ANATOMY OF A MEDICAL MALPRACTICE CASE

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OHIO LAW

Elements Of Proof

The elements of proof for a medical malpractice case have not changed since the Ohio Supreme Court decided Bruni v. Tatsumi, 46 Ohio St.2d 127 (1971), wherein the Court held at ¶1 of the syllabus:

> In order to establish medical malpractice, it must be shown, by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things.

Most trial briefs routinely cite this language.

The standard of care for a specialist is that of a reasonable specialist practicing medicine or surgery in that same specialty in the light of present day scientific knowledge in that specialty field, without regard to geographic considerations. Id. at syllabus, ¶2.

Methods Of Proof

Proof of the standard of care, and of the defendant's departure therefrom, must be made by expert testimony. Bruni v. Tatsumi, supra at 131-132. The testifying expert witness need not necessarily be practicing in the same specialty as the defendant, provided that the witness possesses knowledge of the requisite standard. Ohio Rev. Code §2743.43(A)(3); see also Alexander v. Mt. Carmel Med. Center, 56 Ohio St.2d 155, syllabus (1978). However, whatever his practice area, the expert must devote at least three-fourths of his professional time to active clinical practice or to medical teaching. Ohio Rev. Code §2743.43.

Compare Evid. R. 601(D), requiring only one-half. The constitutionality of this requirement, unique to medical claims, has withstood an equal protection clause challenge. Denicola v. Providence Hospital, 57 Ohio St.2d 115 (1979).

Except as to questions of cause and effect within the ken of lay persons, proof of causation also must be made by expert testimony. Darnell v. Eastman, 23 Ohio St.2d 13, syllabus (1970). The admissibility of such proof is contingent upon the expression of the expert's opinion in terms of probability, defined as a likelihood greater than fifty percent. Stinson v. England, 69 Ohio St.3d 451, syllabus (1994).

Statute Of Limitations

Historically, the statutes of limitation for medical malpractice actions have been short, and in Ohio, this has meant a one-year statute. The current version retains this same time frame. See Ohio Rev. Code §2305.113, (Appendix A), though the one-year period can be extended for 180 days. Id. (Appendix B). The one-year period "commences to run (a) when the patient discovers or, in the exercise of reasonable diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." Frysinger v. Leech, 32 Ohio St.3d 38 (1987). The legislature also has enacted a four-year statute of repose. (Appendix A)

Pleadings

An affidavit of merit as to each defendant, executed by a physician qualified under Evid. R. 601(D) and 702 to testify on the applicable standard of care, must accompany a complaint setting forth a medical claim, though a court may extend the time for filing the affidavit for a reasonable time not to exceed ninety days. Ohio R. Civ. P. 10(D)(2). Essentially, the affiant must swear that he has reviewed the relevant medical records, that he is familiar with the applicable standard of care, that the defendant departed therefrom, and that such departure caused injury to the plaintiff. Id. The filing of an affidavit of merit does not obviate the need for expert trial testimony.

Privileged Communications

The filing of a medical claim operates as a waiver of the physician-patient privilege as to relevant communications. Ohio Rev. Code §2317.02(B).

Confidential Information

Peer review records and testimony regarding peer review activities are immune from discovery and are inadmissible as evidence. Ohio Rev. Code §2305.252. Similar restrictions are in place relative to quality assurance committees and utilization committees. Ohio Rev. Code §2305.24. Incident and risk management reports, and testimony regarding the same, also are not discoverable or admissible. Ohio Rev. Code §2305.253.

Documentary Evidence

The admission of medical records is governed by Evid R. 806(6). See also Ohio Rev. Code §2317.40. Photocopies are admissible. Evid R. 1003. See also Ohio Rev. Code §2317.41. Hospital, nursing home, and other similar records can be admitted into evidence without calling a records custodian as a witness, provided the custodial certification procedure is followed. Ohio Rev. Code §2317.41. Frequently the parties will stipulate that all relevant medical records may be admitted into evidence, thereby obviating the need to call records custodians or obtain custodial certifications.

That the bulk of a medical record may be admitted into evidence does not mean, however, that every diagnostic reference therein is automatically admissible. In addition to ordinary business records requirements, to be admitted the diagnosis must have been the result of well known and accepted objective testing and examining practices and procedures which are not of such a technical nature as to require cross-examination; must not have rested solely upon the subjective complaints of the patient; must have been made by a qualified person; and, if the use of the record is for the purpose of proving the truth of matter asserted at trial, must be the product of the party seeking its admission. Hytha v. Schwendeman, 40 Ohio App.2d 478 (10 Dist. 1974).

If itemized by date, type of service rendered, and charge, and if delivered to opposing counsel at least five days before trial, medical bills constitute prima facie evidence of the reasonableness of the amount stated therein. Ohio Rev. Code §2317.421. Once admitted, the bills also constitute prima facie evidence of the necessity for the medical and hospital services. Wagner v. McDaniels, 9 Ohio St.3d 184 (1984).

Photographs, videos, x-rays, and the like are frequently used in medical malpractice litigation, and the admission into evidence of these items is governed by Evid. R. 901, 1001, 1002, and 1003.

Prior practice limiting the use of learned treatises was modified in 2006.

Under Evid. R. 803(18), learned treatises may now be read into evidence, though the treatise itself may not be received as an exhibit.

Expert Testimony

Aside from the expert witness competency requirement imposed by Ohio Rev. Code §2743.43(A)(3), the usual rules for expert testimony otherwise apply in medical malpractice litigation. See Evid. R. 701-706.

Damages Evidence

Effective April 11, 2003, the Ohio legislature enacted sweeping tort reforms, which have significantly changed the law of damages relative to medical claims. No aspect of these reforms has more dramatically affected medical malpractice litigation than the caps imposed on non-economic damages. See Ohio Rev. Code §2323.43 (Appendix C)

Although the Ohio Supreme Court has yet to rule on the constitutionality of this statute, analogous general tort claim caps on non-economic damages have survived a broad-based constitutional challenge. Arbino v. Johnson & Johnson, 116 Ohio St.3d 468 (2007). In light of the present composition of the Ohio Supreme Court, it seems likely that the medical claim caps will survive too, even though they are more restrictive than general tort claim caps. In this regard, Ohio Rev. Code §2315.18 exempts cases involving serious permanent injuries and death from the general tort cap, while Ohio Rev. Code §2323.43 exempts only death cases.

Traditionally, Ohio has long followed the common law collateral source rule: "The collateral source rule is an exception to the general rule of compensatory damages in a tort action, and evidence of compensation from collateral sources is not admissible to diminish the damages for which a tort-feasor must pay for his negligent act." Pryor v. Webber, 23 Ohio St.2d 104 at syllabus, ¶ 2 (1970). The intellectual underpinning of the rule is a "judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanates from sources other than the wrongdoer." Id. at 107, quoting Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669, 670. The rule is applied even though a "plaintiff may get double payment on account of the same items." Id. at 108. In practical application, the

receipt of collateral benefits is deemed irrelevant and immaterial on the issue of damages, is not to be disclosed to the jury, and is not a reason to deduct anything from plaintiff's special damages. Id. at 109. But, effective April 11, 2003, the General Assembly abrogated this common law rule of damages, enacting §2323.41. Under this statute, collateral source information may be admitted into evidence, provided that the collateral payor is not subrogated.

Aside from statutory tort reform, the Ohio Supreme Court's decision in Robinson v. Bates, 112 Ohio St.3d 17 (2006), held that, under Ohio common law, "an original medical bill rendered and the amount accepted in full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care." Id. at syllabus, ¶1. As a consequence of the passage of statutory collateral source rules for general tort cases, Ohio Rev. Code §2315.20, and for medical malpractice cases, Ohio Rev. Code §2323.41, there is considerable uncertainty regarding the continuing validity of the Robinson case. Only one appellate court is known to have considered the question. See Jaques v. Manton, 2009-Ohio-1468 (6 Dist. 2009) (Robinson found to have no continuing application in general tort cases). Two Franklin County Common Pleas Court judges have issued decisions on the question. (Appendix D and E). There is a move afoot in the legislature to overturn Robinson, at least insofar as precluding its continuing validity.

Medical Malpractice Case
Investigation, Evaluation, And Preparation

Interviewing The Prospective Plaintiff

The opportunity to select a client begins with the first phone call. At that time we attempt to obtain as much information as possible to enable us to determine whether it is worth the additional time and effort to schedule the client for a meeting in our office. Accordingly, regardless of whether we interview the client over the phone or a member of our staff does so, we have a checklist of pertinent information to elicit at the time of the initial call. To insure that such information is provided to us in the event we are not available to take the call, we provide our staff with a form (Appendix F) to enable them to determine what questions are significant to our evaluation of the merits of the claim.

In medical malpractice cases, what is more important than liability assessment is the amount of damages, due to the fact that the cost of pursuing a

case can be so significant that the smaller damage case pragmatically cannot be pursued. When one couples that fact with the difficulties of winning a medical malpractice case (across the country, doctors win at least 9 out of 10), damages evaluation becomes even more critical. Our thumbnail rule is that if we do not believe that potential jury verdict or settlement will be at least $300,000, we do not accept the case, unless liability is so clear that we believe there is a reasonable chance of obtaining a settlement without incurring significant cost advances.

Because the "rules of the road" have drastically changed for medical malpractice cases in this era of damage caps, one needs one or more of the following to reach the $300,000 threshhold: (1) a large amount of medical bills to date, (2) a large amount of lost wages to date, (3) significant lost earning capacity, (4) an expensive life care plan, and/or (5) death.

Because we have the opportunity to screen many medical malpractice client calls and have done so for more than 30 years, usually it is not difficult for us to discern which of them merits an in-the-office interview. On average, we personally interview no more than 60 potential new clients per year. Of those, we agree to investigate the merits of no more than half of those cases. To do so, we ask the client the client to sign a Contact for Legal Services (Appendix G) and a Medical Authorization (Appendix H). Ethically, you should not hold yourself out as an attorney for a client without having an executed Contract for Legal Services and Ohio statutory law also requires such. HIPPA requires that the Medical Authorization be worded in a particular manner to protect the privacy interests of the patient.

We attempt to determine during the client office interview not only pertinent facts and issues surrounding the potential malpractice claims, but also the relevant medical history, particularly to evaluate proximate cause issues. If it appears that the medical records will cost more than $500 to obtain, we may view them at local hospitals and paperclip or yellow sticker those pages of the records we believe are pertinent for further review by us or by an expert. If we obtain complete sets of records for every client who called our office, we could not afford to pursue medical malpractice claims. Similarly, if we contact a potential expert witness to evaluate every case for every client who called us, our economic bottom line would be drastically affected in a very negative way.

In lieu of contacting potential expert witnesses, we often access medical information on the internet to provide an educational foundation concerning the potential case. In addition, one can subscribe to medical journals, or read them at medical libraries.

Witnesses

At the initial interview, if it appears that the case is worth pursuing, you should obtain names of all pertinent factual and medical witnesses. If any subsequent treating physician has criticized any of the medical care providers whom the client is considering suing, you should consider whether to contact those medical care providers to determine whether they are willing to say on the record what they have privately told the client. In most cases, the subsequent treating medical care providers are not willing to cooperate in that regard for various reasons, particularly if they are in the same locale as the allegedly negligent medical care providers. Nevertheless, if you do not speak to subsequent medical care providers who practice in the same medical specialty as those whom you are considering suing, you may commit malpractice in the event that you file a lawsuit and the defendant's attorney takes the deposition of those subsequent medical care providers, only to learn at that time that they provide opinions in favor of the defendant physician's position.

Experts

As set forth above in the Ohio Law section, you cannot proceed with a medical malpractice case in Ohio without an expert witness signing an affidavit of merit. (Appendix I). Therefore, if the deadline for filing a lawsuit is approaching, you need to send the pertinent records to a potential expert witness for evaluation of the negligence and proximate cause issues. The reviewing expert need not agree to testify as an expert witness. However, the expert must be familiar with the appropriate standard of care and be willing to sign his or her name on the affidavit of merit which should be filed contemporaneously with the Complaint.

Ultimately, you need to obtain experts who are willing to testify at trial concerning the negligence and proximate cause issues. Over the years we have only used a medical expert service once or twice. We maintain a list of experts whom we have utilized over the years and those with whom we have otherwise come into contact. In addition, many attorneys are willing to share names of experts whom they have previously consulted and provide their opinions regarding the abilities of those experts to withstand cross- examination at deposition or at trial. The Ohio Association for Justice has names of experts and many depositions (the latter at a cost of $28.00 each) to enable attorneys to review opinions expressed by experts in other cases.

Assembling Damages Evidence

At the early investigation stage, damages information should be obtained based on the history provided by the client. As the decision to file the lawsuit progresses, documentation of the damages should be assembled. Medical malpractice tort reform (which became effective April 11, 2003) has no effect on economic damages. As such, medical bills should be obtained from every medical care provider who has treated the client for injuries sustained as a result of the alleged medical negligence. If entities such as the Ohio Bureau of Workers Compensation, Medicaid, or Medicare have paid some of the bills, each of them will provide you with a print-out of the amount of those bills and the amount accepted in payment for them.

In light of the Robinson v. Bates, supra, many defense attorneys will agree to a stipulation showing those amounts, in lieu of requiring the plaintiff's attorney to obtain copies of every bill (the cost of which can be prohibitive). We determine the names of the health insurance companies, and/or other entities which have paid bills for treatment rendered for injuries sustained due to the alleged medical negligence and write those entities at an early date requesting print-outs of the medical bills. As the trial date approaches, we request updated bills from each of those entities to insure that we provide opposing counsel with same at least five business days prior to trial. See Ohio Rev. Code §2317.421.

In addition to medical bills, we obtain pertinent documentation in support of lost wage claims, such as income tax returns for three years prior to the subject medical incident and any since then. Furthermore, if an employer has documentation of time missed by the employee due to the alleged negligence, we obtain such information from each involved employer. If the client is unable to work in the same capacity as prior to the incident, we retain an economist to testify regarding plaintiff's lost earning capacity. In that regard we provide to the economist whatever information he needs to assist in the formulation of his opinion or preparation of a report. If the client can no longer work in the same vocation as prior to the incident, we assess whether to request that the client be evaluated by a vocational rehabilitation consultant, which often assists the economist in the calculation of lost earning capacity.

Medical Literature Review

Medical literature review typically is not important during the initial stages of potential medical malpractice claim evaluation. However, if one decides to

interview the client in person and then begin obtaining and organizing medical records, medical literature review becomes important. If you know a local physician or one who is willing to evaluate for a nominal fee the potential merits of a medical negligence claim, you should not only review the pertinent facts and issues with the doctor informally, but also ask the doctor for sources of medical literature to assist in the evaluation of the merits of the claim.

In addition, many on-line sources are available. If you simply access Google, you will find a number of potential sources of medical literature, some of which require subscriptions. However, in the event that damages are significant and liability is potentially promising, the cost of obtaining medical articles typically is far less than the cost of obtaining a full scale review by a potential expert witness.

If you contact an expert witness service for the review, the cost is typically in the range of $1,500.00. In an office that reviews at least 50 cases per year, at least $75,000.00 would be spent if you consult with expert witnesses in each of these instances. Nothing is worse than "costs advanced not recovered." It is difficult enough to swallow that number when you lose a medical malpractice trial, let alone to have that number exacerbated by $75,000.00 expended on cases never filed.

Consulting Potential Experts

Except for the above, if you have a significant amount of experience in evaluation of medical malpractice claims, potential experts need not be consulted more than 10-15% of the time, unless the issue is so specialized that you are not able to capably and prudently evaluate the claim without the assistance of an expert. Ideally, the expert should be a leader in the field whose income derived from medical malpractice cases is less than 10% of his total income. Sources of potential experts include calling graduates of the university you attended; experts utilized on previous cases by you or opposing counsel; or those whose names you've obtained from medical literature searches revealing articles written on the pertinent subject matter.

Complaint

Ohio R. Civ. P. 8 has not been amended much in the 39 years since the Rules of Civil Procedures were adopted. It reads as follows:

> General rules of pleadings
> (A) Claims for relief

A pleading that sets forth a claim for relief … shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. If the party seeks more than twenty-five thousand dollars, the party shall also state in the pleading but shall not specify in the demand for judgment the amount of recovery sought, unless the claim is based is upon an instrument required to be attached pursuant to Civ. R. 10. At any time after the pleading is filed and served, any party from whom monetary recovery is sought may request in writing that the party seeking recovery provide the requesting party a written statement of the recovery sought. Upon motion, the court shall require the party to respond to the request. Relief in the alternative or of several different types may be demanded. …

(E) Pleadings to be concise and direct; consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motion are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Civ. R. 11.

(F) Construction of Pleading

All pleadings shall be so construed as to do substantial justice.

(G) Pleadings shall not be read or submitted

Pleadings shall not be read or submitted to the jury except insofar as a pleading or portion thereof is used in evidence.

(H) Disclosure of minority or incompetency

Every pleading or a motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

Other pertinent civil rules re pleadings include:

Ohio R. Civ. P. 9: Pleading special matters

(A) Capacity

It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in the representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any parties to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(B) Fraud common mistake, condition of the mind

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, common knowledge, and other condition of mind of a person may be averred generally.

(C) Conditions precedent

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(D) Official document or act

In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(F) Time and place

For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(G) Special damage

When items of special damage are claimed, they shall be specifically stated.

Ohio R. Civ. P. 10: Form of pleadings

… (C) Adoption by reference; exhibits

Statements in a pleading may be adopted by reference in different parts of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

(D) Attachment to pleadings

(1) *Account or written instrument.* When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account of written instrument is not attached, the reason for the omission must be stated in the pleading.

(2) Affidavit of merit; medical liability claim.

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in §2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rule 601(D) and 702 of the Ohio Rule of Evidence. Affidavits of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown and in accordance with division (c) of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed 90 days, except the time may be extended beyond 90 days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant the extension.

(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

(i) A description of any information necessary in order to obtain an affidavit of merit;
(ii) Whether is information is in the possession or control of a defendant or third party;
(iii) The scope and type of discovery necessary to obtain the information;
(iv) What efforts, if any, were taken to obtain the information;
(v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

(d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissals [Civ. R. 41(A)] for the failure to comply with this rule shall operate as a failure otherwise on the merit.

(e) If an affidavit of merit as required by this rule has been filed as to any defendant along with complaint or the amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provisions of division (D)(2)(a) of this rule, the court shall grant the plaintiff a reasonable time, not to exceed 60 days, to file an affidavit of merit intended to cure the defect.

Ohio R. Civ. P. 11: Signing of pleading, motions, and other documents

Every pleading … of the party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name … Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney … constitutes a certificate by the attorney … that the attorney … has read the documents; that to the best of the attorney's … knowledge, information, and belief there is good grounds to support it; and that it is not interposed for delay. If a document … is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney … , upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including

an award to the opposing party of expenses and reasonable attorneys fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

As to the complaint, I have utilized the same basic format for 15 years. (Appendix J) You will note that it is extremely generic. I do not specify the theory of liability or the factual basis upon which the liability allegations are based. Other medical malpractice attorneys prefer the opposite approach. My style is to place the onus on defense counsel to ascertain the theory of liability, and facts supporting it.

Discovery Requests

In medical malpractice actions, I do not utilize interrogatories and request for production of documents extensively. I do typically serve a brief set, however. (Appendix K) Often I do so with the filing of the complaint. The primary purpose of interrogatories and request for production of documents, from the plaintiff's perspective, is to obtain documentation of liability insurance coverage. It is a waste to ask questions pertaining to specific items in the medical records or whether the physician agrees that he deviated from accepted standard of care. Answers to interrogatories are typically prepared by opposing counsel. Moreover, I do not desire to educate the defendant, or his counsel, in advance of the defendant's deposition regarding my theory of liability.

Responding to Discovery

We utilize paralegals to meet with clients to respond to opposing counsel's discovery requests and to review the proposed answers prior to serving same upon defendant counsel. One of the customary approaches of defense counsel is to submit a blanket authorization to us enabling them to obtain complete copies any and all medical records of treatment rendered to the client both before and after the subject incident. Ohio Rev. Code §2317.02(B) does not require you to provide such an authorization to opposing counsel, who often misinterpret the statute which indicates that the physician-patient privilege is waived upon the filing of a medical claim or any other type of civil action. It is waived only to the extent of production of medical records relevant to the subject action. Accordingly, unless the plaintiff has pre-existing injuries similar to those allegedly sustained due to the defendant physician's negligence, prior records are not relevant, nor are records of treatment rendered subsequent to the date of the alleged negligence if they do not pertain the alleged injuries resulting from the medical negligence.

We have provided limited authorizations to opposing counsel enabling them to obtain medical records on the condition that they provide us with a complete copy of whatever records they obtain. Many attorneys refuse to do so. Whatever, we have always been trusting of other attorneys, unless they provide us with a reason to believe otherwise. We adhere to the Code of Professionalism of the American Board of Trial Advocates, which states in pertinent part:

- Always remember that the practice of law is first and foremost a profession.
- Always remember that my word is my bond and honor my responsibilities to serve as an officer of the court and protector of an individual's rights.
- Resolve matters and disputes expeditiously, without unnecessary expense, and through negotiation whenever possible.
- Keep my clients "well informed" and involved in making decisions affecting them.
- Achieve and maintain proficiency in my practice and continue to expand my knowledge of the law.
- Be respectful in my conduct toward my adversaries.
- Honor the spirit and intent, as well as the requirements of applicable rules or codes of professional conduct, and encourage others to do so.

In addition, the Ohio Rules of Professional Conduct state in pertinent part the following:

Preamble: A Lawyer's Responsibilities:

- As an officer of the court, a lawyer not only represents clients but has a special responsibility for the quality of justice.
- A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.
- Lawyers should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.

Fairness to Opposing Party and Counsel

A lawyer shall not do any of the following:

(a) unlawfully obstruct another parties' access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that that no valid authorization exists;
(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make a *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;
(e) in trial, allude to any matter that the lawyer does not *reasonably believe* that is relevant or that will not be supported by admissible evidence or by a *good faith* belief that such evidence may exist, assert personal *knowledge* of fact in issue except when testifying as a witness, or state a personal opinion as to the justness of cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; …
(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming available as a witness.

Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not *knowingly* do either of the following:

(a) make a false statement on material fact or law to a third person;
(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal *fraudulent* act by a client.

Respect for Rights of Third Persons

(a) In representing a client, lawyers should not use means that have no *substantial* purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the rights of such person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document was inadvertently sent, shall promptly notify the sender.

Preparing For The Defendant Physician's Deposition

To adequately prepare for the defendant physician's deposition, you should thoroughly review all pertinent medical records, particularly the office chart and the other records of treatment rendered by the defendant physician. If you cannot read the handwriting of the physician or any others whose handwriting appears on the office records, you should request from defendant's counsel prior to defendant's deposition that defendant provide a typewritten version of the pertinent office records so that you has an opportunity to study the records in preparation for the defendant's deposition. Otherwise, if you ask the defendant physician to read into the record the notes at the time of deposition, the defendant physician typically reads the document quickly, so that you cannot possibly determine whether you missed anything important which could benefit the client during the deposition.

In addition, since Ohio law requires that an affidavit of merit be filed contemporaneously with the complaint, you should review with the physician who signs the affidavit of merit his thoughts regarding the pertinent data in the records which supports the opinion of the physician providing the affidavit of merit. In other words, you should not take the deposition of the defendant physician without having consulted with a potential expert witness. Further, you should determine whether there are any articles relevant to the subject medical issues and review them prior to taking the deposition. Finally, you should obtain from the defense attorney a copy of the defendant physician curriculum vitae to determine what articles the defendant has written or speeches he has given in any areas similar to those relevant to those herein. If there are any such articles, you should obtain and review them prior to the deposition to determine what questions, if any, you should ask at the deposition. Alternatively, it may be wise to defer such questions until trial.

Taking The Defendant Physician's Deposition

Although you should have an outline prepared for the defendant physician's deposition, what is more important t is listening to the answers of the defendant

regarding which further questions might be formulated. You should not be married to the outline and may choose to ignore some of the questions on the outline or defer them until trial. If you receive an answer favorable to the plaintiff, rather than re-ask the question and provide the defendant with an opportunity to change his answer, simply move on to another point. If the defendant subsequently changes his answer upon review of the deposition prior to signing it, this is ammunition for cross-examination of the defendant physician, who undoubtedly had the opportunity to discuss with his attorney the answers given at the deposition before reviewing and editing the deposition. Moreover, you should always add at the conclusion of the deposition whether the defendant physician desires to change any of the answers provided in the deposition.

The defendant physician's demeanor has significant bearing on the length and content of the deposition. Typically, the defendant is not happy that he was sued. He has been instructed by his attorney to keep his answers short and sweet. You may have to ask ten questions to obtain information elicited by the original question, simply due to the obstructive and obstreperous nature of many defendants. Ascertaining answers to pertinent questions may not be as important as evaluation of the character, integrity and demeanor of the defendant physician in medical malpractice cases, since doctors win at least 90% of trials. The odds of winning a medical malpractice case against a doctor increase if the jury becomes angry, either with the evasiveness and personality of the physician and/or the conduct of the physician in treatment rendered to your client.

Preparing For And Taking The Defense Expert's Deposition

The preparation for the defendant physician's deposition will assist greatly in preparing for the defense expert's deposition. The primary additional areas to cover are articles (if any) written by the expert. In addition, transcripts of depositions previously given by the expert should be obtained and thoroughly reviewed. The decision whether to cross-examine the defendant physician's experts with statements contained in those previous depositions is a strategic one which must be evaluated prior to and during the deposition. Often, we plan to cross-examine the defendant's expert with statements from previous depositions, but elect to reserve that cross-examination for trial. Alternatively, we may decide to do so at the deposition in the hope of causing enough consternation for the defense attorney that he recommends to the defendant physician and his liability carrier that they consider settlement negotiations. Since the goal in most of these cases is to obtain the maximum amount of money the defendant is willing to

offer, we usually lay our cards on the table during the deposition of the defendant's expert.

The expert deposition is a discovery deposition pursuant to Ohio R. Civ. P. 30. As such, my objective is to elicit from the defendant's experts each of his opinions, the bases for each, the pertinent facts in the medical records in support of each opinion, and the education, training, and experience of the expert (including any citations to medical literature). If the expert expresses any significant information at trial which I failed to elicit at his deposition, I committed malpractice at the discovery deposition. At the same time, if the expert offers a new opinion at trial in violation of Ohio R. Civ. P. 26(E), we object and move to strike any such opinions. If we become aware in advance of trial that defendant's expert intends to express opinions which were not disclosed to us at the time of his deposition and we were not provided with a reasonable opportunity to reconvene the deposition of defendant's expert to discover said opinions, we will file a motion in limine to exclude such additional opinions of the expert.

Preparing Plaintiff For Deposition

Since many plaintiffs are not well educated and are economically deprived, you should spend a considerable amount of time with the plaintiff in preparation for his or her deposition. Defense attorneys in these cases are some of the best trial lawyers in the State of Ohio. They are skilled cross-examiners. They will do everything possible to secure admissions against interest during depositions. Therefore, certain "warnings" should be provided prior to plaintiff's deposition.

In particular, the standard care for attorneys handling medical malpractice cases is as follows:

- Tell the client that if he does not understand a question, he should request the defense attorney to repeat it or suggest that the attorney come back to that question later.
- Warn the client that if the defense attorney initiates a question with the words "isn't it true that" or concludes a question with "true?", the defendant's attorney is attempting to obtain an admission on the part of the plaintiff against his interest; in that instance, a light bulb should go off in the plaintiff's head to be on guard and to particularly concentrate at that point; the plaintiff should be extremely guarded, particularly with word choice in that instance.

- Do not provide the medical records to the client for his review; however, review with the client pertinent references within the medical records about which you anticipate that the defense attorney will interrogate your client, so that the first time your client hears about certain symptomatology or diagnoses in the records is not in response to defendant's attorney's questions. Providing the records to your client simply opens up a can of worms and leads to a much longer deposition.
- Advise the client to listen to the question closely and answer the question in the least amount of words necessary, while at the same time providing a complete answer; the objective is to not provide the defense attorney with any ammunition for the next question, beyond the defense attorney's thoughts or outline regarding same prior to the deposition; along those lines the client should be counseled to not provide an answer beyond the words necessary to respond to the defendant's attorney's question; many times clients want to "tell their story" in the hope that doing so will stimulate the defense attorney to persuade his clients to offer money; nothing could be further from the truth – I tell the client if he comes away from the deposition upset that he did not have an opportunity to discuss matters that the client thinks are relevant, he should be thankful that the first time defense attorney will hear about any such item which I think is important to the jury's assessment of the case will be in the courtroom, without defense attorney's preparation for cross-examination concerning same due to his failure to inquire about that subject matter during the deposition.

Preparing Your Experts For Deposition

Preparation of your expert for deposition is similar to preparing for the defense experts deposition, except in the reverse manner. You need to be careful concerning what you say in any correspondence to your expert, beginning with the initial cover letter. If the defense attorney asks your expert at his deposition whether he relied upon any of the statements contained in your correspondence to the expert (including e-mails) and the expert states that he did so rely, your expert's opinion may not comport with the requirements of Ohio R. Civ. P. 703, which requires that the data underlying the expert's opinions or inferences be that perceived by him or that admitted in evidence.

In addition, the expert should be advised to review any article written by him that is relevant to any of the issues in the case, in anticipation of cross-examination by the defense attorney regarding any statements contained in such articles which potentially contradict opinions or statements of the expert in the case at issue. If any such statements exist, the expert should be prepared to distinguish the facts in the instant action from those set forth in his published article.

Also, ask the expert whether he has ever provided any deposition or trial testimony contrary to the opinions he is expressing in the case at hand. Do not necessarily rely upon what the expert tells you; rather, do the necessary to obtain transcripts of any depositions involving similar medical issues and review them prior to the expert's deposition. If you have any contradictory testimony, bring it to the attention of the expert prior to the deposition to provide him with an opportunity to distinguish between his testimony in your case and his previous testimony.

Subrogation And Settlement

Subrogation Claims and Liens

Where authorized by statute or contract as to losses occasioned by the tortious conduct of third parties, a right of subrogation recovery exists in favor of those entities which pay the bills of medical care providers and/or make payments to claimants for lost wages. By virtue of this right, subrogated entities are entitled to be reimbursed out of the proceeds of medical malpractice settlements or jury verdicts in the same manner as for general personal injury cases.

The federal statutes applicable to Medicaid and Medicare subrogation claims place an affirmative duty on the part of the claimant's attorney to notify Medicaid and Medicare of the existence of any potential subrogation claim. In this regard, an attorney is subject to personal liability for the amount of the subrogation claim in the event that the attorney fails to ensure that it is satisfied out of the proceeds of any settlement or jury verdict. The pertinent statutes regarding same are 42 U.S.C. §1395, 42 U.S.C. §2651, and Ohio Rev. Code §5101.58.

As a practical matter Medicaid and Medicare frequently are willing to negotiate reductions of their subrogation claims and liens depending on the facts and circumstances of the particular case. A paralegal at the U.S. Attorney's office is assigned to assist in the resolution of Medicare subrogation claims and can be contacted as necessary.

It often is not possible to determine the extent which Medicaid or Medicare will reduce the amount of their subrogation claim until a settlement is finalized. In fact, it is difficult to discuss potential resolution of a Medicaid and Medicare subrogation claim without a final settlement figure.

Medicaid and Medicare will provide a printout of the medical bills paid from the date of the allegedly negligent act. It is incumbent upon the plaintiff's attorney to determine whether any of the bills listed in the printout are unrelated to the treatment rendered for injuries sustained due to the alleged medical negligence. The printouts often are useful to enable the attorney to determine the names of all treating medical care providers. Frequently it would be otherwise impossible to determine the same from the plaintiff who may well be unaware of the names of all medical care providers – particularly in a hospital setting.

Since the primary objective in representing the injured party is to place as much money in the plaintiff's pocket as possible as a result of a settlement or jury verdict, we must put on a "defense hat" to negotiate reductions of subrogation claims and liens. Therefore, the same type of arguments raised by defense counsel in the medical malpractice case itself typically are those raised on behalf of the plaintiff, such as the difficult odds of winning the case, the strong opinions of the defendant's expert witnesses, etc. In this regard, there is no harm in asking for a percentage reduction well in excess of that to which you reasonably expect Medicaid or Medicare to ultimately agree. For example, if the objective is to obtain a 50% reduction, a reasonable starting place for negotiations is a request for a 75% reduction. Keep in mind that, while any reduction of a subrogation claim results in additional money to the plaintiff at the time of settlement distribution, it should have no effect on the attorney fee you receive.

The fact that an individual is the victim of medical malpractice after a work-related injury does not preclude the Ohio Bureau of Workers Compensation from paying medical bills and lost wages after the date of the medical malpractice. For example, in one of our recent cases the BWC continued to pay the plaintiff's medical expenses and lost wages after the date of the alleged medical negligence, despite the argument that at least 80% of those payments would not have occurred but for the alleged negligence of the defendant physician. In essence, the BWC applied the successive tortfeasor rule, which holds that an original tortfeasor is liable not only for injuries resulting from his negligence but also for injuries resulting from the negligence of the successive tortfeasor whose involvement was necessitated by treatment of injuries due to the negligence of the original tortfeasor. And, it is important to be mindful that the BWC enjoys a statutory right of subrogation for such payments. See Ohio Rev. Code §4123.931. In a

manner essentially similar to the Medicaid and Medicare statutes, the BWC subrogation statute obligates the claimant to notify the BWC and the Attorney General of all third parties against whom a right of recovery exists. Id. at (G). The failure to give notice prevents any settlement or judgment from becoming final and jointly and severally obligates the claimant and the tortfeasor for the subrogated amount. Id.

The BWC maintains a subrogation department of sixteen claims adjusters whose sole function is to negotiate settlements of BWC subrogation claims throughout the State of Ohio. Attorney Howard M. Sanders, 30 W. Spring Street, Columbus, OH 43215, whose phone number is (614) 728-0849, supervises this department. For larger claims, Howard himself will meet to discuss settlement. A large subrogation claim often warrants a call to Howard to schedule such a face-to-face conference.

In contrast to the affirmative duty imposed by statute to notify Medicaid, Medicare, and BWC that a subrogation claim exists, normally there is no such affirmative duty to notify health insurance companies of the existence of subrogation claims. In a medical malpractice case, the odds are slim that a health insurance company would have any knowledge of the existence of a medical malpractice claim unless the attorney writes the carrier requesting information.

Nonetheless, health insurance companies that pay medical bills for treatment rendered to the plaintiff which would not have been necessary but for the alleged negligence of the plaintiff's medical care providers normally are contractually entitled to reimbursement out of the proceeds of any settlement or jury verdict. The willingness of health insurance companies to discount the amount of their subrogation claim varies widely depending not only upon the facts of the case, but also upon the company. As mentioned, if you do not contact a health insurance company requesting a printout of amounts paid by medical care providers, the odds are that the healthcare provider will have no knowledge of the existence of the medical malpractice claim you filed on behalf of the plaintiff. However, to ensure that you have uncovered every conceivable medical expense for treatment rendered to the plaintiff due to the alleged negligence of the defendants, you need to weigh the benefit to the plaintiff of obtaining information from the health insurance carrier regarding the names of those medical care providers and the amount of their bills for said treatment against the net amount the plaintiff will receive from a settlement or jury verdict in the event that the subrogated health insurance carrier has no knowledge of the lawsuit. Thus, you should candidly discuss with the plaintiff the pros and cons of notifying the health insurance

carrier of the medical malpractice lawsuit and of failing to notify the health insurance carrier of same. Your Settlement Sheet should clearly indicate that the plaintiff acknowledges the existence of any unsatisfied subrogation claims and liens and that plaintiff accepts full responsibility for the payment of same. Such a statement probably protects the lawyer from personal liability to health insurance companies, though it would not do so vis-a-vis the federal government concerning Medicaid and Medicare subrogation claims.

Settlement Demand Letters

Many attorneys send demand letters accompanied by extensive documentation in support of same. Whether to submit such letters in medical malpractice cases must be evaluated on an individual basis. The competence of medical malpractice attorneys on both sides of the fence is extremely high. Thus, a lengthy demand letter accompanied by extensive documentation and support of same may insult the intelligence of opposing counsel or the medical malpractice insurance company.

In any event, if such a letter is written, it is rarely beneficial to do so pre-suit because the odds of settling a medical malpractice claim pre-suit are less than 1%. The oldest medical malpractice insurance company in the country, The Medical Protective Company, states on its website that 82% of all medical malpractice claims are resolved without payment. In addition, 92% of all medical malpractice trials result in verdicts for the defendant medical care providers. Finally, nearly every medical malpractice insurance policy provides that no settlement negotiations may ensue without the written consent of the medical care provider insured. Thus, only if the medical negligence is blatant will it be worth the effort to attempt a pre-suit medical malpractice settlement. Considering that the typical length of time from filing of a medical malpractice lawsuit to resolution by settlement or jury verdict is a minimum of two years, it is in the plaintiff's best interest more often than not, to file suit as soon as the Affidavit of Merit is obtained, rather than waste time and effort with pre-suit settlement negotiations.

Excess Exposure Letters

The greatest fear of defense attorneys is a verdict against their clients in excess of their liability policy limits. Accordingly, defense attorneys are often

relieved to receive a letter from the plaintiff's attorney indicating that in the event a judgment is obtained in excess of policy limits, plaintiff will attempt to collect the balance from the personal assets of the defendants, which provides the defense attorney with validation of the need to recommend to his clients that they retain personal counsel to represent their interests regarding their personal exposure in excess of their policy limits.

A letter to defense counsel setting forth your opinion not only of the value of the claim and of the potential jury verdict range, but of the exposure of the defendants in excess of their liability limits, sets up a potential claim for prejudgment interest under Ohio Rev. Code §1343.03(C) in the event you obtain a verdict well in excess of the settlement offer. The rate of interest until several years ago was 10%. It still equals or exceeds 5% in most years and is 5% for 2009. It is calculated from the date of the alleged negligence. For example, if the plaintiff receives a one million dollar verdict and post-judgment the Court determines that the defendant failed to negotiate in good faith, the plaintiff may be entitled to a substantial amount of prejudgment interest. In addition, if the judgment is appealed and the Court of Appeals affirms the trial court's judgment, the plaintiff is entitled to post-judgment interest in addition to prejudgment interest.

Settlement negotiations which occur once the trial begins will not be considered by the Court in determining whether defendant made a good faith offer to settle the case. Although many physicians fail to consent to settlement prior to trial, once the physician has had the opportunity to observe what occurs in the courtroom, his opinion regarding consent sometimes changes. Thus, settlements of medical malpractice claims during trial are not uncommon. Moreover, settlements of medical malpractice claims while the jury deliberates also have occurred. Because of excess exposure potential, high-low discussions also occasionally occur during jury deliberations. The risk of postponing such discussions until the jury retires is the uncertainty regarding the length of jury deliberations. The advantage to the defendant of a high-low agreement is eliminating a personal exposure in excess of the policy limits. The advantage to the claimant is a guarantee of a certain amount of money in the event of a defense verdict. If the verdict is for an amount between the high and low agreed upon

figure, the case is resolved for such amount. A high-low agreement is, in essence, a settlement which cannot be appealed.

In a situation involving a physician employed by a hospital or corporation which also is a defendant, another pragmatic approach to resolution of a claim is an agreement to dismiss the defendant physician with prejudice in the event of a settlement of the claim, obviating the need to report the amount of the settlement to the National Practitioners Data Bank or the State Medical Board. However, in the event of a high-low agreement where the jury returns a verdict against a physician and his employer, the National Practitioners Data Bank requires that the physician report the amount of the verdict.

Mediation

In the 70's, 80's and early 90's, mediations were essentially nonexistent. Settlements typically occurred based on telephone conversations between opposing counsel, similar to the manner in which settlements occurred in routine personal injury claims. As liability insurance companies became more and more concerned about attorney fees associated with the defense of medical malpractice claims, mediation became more prevalent. In recent years, when settlements of medical malpractice claims occur, 80-90% of them do so at mediation conferences.

Medical malpractice is such a unique subspecialty that, unless the mediator has a significant amount of experience in medical malpractice, his benefit to resolution of a medical malpractice claim at a mediation conference is debatable. Prior to commencement of the mediation conference, mediators of medical malpractice claims typically require the attorneys for the parties to prepare "Position Statements" setting forth pertinent facts, issues, and the respective parties' position regarding settlement. The Plaintiff's "Position Statement" essentially serves as a settlement demand letter. To what extent attorneys "lay their cards on the table" in their "Position Statements" depends in large part upon the style of the respective attorney and his objectives. Many attorneys play it close to the vest in the Position Statement and prefer to "spill their guts" to the mediator during the mediation conference. Others prefer to attempt to scare the medical care provider defendants and their liability insurance company prior to

the mediation conference in an effort to stimulate not only consent to settlement, but also discussions between defense counsel and the liability insurance carrier regarding settlement authority.

The initial settlement demand should be high enough to provide the plaintiff with sufficient flexibility to obtain a settlement within the range of the authority granted by the plaintiff prior to initiation of the mediation conference. Reductions of a settlement demand during the mediation conference should be carefully calculated to be consistent with that same objective. It is not in the plaintiff's best interest to lower the settlement demand to such a point that it signals a willingness to accept an amount lower than the authority extended to you by the plaintiff.

Representing the plaintiff, you should be conservative and realistic in preparing for the mediation conference. In some instances it may be appropriate to review with the plaintiff the list of Franklin County jury verdicts to demonstrate how difficult it is to obtain a sizable jury verdict in Franklin County, regardless of the type of case. This information documents that 90% or more of the medical malpractice jury verdicts in Franklin County are in favor of the medical care provider. Moreover, no more than five verdicts in excess of five million dollars have ever been rendered by juries in medical malpractice cases in Franklin County.

One tactic of a local mediator is to provide a "mediator number" at the conclusion of the mediation conference if the mediator believes that the case should be settled but the parties cannot reach a common denominator. The mediator provides a settlement figure on a piece of paper, providing each party with the opportunity to say "yes" or "no" to the suggested number. The mediator does so after conclusion of the mediation conference, providing a deadline for the parties to say "yes" or "no." The parties are told to return the sheet of paper indicating their response within a certain timeframe. If the parties agree to the proposed settlement figure, the mediator notifies the parties of the settlement.

A mediator typically bills by the hour. The cost of the mediator's fees is typically borne equally by the parties. In the event there is more than one defendant, the cost of the mediator typically is borne equally by each of the parties. For example, if there is one plaintiff and four defendants, the cost of the mediator typically is divided equally among the five parties.

The advantage to settlement, whether by mediation or otherwise, is not only

conclusion of the matter, but also the certainty of it. One of the motivating factors to both sides is the elimination of additional significant expenses and/or attorney fees. It is not unusual, for example, that costs advanced in a medical malpractice case increase by $30,000 or more as the trial date approaches. This is quite important to plaintiff's counsel, as nearly all plaintiffs are unable to reimburse their counsel for costs advanced but not recovered. As a consequence of the additional expenses of trial, a plaintiff too may sometimes be adversely affected by receiving less in a later settlement at trial than would otherwise have been received in an earlier settlement before trial.

Probate Court Approvals

Settlement of wrongful death and minor's claims require probate court approval, which can delay payment by as much as three months depending on the jurisdiction. One should be familiar with the requirements and/or idiosyncrasies of the local probate court judge regarding settlements of wrongful death and minor's claims prior to attendance at a hearing concerning approval of same. Local probate court rules, if any, should be consulted. Certain probate court judges require approval of a contingent fee contract prior to filing a wrongful death claim. During his tenure, for example, Judge Belskis required a hearing in chambers in the event that the fee proposed by the plaintiff's attorney exceeded 33.33%. Even if Judge Belskis did approve the contract for legal services prior to filing of the wrongful death claim, he still required approval of attorney fees and cost advances prior to approving a proposed settlement of the wrongful death or minor's claim.

Structured Settlements

Depending upon the situation, structured settlements may be in the best interests of the plaintiff. Defendants and their insurance companies typically have no objection to structured settlements. Structured settlements usually provide a monthly payment guaranteed to increase at a certain amount per year over a guaranteed time period. This arrangement can be beneficial in a larger case, especially if the plaintiff is not sophisticated in handling money. The service

provided by a structured settlement broker is at no cost to the plaintiff. The structured settlement broker we have utilized is Gary Brewer, Settlement Funding Associates, 3999 Alward Road, Pataskala, Ohio 43062. His phone number is (740) 927-7979.

Special Needs Trusts

If the plaintiff is a Medicaid recipient and the amount he receives from the settlement will eliminate his right to receive Medicaid benefits, you should consult an attorney who specializes in special needs trusts to determine if the plaintiff will benefit from creation of such a trust, thereby enabling the continued receipt of Medicaid benefits. If you retain an attorney to assist with a special needs trust or to represent to the executor of an estate in the application for approval of a settlement of a wrongful death claim, the plaintiff's attorney should pay that attorney out of the contingent fee, rather than including it as an additional cost to the plaintiff.

The Trial

Motions In Limine

Motions in limine are nowhere described in the Ohio Rules of Civil Procedure or in any local court rules. Yet, such motions are useful to educate the Court prior to trial regarding problematic evidentiary issues. In fairness to the Court, motions in limine should be filed at least several days prior to trial. Occasionally a trial court will set a deadline by which motions in limine must be filed.

Sample responses to a motion in limine are attached. (Appendix M). These samples are drawn from one of two cases tried this year in which the defendant physician failed to pass the board certification examination. In each instance, the defendant physician's attorney filed the motion in an attempt preclude cross-examination on that topic. Ohio case law generally holds that such cross-examination is not to be permitted on the issue of the standard of care. Nonetheless, Judge Michael Tucker of the Montgomery County Common Pleas Court and Judge Robert Davidson of the Marion County Common Pleas Court were persuaded to allow limited use of such evidence. Both Judges issued rulings prohibiting the cross-examination of the defendant physician regarding the failure

to pass the board exam, but the rulings were conditioned upon the defendant physician not offering an opinion concerning whether he deviated from the accepted standard of care. If the defendant physician were to choose to testify on the standard of care, then the Judges decided that cross-examination on the board exam failure would be permitted on the issue of the physician's qualifications as an expert witness. In both instances, the defendant physician's attorney strongly advised the defendant physician not to open the door to such cross-examination by volunteering a standard of care opinion in response to cross-examination during plaintiff's case in chief. Likewise, they counseled the defendant physician not to volunteer an opinion regarding conformity to the standard of care on direct examination by defense counsel. In each case, the defendant physician very much wanted to express an opinion to the jury regarding conformity with the appropriate standard of care, but opted not to do so, thereby avoiding cross-examination regarding the board exam failure.

Voir Dire

There is nothing more important to any trial than the selection of the jury. A primary consideration during voir dire is to address head-on the bias in favor of the medical profession. Anyone employed in the medical field or by an insurance company should be removed from the panel.

Another objectives of voir dire is to attempt to stimulate communication with each prospective juror. There typically are several key questions to which you need to obtain jurors' responses, along with a commitment they can be fair and impartial to the plaintiff based on the information your supply to them regarding the pertinent facts and issues.

Always remember that you are limited to three preemptory challenges. In advance of trial, many Courts provide attorneys with copies of questionnaires completed by the prospective jurors. The questionnaires should be placed in the order in which the jurors are seated in the jury box. Anytime you consider removal of a juror with a preemptory challenge, it is incumbent upon you to review the completed questionnaires of the next few jurors to be certain that the next jurors on the list will not be more harmful to the plaintiff than the one under consideration for removal. This review becomes most critical after the utilization of the second preemptory challenge, leaving only one.

Some judges do everything possible to avoid excusing a juror for cause. In a recent trial, even after jurors said they could not be fair and impartial, the judge insisted upon asking jurors additional questions, trying to persuade the jurors to change their minds regarding bias.

If you have no experience with the particular judge, try to determine in

advance what restrictions, if any, the judge will place on voir dire questioning, including restrictions on the length of voir dire. In a complex medical malpractice case, voir dire can easily last 5- 6 hours, if the judge places no restriction on the amount of time available for questioning.

Opening Statement

Every trial needs a theme. While voir dire provides the first opportunity to present to the jury your theme of the case, opening statement allows you to outline the details in support of that theme.

It is difficult to win a case in opening statement but possible to lose it there. Accordingly, the opening statement should outline the main evidence in support of your theory of the case. In a medical malpractice action, the elements of proof require persuading the jury that the medical care provider was negligent and that such negligence was a proximate cause of plaintiff's injuries. Therefore, each element must be discussed.

Because the average juror is uncomfortable sitting on a medical malpractice case due to lack of knowledge about the medical subject matter, the opening statement also represents an opportunity to ease this discomfort by explaining the medicine.

Jurors also should be educated about important aspects of expected expert witness testimony. Any significant concessions made in depositions given by the defendant physician or his expert witness normally should be highlighted. In addition, the opening statement should set forth the opinion of the plaintiff's expert regarding the defendant physician's deviation from the standard of care and the bases for that opinion.

Use of Microsoft's PowerPoint during opening statement is particularly beneficial because the contents of medical records and/or specific aspects of anatomy are usually essential to an understanding of the case. If you are not proficient in PowerPoint, or other similar software programs like "Sanction," do not try to use these programs yourself. Medical malpractice cases are difficult enough to win without embarrassing yourself due to technological incompetence or inefficiency. Therefore, retention of a technology expert to assist with software presentation in the courtroom is recommended in medical malpractice cases. In this regard, the defense nearly always utilizes PowerPoint, so it is risky not to

follow suit on the plaintiff's side. While the cost of expert software assistance is at least $150 per hour, the potential benefits of PowerPoint almost mandates its use in most medical malpractice cases.

Medical illustrations also are almost always helpful. When used, they should be submitted by the medical illustrator to the PowerPoint specialist for inclusion in the PowerPoint presentation. Whether medical illustration boards also are necessary varies from case to case.

Our recommendation is to utilize pertinent medical records and medical illustrations in opening statement to educate the jury prior to the testimony of any witness. Reinforcement of the significance of the medical records and medical illustrations can be done either during cross-examination of the defendant physician and/or during direct examination of plaintiff's expert.

Direct Examination Of The Plaintiff

If the jury does not like or believe the plaintiff, there is no chance of success in a medical malpractice case. Accordingly, preparation of the plaintiff for direct examination is often more important than the direct examination itself. Never lose sight of the fact that a courtroom is an experience with which the plaintiff is totally unfamiliar. It will be uncomfortable and anxiety provoking. Your job is to do whatever it takes prior to and during the direct examination of the plaintiff to ease her discomfort and provide the jury with an opportunity to learn about the plaintiff – not only the events surrounding the medical care which precipitated the lawsuit, but sometimes more importantly, about her character and integrity.

Although leading questions generally are not permissible, the natural tendency on direct examination is to lead a nervous witness. Try not to do so. Let the plaintiff know that you have no alternative but to ask open-ended questions – who, what, when, where, how, and why. Provide the plaintiff with an opportunity to review her deposition testimony, explaining that opposing counsel will attempt to impeach her if her answers at trial differ substantially from what she provided at her deposition. If any of her deposition answers are harmful, you need to "red flag" those answers for her so that she knows in advance what defense counsel will attempt to cover on cross-examination. If any such answers were given at deposition without an opportunity to explain, direct examination at trial is a perfect opportunity to give the missing explanation. If the explanation is credible, it may preempt defense counsel's cross-examination regarding same.

Plaintiff also should be counseled not become contentious with defense counsel, while at the same time not allowing herself to be bullied or intimidated by him. In addition, she needs to be advised to listen closely to each question and think about her answers before articulating them. Being told that that any question beginning with "Isn't it true that . . ." constitutes a "red flag" can be helpful advice too.

To ensure that all pertinent areas are covered on direct examination, it may be prudent to prepare an outline of questions or, at least, of subject areas. Keep in mind, however, that if the answers of the plaintiff appear to be scripted, her testimony will be less credible. Accordingly, even if an outline is prepared, I do not recommend providing the plaintiff with a copy of it or with a list of questions. Nor do I recommend rehearsing with plaintiff the answers to every conceivable question. However, I do suggest that the plaintiff be asked the key questions in advance of direct examination to validate her memory of the answers.

Of course, the plaintiff is a fact witness only. Accordingly, advise her that regardless of any opinions she holds concerning the quality of her medical care, she should not express those opinions at any time in response to your questions or to those of opposing counsel.

Direct Examination Of Plaintiff's Expert Witness

In a medical malpractice case, whether the defendant physician deviated from accepted standard of care is nearly always at issue. The only evidence before the jury regarding same will be the testimony of expert witnesses, along with any treatises identified by the experts. See Evid. R. 803(18).

Since the typical defense strategy is to persuade the jury that there is no one standard of care applicable to the treatment rendered by the defendant, the credibility, knowledge, and expertise of plaintiff's expert is paramount if one hopes to prevail in a medical malpractice case. Although by the time plaintiff's expert takes the stand the jury should be cognizant of the pertinent medical issues, plaintiff's expert must demonstrate his knowledge and expertise in the area as a predicate for whatever opinions he expresses concerning the deviation from

accepted standards of care and the nature and extent of the injury sustained by the plaintiff as a direct and proximate result therefrom.

There must be some connection established between plaintiff's expert and the jury. Accordingly, requesting the Court for permission for the expert to leave the witness stand to educate the jury regarding the medicine applicable to the case can be extremely beneficial. In that regard, old-fashioned exhibit boards resting on an easel may be helpful, in addition to providing the expert with a laser pointer to educate the jury based on medical records or medical illustrations presented by PowerPoint. If the expert has any models which would be helpful for the jurors to pass among themselves while the expert speaks, ask the Court for permission to do so. In a trial we had a couple weeks ago, the Court, upon receiving such a request, asked opposing counsel whether he had any objection; and this placed opposing counsel in an awkward position, precluding his objection. It is extremely effective for an expert to stand directly in front of the jurors explaining the significance of the model as it is passed from juror to juror.

Similar to direct examination of the plaintiff, neither the questions nor the answers should appear to be extensively rehearsed with the expert witness. However, the key opinion questions should be outlined so that none are omitted. Example questions are:

Do you have an opinion, to a reasonable degree of medical probability, whether
Dr. Smith deviated from accepted standards of care?

What is the opinion?

What is the basis for your opinion?

Do you have an opinion, to a reasonable degree of medical probability, whether
Dr. Smith's deviation from accepted standards of care was a proximate cause of
plaintiff's injuries?

What is the opinion?

What is the basis of the opinion?

To a reasonable degree of medical probability, what are the injuries plaintiff sustained as a direct and proximate result of Dr. Smith's deviation from accepted standards of care?

What is the basis for your opinion?

But for Dr. Smith's deviation from accepted standards of care, would plaintiff probably have been able to return to work?

If so, by what date?

What is the basis for your opinion?

But for the negligence of Dr. Smith, what was plaintiff's probable outcome from the treatment rendered by Dr. Smith?

What is the basis for your opinion?

But for the negligence of Dr. Smith, to what extent would plaintiff probably have been able to engage in certain activities?

What is the basis for your opinion?

But for the negligence of Dr. Smith, would plaintiff's pain probably have been less?

If so, to what extent?

What is the basis for your opinion?

To a reasonable degree of medical certainty, is plaintiff's injury permanent?

If so, what is the basis for your opinion?

But for the negligence of Dr. Smith, would plaintiff's subsequent medical treatment probably have been unnecessary?

What is the basis for your opinion?

The Duty To Supplement

As to direct examination of Plaintiff and Plaintiff's expert, it is very important to recall the provisions of Ohio R. Civ. P. 26(E), which reads:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify.
>
> (2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

The rules of discovery, including the foregoing rule, were enacted to avoid trial by ambush. If the duty to supplement is ignored, the Judge may preclude testimony that is intended to be offered on direct examination. Thus, to the extent that answers to interrogatories or responses to questions at depositions need to be updated or changed, it must be done prior to trial. However, if defense counsel failed to inquire by interrogatory or at deposition regarding a particular matter relevant to direct examination, you are permitted to proceed with the evidence without informing defense counsel of the area of inquiry.

Cross-Examination Of The Defendant Physician And His Expert

The cardinal rule on cross-examination is never to ask a question to which you do not know the answer. The only exception to that rule is a question to which the doctor's answer is irrelevant because the asking of the question makes the point. In other words, there are situations in which your question essentially provides you with an opportunity to reinforce your theme.

Cross-examination should elicit "yes" answers to benefit the plaintiff's position. To articulate questions with any degree of certainty that the physician's answers will be favorable to the plaintiff, great care must be taken at the discovery depositions of the witnesses (see above) to be certain that you provide the experts with an opportunity to answer every question potentially relevant to the case. To the extent any of the answers at deposition are beneficial to your case theme, leading questions should be posed to the doctor regarding same. To the extent that defendant's expert witness provided answers at his deposition which are supportive of the plaintiff's case, leading questions to the defendant physician regarding whether he agrees with those opinions of his expert are potentially beneficial too. If the defendant physician does not agree with his expert, the lack of unanimity detracts from the credibility of defendant's position.

In 2006, the learned treatise rule was changed to permit utilization of learned treatises regardless of whether an expert agrees they are reliable authorities. See Evid. R. 803(18). Moreover, such treatises can now be more easily used in cross-examination of the defendant physician and his expert, and such treatises should be so used in appropriate situations.

Jury Instructions and Interrogatories

Judges experienced in medical malpractice trials often have a set of jury instructions they have utilized in the past, and Judges tend to follow what they have. Normally such instructions track OJI. Plaintiff and defense counsel also typically propose their own instructions, and frequently there is not much variation between the competing sets. A sample set of instructions is attached. (Appendix S).

Jury interrogatories (Ohio R. Civ. P. 49) are required by Ohio Rev. Code §2323.43 (Appendix C). A sample set is attached. (Appendix T). Prior to the enactment of the 2003 legislative cap on non-economic damages, plaintiff's attorneys preferred an interrogatory on damages requesting the jury to denominate a specific amount of money for each of several non-economic damage categories,

such as pain and suffering, loss of enjoyment of life, mental anguish, and the like. Since the jury is not permitted to know about the cap, such an interrogatory may still be useful because it draws the jurors' attention to the evidence presented regarding same. If jurors individualize the items of damage, they may feel more comfortable rendering a large verdict.

Final Argument

Although studies indicate that 85-90% of all jurors already have reached a verdict on liability prior to closing argument, it is extremely difficult to make the argument with optimum credibility and quality if you approach the liability aspects of the case with pessimism running through your mind. You should assume that what you say on liability does matter.

My father, Jack Alton, never had a typed outline for voir dire, opening statement, witness examinations, or closing argument. Often he wrote no more than five words on a page – bullet points or topics to remind him what he wanted to cover.

In contrast, I attended a seminar several years ago in which three lawyers recreated the closing arguments they had given in cases where each jury had rendered a multi-million dollar verdict. The seminar was educational regarding the different styles of those lawyers. One lawyer's case was for wrongful death. His argument lasted 16 minutes. At the close of the argument, he told the jury that prior to trial he had informed the defense attorneys he thought the case was worth five million dollars and that nothing had occurred during the trial to make him feel any differently. The jury awarded five million dollars. After hearing the lawyer reargue his closing, I asked him regarding the extent to which the argument at the seminar mirrored the actual argument. He replied "word for word," due to the fact that he scripts his entire closing arguments. I was surprised, in that he did not read the closing argument, but apparently had it well memorized. Another lawyer who spoke at the same seminar has a looser style; yet he still types his closing arguments, though he does not read from the scripts.

With the advent of PowerPoint, some lawyers outline or bullet-point their closing arguments. The downside is that the jury stares at a screen rather than you. On the other hand, in a case in which medical records and medical illustrations are important to the theme of the case, utilization of PowerPoint, or similar software programs, can be extremely effective in closing argument.

One question often asked is whether plaintiff's counsel should provide the

jury with a recommended dollar amount for the verdict. My answer is "yes." In a case I tried in 1999, I did not provide the jury with a suggested dollar amount, resulting in a six-hour deliberation which would have been one hour had I done so. When I spoke to the jurors afterwards, they stated that if I had suggested a figure above one million dollars, they would have awarded it. They were adamantly in my client's favor, but they had no idea how to place a dollar value on his injury, resulting in lengthy deliberations. The ultimate verdict was in the sum of $450,000.

APPENDIX A through T

Twenty appendixes form the rest of this document and consist of 274 additional pages. They are not provided here due to the size of the document but are available by request. If you would like to receive these, please email jalton@johnalton.com.