list all hospitals).

7. Future or intended assignments, whether as MEDCEN/MEDDAC staff, civilian fellow, or civilian practice after leaving the Army. Always obtain a future address, if possible.

G. Discuss the HCP's experience in the medical field involved, e.g., the number of procedures he or she had done (with and without assistance) prior to the incident.

H. The HCP's involvement. Have the HCP explain in narrative form his involvement with the patient and medical care at issue. Have a specific list of questions prepared for the HCP. Questions should be open ended initially to obtain the HCPs overview. See Attachment C.

1. Staffing and interplay of staff during care.
2. Other HCPs' involvement during care.
3. HCP's communications with patient.
4. HCP's step-by-step care provided to patient.

I. Ask follow-up questions to clarify the HCP's account.

J. After the HCP commits to one story, review with the HCP the data set forth in the medical records, for example:

1. How often did he visit the patient?
2. Why are certain visits not recorded?
3. What complaints did the patient have at each visit and were these complaints recorded in the records?
4. Why are there conflicts between what the HCP states and either his or other contemporaneously generated notes in the records?

5. What was the HCP's day-to-day involvement with the patient?

K. Try to resolve the conflicts between what the HCP recalls and what the medical records reflect.

L. Determine the treatment choices considered for the patient by the treating medical staff. Determine whether the advice of any other physicians was sought on the medical or surgical management of the patient. If so, discover what the consultant's treatment recommendations were.

M. Query the HCP concerning his or her own health or physical condition at the time he or she rendered treatment to the patient.

N. Establish what counseling the patient received, when and by whom it was provided, and what was discussed.

O. Obtain the HCP's opinion. Whether the U.S. Army should defend or settle the claim based on the medical records and what he or she did or did not do during the treatment rendered to the patient.

P. Obtain his or her personal notes and research files on the patient. See para II.B.8, *supra*.

#### V. EX PARTE INTERVIEWS OF HEALTH CARE PROVIDERS

A. ABA Model Rules of Professional Conduct (hereinafter Model Rule) 4.2 provides that "in representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another attorney in the matter; unless the lawyer has the consent of law."

B. The Comment to Model Rule 4.2 states that "communications authorized by law include. . . the right of a party to a controversy with a government agency to speak with government officials about the matter." Therefore, the question becomes who within the government is considered a party with whom opposing counsel should not communicate without permission of government counsel.

C. The weight of authority holds that a government party is an employee, public official, or public body with authority to bind the government, settle a litigable matter, or whose act or omission gave rise to the matter. All others are not considered parties for purposes of ABA Model Rule 4.2.

1. Camden v. State of Maryland, 910 F.Supp. 1115, 1118 n.8 (D.Md. 1996)

2. Bussell v. Minix, 926 F.Supp. 809 (N.D.Ind. 1996)

3. Carter-Herman v. City of Philadelphia, 897 F.Supp. 899 (E.D.Pa. 1995)
4. Frey v. Department of Health and Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985)
5. Eth. Op. 92-7, 1992 WL 739409 at 2 (Ohio Bd. Comm. Griev. Disp. April 10, 1992) (government party is an employee, public official, or public body with authority to bind the government, to settle a litigable matter, or whose act or omission gave rise to the matter).
6. Ethics Opinion 652, 1993 WL 555952 at 2 (N.Y. St. B. A. Com. Prof. Eth.) (Government party is an individual who can bind the government, all others are employees of the government who may be contacted by opposing counsel).
7. Eth. Op. R-2, 1989 WL 428545 at 3 (Mich. Prof. Jud. Eth. April 29, 1989) ("Those who can hurt or bind the organization with respect to the matter at hand are off limits except for formal discovery or except with the consent of the entity's lawyer.").
8. Eth. Op. 115, 1993 WL 750906 at 2 (Utah St. Bar May 20, 1993) (Model Rule 4.2 does not in any way impair the right of opposing counsel to interview government officials).

D. Government counsel's ability to limit contact is circumscribed by the case law and ethical opinions interpreting Model Rule 3.4(f).

1. Model Rule 3.4(f) provides that (government) counsel cannot request a person other than a client refrain from voluntarily giving relevant information to another party unless:
  - a. the person is a relative or an employee or other agent of a client; and
  - b. the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
2. While a literal reading of Model Rule 3.4(f) would appear to permit government counsel to control access to agency employees by opposing counsel, courts have held that the employees' First Amendment rights supersede the government's interests and the government may not direct employees to refrain from speaking to opposing counsel. See Frey v. Dept. of Health and Human Services, 106 F.R.D. at 37; Veda v. Bloomsburgh, 427 F.Supp. at 595; Ethics Opinion 92-7, 1992 WL 739409 at 3 (citing Kentucky Bar Ass. Op. 332 (1988)).

E. There is ample authority (see reference 9, para IIE2b) to permit government counsel to communicate with military and DA civilian providers. For the same reasons, government counsel may communicate with contract physicians, but it would be advisable to do so only after notifying the physician's employer and insurer. An

alternative way to obtain information about a contract physician's treatment is through the risk management process. As for communication with such providers by opposing counsel, it is advisable to do several things since Model Rules 3.4(f) and 4.2 provide government counsel limited authority to restrict access to our witnesses:

1. Explain to the witnesses that they may speak to opposing counsel, but they have no requirement to do so, and the advantages and disadvantages of speaking to opposing counsel. Afterwards a memorandum for record of the discussion should be prepared.

2. Strongly urge the witnesses that any contact by opposing counsel should be referred to the claims attorney.

3. If opposing counsel contacts the claims attorney to request an opportunity to questions our witnesses, offer to provide a summary of whatever information the witnesses possess, or to respond to written questions from opposing counsel, or as a last resort, to make the witnesses available for an informal interview (this could be in exchange for a claimant interview).

## VI. INTERVIEWING THE CLAIMANT.

The claimant interview is crucial to a complete claims investigation. For FTCA claims, the claimant must agree to an interview; for MCA cases, a claimant's refusal to consent to an interview may be grounds for denial. For guidance in the preparation and conduct of a claimant interview, see DA Pam 27-162, para 2-34i-n.

## VII. PREPARATION FOR THE INTERVIEW.

### A. Timing.

- B. Time Allotted. Quality interviews cannot be conducted in a hurry.

- C. Site. If at all possible, arrange the interview to take place at the claimant's home, where you can observe the claimant's life-style, interpersonal interactions with family members, and ability or inability to perform some of the basic activities of daily living.

### D. Pre-Interview Homework.

1. Obtain as many of claimant's medical, military, and financial records as possible.

2. Prepare a chronology of the medical care provided, and relate that care to any key events in claimant's life of which you are aware (e.g., marriage, births, PCSs, retirement, etc.).

3. Make a list of any matters which need clarification (e.g., internal contradictions

in the records, or conflicts between the records and the allegations).

4. Interview the treating physicians, particularly those who are specifically mentioned in the allegations, before you interview the claimant. Once you obtain the physicians' recollections of the facts, then you can query the claimant specifically regarding any contradictions between the physician's version of the facts and that of the claimant.

5. Always prepare a detailed list of questions to ask the claimant. If you fail to do so, you will invariably forget to ask an important question.

6. Research the applicable state law on damages so that you can ask relevant questions (see part VIII D, below).

E. Attendees.

1. Always try to bring along another claims person, preferably a claims investigator, to assist you in asking, and following up on, questions, and in taking notes.

2. For complex injury cases which are likely to involve a medical trust (e.g., brain damage or quadraplegia), it is most helpful to bring along the medical fund advisor to meet the family with which he will be working and to serve as an additional observer/notetaker.

VIII. CONDUCT OF CLAIMANT INTERVIEW.

A. Represented v. Unrepresented Claimants.

1. Win the trust and confidence of the claimant.

2. Anticipate, and be prepared to respond to, objections from the attorney with respect to the content and/or form of your questions.

3. Caveat: if the claimant is unrepresented, be wary of "overreaching", or of creating the appearance that you are taking advantage of the claimant.

B. Establish Rapport with the claimant.

1. Take the time to introduce yourself and to brief the claimant about the administrative claims process and the purpose of the interview (establish yourself as the "good guy").

2. Endeavor to make the claimant feel at ease; if you share something in common, exploit it. Try to find something about the claimant, or his home or family, to compliment.

C. Adopt a Conversational Style.

1. The interview should be a conversation between you and the claimant. You are not doing a deposition. Avoid the stilted pattern of question and response, question and response . . . .

2. Endeavor to counteract any coaching by the claimant's attorney by encouraging the claimant to elaborate on simple "yes", or "no", or "I don't know" responses.

3. Try not to interrupt or cut off a claimant during a response unless he is meandering too far afield-gently steer him back to the subject as needed.

4. Be as nosy as the claimant's attorney will allow.

5. Maintain eye contact with the claimant as much as possible. This is difficult to do if you must spend all of your time furiously scribbling notes on what the claimant is saying. (Have a scrivener.)

6. Make your questions as informal as possible.

7. Personalize the information to be elicited as much as possible.

D. Do not admit liability. Such an admission can be introduced at trial.

IX. CONTENT OF THE CLAIMANT INTERVIEW.

A. General Matters.

1. Beware of becoming a slave to checklists. The claimant checklist at Figure 2-23 of DA Pam 27-162, should be your starting point, not your ending point.

2. Before ending the interview, always take time to check your question list, which you prepared in advance, as well as your interview notes.

3. At the end of the interview, attempt to secure claimant's consent to be re-interviewed as needed at a later date. Also obtain the claimant's permission for you to talk to his employer, teacher, treating physicians, etc., as needed. (See Part IX, "Post-Interview Follow-up," below.)

B. Initial Questions.

1. Your first questions should always be designed to elicit as much personal background information as possible.

2. If the claimant's spouse is also present, make sure that you ask about his/her

personal background, even if he/she is not a claimant. The spouse will inevitably influence the ultimate settlement decision.

C. Liability Issues.

1. Obtain a complete history of the claimant's medical care and treatment prior to the incident. Make certain that all patient visits are covered and the medical records, e.g., outpatient records, are complete.

2. If the claimant is a poor historian, use appropriate references to medical records to jog his memory.

3. All major illnesses, any hospitalizations, any chronic illnesses, and any long-term medication use should be elicited from the claimant.

4. Obtain the claimant's family medical history.

5. Ask the claimant what records and documents he reviewed prior to the interview. If he states that he did not review anything, ask him when was the last time he reviewed his medical records, if ever.

6. Have the claimant relate the incident as he recalls it, without reference to the medical records.

7. After the claimant is finished with his independent recollection, go back and review the same events with the claimant, with specific references to the medical records.

8. Carefully explore any contradictions between the medical record entries and the claimant's recollections of events.

9. As applicable to a particular case, go over the incident either month by month (e.g., delay in diagnosis of cancer), week by week (e.g., delay in diagnosis of an infected, nonhealing fracture), day by day (e.g., delay in diagnosis of an ectopic pregnancy), hour by hour (e.g., delay in diagnosis of meningitis, or minute by minute (e.g., delay in diagnosis of an anaphylactic reaction).

10. Make sure that the claimant accounts for all periods of nontreatment.

11. Query the claimant about any discrepancies between his recollection of events and that of the treating physician(s) who were previously interviewed.

D. Damages Issues. (See, generally, DA Pam 27-162, para 2-341).

1. Preface your questions on damages with an introductory remark regarding the need to ask all questions at a single interview. Clarify that you have not yet determined whether liability exists in the case, but that you want to avoid subsequent inconvenience

and/or delay in the event that liability is established.

2. Ask the claimant how the alleged injury has impacted specifically on his ability to perform or to enjoy the following:

- a. his job;
- b. his conjugal duties;
- c. his parental responsibilities;
- d. his social responsibilities;
- e. his leisure time activities; and
- f. the basic activities of daily living.

3. In serious injury cases, have the claimant describe a typical day or week in his life.

4. Have the claimant relate the nature and schedule of medication or therapy.

5. If the claimant is alleging permanent pain and suffering, ask him to describe in detail the type and frequency of the pain, as well as what actions/activities make it better or worse (does it really hurt "all the time?").

#### E. Photographs/Videotape.

1. If permitted by the claimant's attorney, bring along a camera and/or videotape the claimant interview.

2. If the damages include compensation for physical disfigurement, photos are a must.

3. In a brain damaged baby case, a videotape of the child is extremely helpful in ascertaining the nature and extent of the child's disabilities. The videotape should include, at a minimum, footage of the child eating, bathing, dressing, playing, undergoing therapies, communicating, and interacting with family members, teachers, and the interview participants.

#### X. POST-INTERVIEW FOLLOW-UP.

A. Draft your Memorandum for Record (MFR) of the interview as soon as possible. First, record a factual narrative of what the claimant stated and forward to the claimant for review. Then, in a separate MFR, record your personal observations of the claimant, his home, his family, and his neighborhood, as well as your personal assessments of the

claimant's credibility. This should not be provided to the claimant.

B. Verify information provided, as needed.

C. Follow-up on any leads (e.g., additional witnesses to be interviewed and/or additional documentation to be obtained).

D. After making attorney aware, conduct a neighborhood check if you suspect that claimant is not as disabled as he claims.

E. After making the attorney aware, (if the claimant is employed), talk to the claimant's employer and coworkers to determine the claimant's actual ability to perform his job, as well as to assess the claimant's future employment prospects.

F. If the claimant is a minor, talk to his teachers, counselors, and therapists regarding his behavior, his communication ability, his interaction with his peers, and his learning potential.

G. Discuss the nature of any permanent disabilities or the need for any future medical treatment with the claimant's treating physicians.

#### XI. SPECIAL INTERVIEW: STATUTE OF LIMITATIONS (SOL).

A. Prepare a detailed chronology in advance, as well as a detailed list of questions, with references to specific dates, events, and physicians. See Attachment D.

B. Interview all physicians or other witnesses with information relevant to the SOL issue before the claimant interview. You can then confront the claimant with the other witnesses' recollections of what was told to whom, and when.

C. Allocate extra time to conduct a SOL interview.

D. A minimum of two claims personnel (ideally, the claims attorney and his investigator) should conduct/ observe/record the interview.

E. Ask the tough questions regarding the statute of limitations issue after asking your other questions on liability and damages.

#### XII. COMMON CLAIMANT/WITNESS INTERVIEW PROBLEMS AND MISTAKES.

A. Arguing or being confrontational.

B. Asking leading questions rather than asking who, what, when, where, why questions.

C. Failing to ask the hard or tough questions (e.g., why didn't you do anything for the patient's elevated white blood count?, or if you continued to feel the lump in your breast, why didn't you return to the hospital?)

D. Failing to properly prepare for the interview. Not knowing and/or understanding the medical records.

E. Not knowing the medical subject or treatment standards involved and not reviewing general medical texts and articles prior to conducting the interview.

F. Allowing longwinded answers and not making the witness break the answer down into step-by-step parts.

G. Allowing the medical witness to speak in "medicalese" rather than explain the subject involved in plain, easily understandable English.

H. Failing to understand the witness' answer and not asking for a clarification of the answer.

I. Failing to ask follow-up questions.

J. Being intimidated by the witness.

### XIII. SUGGESTED APPROACH TO CLAIMS INVESTIGATIONS.

A. Understand allegations and theory of liability set forth in the claim. Seek clarification from the claimant's attorney if necessary.

B. Locate and review all relevant medical records, including military and civilian records in the possession or control of the claimant.

C. Provide action officer at USARCS with claim and medical records. (USARCS will arrange review by CCRB.)

D. Prepare a chronology of medical care with reference to the page number of the medical records for each chronology entry.

E. Review medical literature on the subject of the claim.

F. Consult with appropriate medical specialist in an effort to understand the standard-of-care issues involved.

G. Interview health care providers. Nurses and para-professionals may be as important as, or more important than, the doctors to your investigation.

H. Coordinate independent expert review of the medical issues with USARCS action officer.

I. Interview claimant.

J. Discuss your position with your USARCS AAO and who will take final action on the claim.

K. Determine whether an expert medical opinion should be requested from the claimant after the Government position has been established and explained to the claimant.

#### XIV. ATTACHED REFERENCES.

A. Sample requests for preserving, inventorying and sequestering medical evidence.

B. Sample notification of existence of a non-Federal HCP.

C. Sample questions for health care providers.

D. Sample chronology and questions prepared for a claimant interview .