

***What Works and What Doesn't-
A Defense Lawyer's Thoughts on Medical Malpractice Actions***

By Francis J. Carney

No one plans on becoming the Myra Breckenridge of the medical malpractice bar but for me it has turned out that way regardless. Having started out doing plaintiff's work, then spending almost twenty years doing defense work, I now find myself again back on the plaintiff's side. So, having now come over from the dark side of The Force, I was asked to and share my thoughts on what defense lawyers and insurers find to be effective tactics from plaintiff's counsel and what works against them. Of course, I cannot speak for all defense lawyers and can only give you this one lawyer's opinion, for whatever it might be worth.

90% of the Battle is Picking the Right Cases

Everyone who has been around for any length of time understands this. A great case is tough to mess up; a marginal case is tough to win, no matter how hard you work or how talented you are. Let's face it, unless the defendant is an HMO, a jury will nearly always give the doctor the benefit of the doubt in this state. Which means you've got to invest the time to pick your medical malpractice cases even more carefully than you would on your other personal injury claims.

It takes time and money to do so and nearly always requires dollars paid to reviewing consultants. In that regard, don't solely rely upon so-called "nurse consultants"--- with few exceptions, they are worse than a waste of money and will often lead you down irrelevant paths out of their lack of knowledge and analytical abilities. Have the case reviewed by a qualified physician in the field or, if you want to be careful, refer it to another lawyer who specializes in this area.

Don't expect quick and cheap settlements in medical malpractice claims-- it's usually not going to happen. These aren't car crashes and physicians are rarely willing to settle when that fact will be reported to the National Practitioner Data Bank, as it will be if they are named defendants. Medical malpractice insurers, in my experience, rarely care that it will take \$50,000 to try a case that can be settled for half that amount if they feel the case is meritless; I have tried more than a few cases that fit into that category, with no offer ever being made to the plaintiff. A good rule of thumb is that a medical malpractice case isn't worth taking if the settlement value isn't at least in the \$100,000 range.

We all have sympathetic plaintiffs whom we want to represent but their claims are marginal. Let them go. They will eat you alive. We also have good cases with small damages- let them go too. And, finally, there are the whiners. You know, the people with a life-long history of complaints, problems, struggles, who come to your office with a particular grudge against a certain doctor. If you don't like them, neither will a jury. If you sense red flags, so will a jury. Let those cases pass.

Keep the Pressure On

Besides the luxury of picking your cases, a great asset that you have as a plaintiff's lawyer is the ability to work on relatively few files. Many defense counsel will carry a caseload of a hundred files or more and there is no way that they can keep up with an energetic plaintiff's lawyer with only a dozen cases to focus on. I was always fascinated by the plaintiff's lawyers who file claims and do nothing but sit on them; here I was thinking that delay was a defense strategy.

The plaintiff's lawyer who always gets defense counsel's attention is the one on top of his

case, the one pressing to get discovery completed, the one pressing for settlement discussions. Squeaky wheels do, in fact, get oiled. So after the claim is filed, get moving on discovery. Ask for a scheduling conference and get a trial date, or at least a discovery cutoff date. Don't let the agenda be set by the defense through your default.

And don't waste your time and diminish your credibility on nonsense. Forgot those silly form interrogatories-- they are proof positive of an inexperienced lawyer and rarely produce anything but evasive and incomplete answers. Save interrogatories for focused identification of witnesses and records and ask the questions that matter in depositions. Keep in mind that you don't get paid by the hour but your opponent does and is usually more than willing to wrestle with you over time-consuming ego battles in discovery.

Nice Guys (and Gals) Finish First

The most respected members of the plaintiff's bar-- and the ones that get the best results for their clients-- are not coincidentally the most professional. Little time is wasted on ego battles with a top-notch players like Charles Thronson, Ralph Dewsnup, Roger Sharp, Colin King, and others. They get the top dollar yet they never bully or bluster. And what happens to the others, those who think they can win through intimidation?

Their clients lose. Let's not call them Rambos; it does not do them justice-- I call them Bozos. It's more suited. We fight the Bozos to the bitter end, just because they *are* jerks. Human nature being what it is, the response to jerks is to treat them like jerks-- and the defense gets paid by the hour. So not only does the Bozo's tactics not work, they are counterproductive. And soon the judges get to know and distrust them as well. And they have little credibility. So on close motions, I win, every time because my word counts and Bozo's is mistrusted.

Sure, there are also Bozos on the defense side and I have in mind two or three well-known examples. In general, however, we'll have a highly competent and professional medical malpractice bar on both sides. And I agree that it's hard to keep to the high road when the defense lawyer is a jerk, someone who doesn't return calls, someone who won't schedule anything cooperatively, someone who imitates Genghis Khan in depositions. You have to be patient-- put all requests in writing and cordially. Make your record. Then bring it before the judge and hope you've got a judge with the gumption to do something about it. Eventually, the Bozo's reputation exceeds the boundaries of the case and works against him.

The insurance companies that I have worked for factor this into the settlement equation. Lawyers perceived as Bozos are usually allotted lower settlement authority. The idea is that if we dislike them, a jury will also dislike them and that dislike may carry over to their clients. So they get offered less than the professional does. The lawyer who is seen as the most dangerous for trial and who gets top dollar settlement authority is the earnest straight-shooter, the Jimmy Stewart, the someone whom a jury will like and trust. Quite the opposite of what one might think from reading the ATLA literature.

I am not suggesting that being a professional means that you have to be a patsy. For example, take no crap in depositions if opposing counsel is badgering or harassing your client, or if he is unethically coaching his witness. But try to resist the (admittedly powerful) temptation to get down into the gutter with him. Does the other side need an extension? Give it to them every time-- unless it would harm your client in some fashion. Scheduling of depositions? Always call and work it out when possible. This doesn't mean back-slapping friendliness at trial and a respectful distance is there the best policy.

Focus and Simplification

It's the defense's job to complicate things; you, the plaintiff's lawyer, always need to focus and simplify. For example, an effective opening statement for a plaintiff is one that sets forth the two or three basic issues for the jury to decide: "There's only two questions that you need to answer. First, was this suture put in the right place by Dr. Smith? Second, how much was Mrs. King damaged by that negligence?" Let the defense lawyer try and muddy the waters regarding the complicated medical issues, the variety of techniques, and so forth.

On depositions, I wish I could take every budding lawyer and have them sit through a deposition of a physician by Jim Hasenyager. Wham. Bam. Thank you, Ma'am. As opposed to the miserable experience of sitting through a deposition by an eager novice armed with the power of subpoena and determined to waste hours taking a doctor through where he went to medical school, what subjects he took, what grades he got, ad nauseam. None of which ever mattered nor ever even comes up at trial. The thinking is that if it can be asked, it should be asked, or I must be doing something wrong. No question about it, it takes experience and courage to leave out the trivia and focus on the things that matter.

Naming Individuals as Defendants

I can't say that only inexperienced or unthinking lawyers name individual defendants in medical malpractice cases when it's not absolutely necessary (for example, my partner Rocky Anderson routinely does it) but I believe a better practice is not to do if it can be avoided. Most experienced plaintiff's attorneys do not name individuals as defendants, and for good reason.

First, it is *much* easier on the defense side to represent Dr. Marcus Welby at trial (who happens to be employed by No-Care HMO) than to represent No-Care HMO as the sole

defendant. Second, naming an individual physician as a defendant makes it tougher to settle the case. Even without a "consent" provision in the insurance policy, it's difficult to convince named doctors to settle because their name will henceforth appear in the Data Bank. At least as it stands now, no reporting is necessary if only the institution is named.

This does not mean you should ignore the individuals. You need to first make sure that they are employees of the institution, acting within course and scope of employment. Once you have that stipulation, drop them.

Settlement brochures work

These things can be very persuasive to an insurer and the defendant. I used to think that they were only of little value because they set forth most of the substance and strategy of the plaintiff's case and served to educate the defense. But given that 90% of all cases settle, and that these brochures are read by the clients as well as counsel, I have changed my opinion entirely. A well-put together settlement brochure with a clear analysis of the facts, issues, and witnesses, with some visual evidence like photographs, has a real effect.

But if it's overwrought with emotionalism, it loses effect accordingly. If it's exaggerated, it loses effect. If it's devious, or if it fails to address your weak points, it loses effect. Make it plain and make it straight and it will help your case.

Video settlement brochures are occasionally seen. They are expensive, slick, and rarely persuasive because they are usually mawkish, contrived and insurers are suspicious of them. If video evidence is important, take your own camera over to the plaintiff's house and turn it on for ten minutes, then send this rough homemade version with your settlement brochure to defense counsel. It will probably work as well as something you might pay several thousand dollars for.

Mediation Works Too

Mediation is a very useful preview of your skills, your client's believability, and your case as a whole for the insurance company. If your client is persuasive, if your evidence strong, by all means agree to mediation at an early stage. Come prepared as if for an opening statement in a jury trial but don't overreach or exaggerate. Again, your credibility is key.

I have several attended mediations where the settlement authority went way up after the adjustor got the chance to hear the plaintiff's case from her attorney's mouth and to actually meet and assess the plaintiff in person. Of course, you also have the chance to hear the defense's side of the story so there's very little downside for you. Better to hear the defense arguments at a mediation for the first time than at trial.

What to Ask for in Settlement

This is a tough one and nearly everyone has a different opinion on it. It would seem that you ought to, as a straight-shooter, ask for close for what your bottom line is but it doesn't work that way. Ask for too little and you won't leave yourself enough room and you may not settle the claim. My general feeling is that you ought to ask as high as is reasonable but below the point of absurdity. All insurance companies are going to expect you to demand two or three times what you'd settle for; and if you tell them otherwise, they simply won't believe you.

And there's a psychological factor that you must consider. "They demanded \$1,000,000 but we got it settled for \$300,000" makes everyone on the defense side feel better. If you'd asked for \$400,000 to start with, you probably wouldn't have got it settled for \$300,000 because it's not far enough below your initial demand. I have a friend whose chief joy in life is to shop for bargains on clothes. If she finds a bargain, she buys it and gleefully trumpets it around the office:

"This blouse was originally \$188 but I got it on sale for \$75, after it was twice marked down!" She'd feel cheated if the blouse was originally priced at \$75 and that's what she paid for it. The point is that you could sell her an old rag worth a buck if you priced it at \$100, then marked it down to \$50, then \$25. She'd still feel that she made a great deal. The same thing phenomenon happens with insurance adjustors and defense lawyers, although we are loathe to admit it. Where's that magic line of what to demand? It's hard to say and it depends, as always on the case. A rough rule of thumb is three times the bottom line as a first demand, but less than that in bigger cases.

Beware Overstatement

Many plaintiff's lawyers seem to over plead and over prove their cases. For example, in a medical malpractice case, it's not necessary to prove that the doctor was incompetent or unqualified or sleazy, simply that he deviated from the standard of care on this one occasion. Yet so many plaintiff's attorneys insist on assigning themselves the burden of proving far more than they need to prove and in so doing make the defense case burden lighter. Is it easier for a jury to be sold on the idea that Dr. Welby made a mistake on this one occasion, and should be held responsible, just like you or I would if we made a mistake when driving? Or do you want to try to sell them on the idea that Dr. Welby is unqualified, incompetent, and has nefarious relations with a blue-cheeked parrakeet every Friday midnight on top of City Hall when there's no reason at all that you need to do so?

And what happens to your credibility when the outrageous things you promised to prove in opening statement weren't proved? I certainly will make sure the jury remembers and remind them again and again that the message is no better than the messenger. "They told you that they

would prove that Dr. Welby was not only negligent, but *incompetent*. Incompetent! Yes, that's what they said. And what did the evidence in fact prove? Why would you believe *anything* that these people tell you?"

Some Final and Miscellaneous Thoughts

Most experienced plaintiff's attorneys stay away from physician experts associated with expert-finder services. Do likewise if at all possible. The alleged taint of being a part of such a service is something that the defense will surely raise at trial. A better way to find experts is to familiarize yourself with the medical literature. First start with the internet. For example, free Medline searches are available at Grateful Med (<http://igm.nlm.nih.gov/>) and several other sites. There are dozens of reported journals on line as well. Second, there's the Eccles Health Sciences Library at the University. Browse the texts, find the chapter that's applicable, and write to the author.

While it's gratifying to have an expert with a thick c.v., that alone isn't enough. Ideally, you want someone who comes across as a teacher and someone who exudes personality and compassion. Granted, it can get very expensive shopping for such an expert. But qualifications alone won't sell a jury and my experience has been that they will accept the opinion of a "less qualified" but common-sense physician over the academic with a thick c.v. every time. I have gotten defense verdicts where the plaintiff's expert literally wrote the book (indeed wrote *all* the standard texts in the area) and I've lost cases where my expert came with similar qualifications.

Finally, the question often comes up of whether to do a generalized or a detailed complaint. I think the insurance companies that I have dealt with find a detailed, specific complaint to be more compelling, *if* it is accurate. A detailed and specific complaint setting forth

exactly the breaches of the standard of care can be intimidating to the defense, although admittedly it does pin the plaintiff's lawyer down somewhat and takes much more work.

The medical malpractice defense bar in this state is, for the most part, highly professional and competent. You aren't going to approach most of them in the knowledge of medicine or the intricacies of malpractice law unless you do this full time for more than a few years. But you don't need to. All you need is to pick your case carefully, get a good expert, deal in a straight forward manner, and all the finer points won't matter.