2013
Annual Meeting

April 25-27
Sheraton New Orleans

AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS

2013 Annual Meeting
New Orleans

* Each course is 50 minutes followed by a 10 minute break with the exception of the first speakers on the 3rd day, whose total presentation time is 110 Minutes.

Thursday, April 25

1:00 PM	Registration Opens in Foyer in front of Aqua Room 308
2:00 PM	William F. McMurry- Louisville, KY Welcome to New Orleans
2:15 PM-	**Bernard M Jaffe MD-** *What the Medical Expert needs from the Attorney-*
3:15 PM	**Elizabeth Pelypenko** *Making Discovery Work For You: Informal Discovery Weapons*
4:15 PM	**Anthony E Francis MD JD -** *Does the Threat of Malpractice Lead to Defensive Medicine?*
5:15 PM	**William Callaham-** *Medical Malpractice Trial Presentation Techniques: Make them Persuasive, Powerful and Moving*
6:30 PM- 8:00 PM	Welcome Reception - **Located at the home of Diplomate Gary L Brooks-** 814 St. Philip, in the French Quarter. Approximately a 15 minute walk from the hotel but transportation is available.

Friday, April 26

7:30 AM	Breakfast
8:00 AM	**Warren R Trazenfeld -** *How to Defeat Affirmative Defenses in a Legal Malpractice case from the Plaintiffs Perspective*
9:00 AM	**Paul D Bekman** *Pushing the Limits in Legal Malpractice Cases*

10:00 AM	**Bennett Wasserman -** *Legal Malpractice: Getting the most out of your Expert Witness*
11:00 AM	**William F McMurry** *Legal Liability and Ethical Dilemmas: The Case within the Case*
1:30 PM	2013 ABPLA EXAMS ADMINISTERED-
6:30 PM	Dinner at **Galatoire's-** a 5 minute walk from the hotel, located at 209 Bourbon Street

Saturday, April 27

7:30 AM	Breakfast
8:00 AM	**Gary L Brooks & Guy Williams -** *Electronic Medical Records- A Disaster Case Study*
10:00 AM	**David Drexler** *The Dialectics of Medical Molestation Cases: Does sex sell in lawsuits against doctors who have sexually molested their patients?*
11:00 AM	**Dominique Pollara -** *Ethical Considerations in Medical Malpractice Litigation*
12:00 PM	**William F. McMurry** Closing Remarks
12:15 PM	Board of Governors Meeting

Bernard M Jaffe MD- *What the Medical Expert needs from the Attorney-*

Dr. Jaffe received his medical degree from New York University in l964, followed by residency training at Barnes Hospital Washington University Medical Center. He served in the United States Air For ce Medical Corps from l972 through l974, attaining the rank of Lt. C olonel. Dr. Jaffe served on the faculty of Washington University School of Medici ne as Assistant Professor (l971),Associate Professor (l975) and Professor of Surger y (l977). In l979 he became Professor and Chair, Department of Surgery at SUNY Downstate Medical Center, as well as Chief of Surgery at Kings County and State University Hospitals. He was recruited to Tulane University School of Medicine in l992 as Professor of Surgery.

Dr. Jaffe has been president of a number of societies, including the Association for Academic
Surgery, Society of University Surgeons, and Society for Surgery of the Alimentary Tract. He has served on an NIH study section (including as chairman) and a VA merit review committee. Dr. Jaffe was a Director and Senior Director of the Am erican Board of Surgery, Editor
In Chief of SURGICAL ROUNDS and a member of several editorial boards, and recipient of numerous teaching and scientific awards.

Dr. Jaffe's research interests include gastrointestinal hormones, small bowel transpl antation and cellular control mechanisms. Clinically, his interests were in the areas of gastrointestinal surgery, endocrine surgery, surgical oncology, intestinal transpla ntation and complex reconstructive surgery. Dr. Jaffe retired in July 2006 and rem ains active in teaching and editorial responsibilities.

WHAT THE MEDICAL EXPERT NEEDS FROM THE ATTORNEY

Bernard M. Jaffe, MD
Professor of Surgery, *Emeritus*
Tulane University School of Medicine

OUTLINE

- Contractual Arrangement
- Medical Records
- Discussions
- Depositions
- Trials
- Time Line

CONTRACTUAL ARRANGEMENT

- Specific Date of Recruitment
- Conversation of How Expert was Identified
- Discussion of Expert's Credentials
- Training
- Legal Case Experience/Expertise
- Expert Certification

CONTRACTUAL ARRANGEMENT

- Contact Information
- Communication Preferences
- Other Attorneys Involved
- Payment Arrangement in Advance
- Payment Style
- Agreements in Writing
- Open Mind

MEDICAL RECORDS

- Complete Records Only
- No Shortcuts
- Nurses Notes Often Most Helpful
- Labs (Including Pathology) Are Critical
- Images Directly, Not Reports
- Updates as New Info Arrives/Depos Taken

MEDICAL RECORDS

- Organized Fashion (Bates Stamps)
- Time Line for Review
- Shipment Techniques
- Use (or Non-Use) of PDFs
- Depos in Miniature Versions
- Typed "Translation" as Needed

DISCUSSIONS

- Time Line of Case (Depos, etc)
- Other Experts (For and Against)
- Conversations at Scheduled Times
- Agenda
- Specific Bates Pages
- Prepared Questions (Physician and Attorney)

DISCUSSIONS

- Weak vs. Strong Points
- Open Mind
- Plan of Approach Agreed to by Physician and Attorney
- Consensus
- Shared Written Record of Points Made for Future Discussions

TIME LINE

- Information re Deadlines
- Depo/Trial Dates Scheduled Far in Advance- Lots of Notice
- Information to Expect Subpoena
- Long-Term Plan
- Periodic Updates
- News if Case Closes/Settles

DEPOSITIONS (EXPERT)

- Preparation is Key
- Anticipate Questions and Answers
- Convenient Location for Physician
- Prepared Lists of Previous Suits, Expert Cases
- Examine File, Discuss Content
- Decision – Educate vs. Give Nothing Away
- Arrange Payment at Time of Depo
- Review Transcript Once Available

DEPOSITIONS (OTHERS)

- Involvement in Preparation
- Discussion of Critical Issues
- Inclusion in Writing Questions re Medical Care
- Review of Information After Depo
- Depo (Miniature) Once Available for Review and Comment

TRIALS

- Preparation is Key
- Education re Courtroom Behavior
- Invitation to Listen to Opposing Expert, or At Least, Detailed Discussion
- Prepared Visuals (Figures, Tables, Images) Jointly Conceived
- Points to Hammer Home
- Answers for Rebuttal Questions

SUMMARY

- Good Expert(s) Can Win Cases!
- Style Counts
- Attorney Needs to Predict Expert's Needs and Act Accordingly
- Open and Frank Discussions
- Collaborative Relationships Critical (and Fun!)
- Partnership/Mutual Respect!

Elizabeth Pelypenko - ***Making Discovery Work for You: Informal Discovery Weapons***

Since 1992, Attorney Elizabeth Pelypenko has been helping individuals and their families who have suffered traumatic injury or loss of a loved one due to negligence of another. She is honest and compassionate with her clients, and highly respected among her peers. As a prominent leader in the legal field and one of the top medical malpractice attorneys in Georgia, she is dedicated to helping clients get compensation for their losses.

WINNING CASES IN THE TRENCHES:
DISCOVERY WEAPONS IN MEDICAL MALPRACTICE CASES

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Introduction

A good discovery plan is the keystone of a successful medical malpractice suit. This paper will discuss several client research strategies, formal discovery, informal discovery, and approaches for preparation for the deposition of the defendant or the expert. The aim is to help you gather more than just information to avoid surprises, but evidence you can use to develop the themes of your case and create a successful outcome.

I. Informal Discovery Regarding the Plaintiff

A. Plaintiff's Medical Records Requests

You cannot successfully prepare a medical malpractice case until you have obtained all pertinent records regarding the plaintiff. This can be a painstaking process, but it is critical to your preparation, and to make certain that no untoward surprises are contained in any records. Send requests for documents for ALL medical care provider records, including third parties, hospitals, clinics, physician offices, psychiatry and/or psychological facilities (depending on the case), pharmacy records, physical therapy facilities, and any outpatient radiology[1] and laboratory facilities.[2]

When obtaining records, your release and request should include: any and all medical records, including those that are written, computer generated, on microfilm, disk, etc. Ask for these as necessary:

- any and all medical authorizations;
- electronic medical records [including audit trail and meta data];
- billing statements;
- billing records;[3]
- insurance correspondence;
- inpatient requisitions;
- outpatient requisitions;
- office notes;
- progress notes;
- consultation notes;
- nurses notes;
- physician notes;
- admission notes;
- discharge summaries;
- surgical notes;
- anesthesia records;
- recovery room/PACU (post-anesthesia care unit) records;
- radiology reports and records,
- laboratory reports and records;
- pathology reports and records;
- cytology reports and records;
- medication records;
- blood transfusion records;
- in-house pharmacy records; and
- transfer records.

Making these requests to the various departments separately (rather than a general request to the hospital for all medical records in the patient's chart) is important because certain patient records are generated throughout a hospital but may not make it to the patient's chart. Discovering these records can clarify aspects of the patient's official hospital chart, or even contradict it. For example, while radiology reports generally make it to the patient's chart, often the requisition form and history form provided by the requesting physician do not. These may contain important information such as indications for the test, communications from the ordering

physician to the radiologist, or time and length of the test. Pathology records not included in the chart but part of the laboratory's records may include photographs taken of organs, tissue, or the patient in the case of an autopsy. The actual slides would be kept in the laboratory, as well as paraffin blocks of the original pathology tissue from which additional slides can be cut.

Although the defendant healthcare provider(s) may have treated the plaintiff on an inpatient basis only, remember he or she often keeps medical and billing records regarding your client at his or her office. If your case involves wrongful death, obtain the death certificate, complete autopsy records, autopsy photographs, autopsy specimens, complete coroner's report, and any county investigational reports.

Additionally, request electronic records kept on the patient, such as fetal monitoring records (which may be in digital format and printed only as necessary), anesthesia records, and electrocardiograms. With anesthesia charts, part may be electronically recorded and most anesthesia machines have digital memory with information on blood pressure, pulse oximeter readings, anesthesia agents used, etc. These should be requested separately, as the data strips may not be printed and affixed in the chart unless there was an untoward event during the surgery. You can then compare timing and other information in the printout with that recorded in the chart. Similarly, EKG machines store data, which may give you information on the time of the EKG, length, etc.

B. Patient Research

In addition to the plaintiff's medical records, consider looking into the following areas to help you prepare your medical malpractice case:

- disability records from the Social Security Administration;
- Medicare, Medicaid or any other medical insurance carrier records;
- divorce decrees;
- life insurance policy records;

- employment records, including salary records;
- criminal background check (federal and state);
- previous lawsuits (both Plaintiff and Defendant); and
- U.S. citizenship records from the United States Department of Immigration and Naturalization (www.ins.usdoj.gov).

II. Formal Discovery

You should always serve initial discovery (including interrogatories, requests for production of documents, and requests for admissions) along with the complaint when a new case is filed. This way, you can obtain some basic information from the defendants early in discovery, as well as information that may be more extraordinary. In addition to the stock set of interrogatories, which can get you the names of witnesses the defendant(s) have, exhibits they plan to use, identity of their experts and the defendants' insurance information, you should add interrogatories that request information on the defendants' education, training, experience, residencies and board certifications, which can sometimes be obtained simply by requesting a copy of a defendant's curriculum vitae. Consider adding some of the following to your stock set of requests for production of documents:

- General as well as department- or unit-specific policies, procedures, guidelines and regulations regarding the claim in question, for example, emergency room policies and procedures, nursing policies and procedures, stroke unit, labor & delivery, etc.;
- Administrative by-laws.
- Advertising that has been released to the public (commercials, billboards, flyers, community magazines, etc.)[4].
- Surveillance videos (i.e.: emergency room, specialty units, etc.).
- Any photographs or video, including audio, of any surgical or diagnostic procedures that involved the plaintiff.

- Incoming and outgoing telephone logs as well as email and inter-office correspondence.
- The physician's application for privileges, as sometimes you will learn that a physician did not have privileges for the procedure he performed.
- Medical record department check-in and check-out logs. When a chart is requested from a medical facility, a record is kept of who requested that chart, when it was requested, and how long the chart was checked-out. This can be a powerful tool when medical record tampering may be an issue.
- Electronic medical records, which is becoming a bigger issue as many hospitals have gone this route. The audit trail and meta data will contain information on when a patient's file was accessed, which is especially important when there is a bad outcome and the entries are not contemporaneous.

When you have sued a hospital in addition to individually-named defendant physicians, include an interrogatory to the hospital that asks if the National Practitioner Data Bank was queried when the hospital granted privileges to the physician (and every two years thereafter). If the hospital responds they did not obtain the information, you can then file their answers and your requests with the National Practitioner Data Bank in an attempt to get the information on the physician. The following is an interrogatory you could send to the hospitals:

- Did you make a query to the National Practitioner Data Bank pursuant to the Health Care Quality Improvement Act of 1986 regarding Dr. _____? If the answer is yes, please state each and every year you have made such query and state:
  a. The results received from the National Practitioner Data Bank for each and every query; and

b. Please provide all letters, responses, or other documents sent to or received from the National Practitioners Data Bank.

A hospital must provide the plaintiff with the requested information, or confirm that it failed to request information from the Data Bank as required by federal regulations, at which point the plaintiff's attorney will be entitled to obtain the information directly through the use of 45 CFR § 60.10 and 60.11.[5]

Further, "a hospital has a direct and independent responsibility to its patients to take reasonable steps to ensure that staff physicians using hospital facilities are qualified for privileges granted."[6] The definition of "peer review" addresses the evaluation of the quality and efficiency of actual medical care services and *does not encompass the credentialing process* to the extent that every decision to extend or maintain staff privileges is a peer review function.[7] Many states have similar provisions in their statutes.

The Joint Commission [formerly Joint Commission on Accreditation of Healthcare Organizations (JCAHO)] is an independent, not-for-profit organization that is governed by a board of physicians, nurses, and consumers, which sets standards and measures health care quality. The standards it promulgates provides fertile ground for inquiry from defendant hospitals. Various aspects of surveys and performance reports such as those performed by the Joint Commission are not privileged nor protected by medical review committees and peer review privileges.[8] The Joint Commission's website provides a good deal of information at www.jointcommission.org. Also be familiar with the Joint Commission's Sentinel Event Policy, which requires that a hospital meet certain reporting requirements when a "sentinel event" occurs, such as an unexplained death or an unusual or unexplained morbidity. Under such circumstances, the hospital must do a "root cause analysis," which may be done outside of

traditional peer review systems and be discoverable. Also, while the actual analysis and conclusions may not be discoverable, the factual material gathered during the analysis may be (as with traditional peer review information).

Additionally, the Joint Commission's standards in its Accreditation Manual for Hospitals are a good source of specific areas into which to inquire regarding the credentialing process of physicians who have privileges at a particular institution. The Joint Commission has written criteria for staff appointments that must include consideration of a physician's training, competence, character, and judgment. Therefore, areas of inquiry could be: the facility's standard of character and judgment for appointment; how they measure judgment and character; and what the credentialing committee relied upon to determine that the applicant had the requisite character and judgment. The facility may not rely solely upon the fact that a physician is or is not board-certified to make a judgment on medical staff membership.

The following is a sample of requests for production of documents you may serve upon a defendant hospital regarding specific practitioners, which could be useful in pursuing a negligent credentialing claim against a hospital:

- Legible copies of any and all policies, procedures, protocols, rules, regulations and guidelines pertaining to any Joint Commission-approved procedures your facility has delineating the procedure used to evaluate the credentials of physicians.
- Legible copies of any and all documentation that shows that said Joint Commission-approved procedures referenced in Request for Production No. ___ (immediately above) were used to evaluate the credentials of Defendant Dr. _____.
- Legible copies of any and all documentation that shows all steps taken to ensure that Defendant Dr. _____ was *qualified for the privileges granted.*

- Legible copies of any and all documentation that shows all steps taken to ensure that Defendant Dr. _____ had *current licensure* at his most recent renewal of clinical privileges prior to seeing (plaintiff), pursuant to Joint Commission Hospital Accreditation Standard MS.5.4.3.
- Legible copies of any and all documentation that shows all steps taken to ensure that Defendant Dr. _____ had *relevant training or experience* at his most recent renewal of clinical privileges prior to seeing [plaintiff], pursuant to Joint Commission Hospital Accreditation Standard MS.5.4.3.
- Legible copies of any and all documentation that shows all steps taken to ensure that Defendant Dr. _____ had *current competence* at his most recent renewal of clinical privileges prior to seeing [plaintiff], pursuant to Joint Commission Hospital Accreditation Standard MS.5.4.3.
- Legible copies of any and all documentation that shows all steps taken to ensure that Defendant Dr. _____ had the *ability to perform* the privileges requested at his most recent renewal of clinical privileges prior to seeing [plaintiff], pursuant to Joint Commission Hospital Accreditation Standard MS.5.4.3.
- Legible copies of any and all documentation that shows *all steps taken to appraise* Defendant Dr. _____ for reappointment to the medical staff or renewal or revision of clinical privileges based on ongoing monitoring of information concerning his *professional performance*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.12.1.
- Legible copies of any and all documentation that shows *all steps taken to appraise* Defendant Dr. _____ for reappointment to the medical staff or renewal or

revision of clinical privileges based on ongoing monitoring of information concerning his *judgment*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.12.2.

- Legible copies of any and all documentation that shows all steps *taken to appraise* Defendant Dr. _____ for reappointment to the medical staff or renewal or revision of clinical privileges based on ongoing monitoring of information *concerning his clinical or technical skills*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.12.3.
- Legible copies of any and all documentation that *confirms the occurrence of a sentinel event* regarding [plaintiff's] care or treatment at your facility and the Joint Commission's intent to evaluate this occurrence.
- Legible copies of any and all documentation that *confirms whether an on-site evaluation* of your organization in which a sentinel event regarding [plaintiff's] care or treatment at your facility has occurred is to be or has been conducted.
- Legible copies of any and all documentation that *confirms the number of Joint Commission standard-related written complaints* filed against your facility and those that have met prospective criteria for further active review in the five (5) years prior to [plaintiff's] admission.
- Legible copies of any and all documentation that shows Defendant Dr. _____'s *delineated clinical privileges*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.14.
- Legible copies of any and all documentation that shows Defendant Dr. _____'s clinical privileges are hospital specific and based on his *demonstrated current competence*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.15.

- Legible copies of any and all documentation that shows Defendant Dr. _____'s *clinical privileges are related to his documented experience* in categories of treatment areas or procedures, pursuant to Joint Commission Hospital Accreditation Standard MS.5.15.1.1.
- Legible copies of any and all documentation that shows Defendant Dr. _____'s *clinical privileges are related to the results of his treatment*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.15.1.2.
- Legible copies of any and all documentation that shows Defendant Dr. _____'s *clinical privileges are related to the conclusions drawn from organization performance-improvement activities*, pursuant to Joint Commission Hospital Accreditation Standard MS.5.15.1.3.
- Legible copies of any and all documentation that shows *when a medical record is considered delinquent* at _____ Hospital (i.e., when it has not been completed within a specific time following the patient's discharge, which time period is spelled out in the medical staff's rules and regulations and cannot exceed 30 days), pursuant to Joint Commission Hospital Accreditation Standard IM.7.6.
- Legible copies of any and all documentation that shows how many patients Defendant Dr. _____ saw at your facility from 12am, _____ until 12am _____. You may redact patient names to ensure confidentiality.

Together with these, send corresponding interrogatories, such as the following:

- Describe all steps taken by _____ Hospital to ensure the Defendant Dr. _____ was qualified for the privileges he was granted, and for each time his privileges were renewed, as required by Joint Commission Hospital Accreditation Standard MS.5.4.3.

- Describe all steps taken by _____ Hospital to appraise Defendant Dr. _____ for appointment to the medical staff or for granting privileges based on ongoing monitoring of information concerning his professional performance for the privileges he was granted, and for each time his privileges were renewed, as required by Joint Commission Hospital Accreditation Standard MS.5.12.1.
- Describe the standards for character and judgment that were used by _____ Hospital for appointment to the medical staff or for granting privileges used to determine that Defendant Dr. _____ had the requisite character and judgment for the privileges he was granted, and for each time his privileges were renewed, as required by Joint Commission Hospital Accreditation Standard MS.5.12.2.
- Describe all steps taken by _____ Hospital to appraise Defendant Dr. _____ for appointment to the medical staff or for granting privileges based on ongoing monitoring of information concerning his clinical or technical skills for the privileges he was granted, and for each time his privileges were renewed, as required by Joint Commission Hospital Accreditation Standard MS.5.12.3.

In the Requests for Admissions, which you should send out with a complaint, always include the following among the stock set that you serve:

- _____ Hospital participates in the Federal Medicare Program, and did so as of _____, 201_.
- The Federal Medicare Program requires, under 42 CFR §482.12 (e) that "the governing body must be responsible for services furnished in the hospital, whether or not they are furnished under contract."
- _____ Hospital is responsible for the services provided at _____

Hospital, whether said services are provided by physicians, nurses, or other healthcare providers within the confines of _____ Hospital.

These should be used because a hospital's participation in Medicare may subject it to a nondelegable responsibility under federal law for the acts of the physicians it provides. Medicare regulations address a wide range of services such as anesthesia and emergency care, and the regulations often state that hospitals are responsible for those services if it provides them.[9] Requests for admissions are a powerful tool because, first, they are usually not limited in the number that may be served (as interrogatories are), and second, they are self-enforcing, in that if a party fails to respond, the requested facts are automatically admitted. If a party responds improperly, such as with an improper denial, you may be able to force the party to reimburse your client for the costs incurred to prove the fact that was denied. It is also helpful to send a corresponding interrogatory requesting an explanation of any denial, such as the following:

If you deny any Request for Admission of Fact, please state the following:

(a) each fact upon which you base your denial;

(b) the identity of all persons with knowledge or claiming to have knowledge of facts which support your denial;

(c) identify all documents or tangible materials which support or tend to support the basis for your denial.

Also consider sending requests to admit after depositions that highlight helpful items of testimony that were brought out (but do so after the deponent's time has expired to read and sign or otherwise "clarify" their testimony). Helpful admissions can be made glaringly obvious to opposing counsel, crystallizing the issues when you bring them to the forefront.

III. Informal Discovery

Much information can be garnered informally through correspondence with various agencies, or by accessing their websites. The information can then be used to prepare written discovery to the various defendants, or can be used to obtain ammunition for cross-examination of defendants and their experts, or even to prepare a response to dispositive motions, which will be discussed in more detail below.

A. Freedom of Information Act (FOIA) Research

The FOIA, which allows one to request copies of records not normally prepared for public distribution, pertains to existing records and does not require agencies to create new records or do research or analyze data. However, the records that are available can provide a wealth of knowledge about a facility, drug, or product. Much of this information will be accessible to you with just a letter citing the Freedom of Information Act. At times you may be asked to provide proof that a lawsuit is pending, especially once you get to the federal agencies, in which case you might need to send a copy of the summons. In the past I have been able to obtain documents from an agency that I have not been able to obtain from defendants through the discovery process, due to protestations that they were either "peer-review protected" or "self-critical analysis privileged". I have provided two form letters at the end of this paper (one for a medical provider, one for a facility) for your use to modify as needed.

As part of your preparation of any medical malpractice case, consider requesting information from the following agencies:

- **State department of human resources or welfare agencies**. These state agencies provide numerous programs that ensure statewide health and welfare. Theses state agencies inspect, monitor, license, register, and certify a variety of healthcare facilities.

Requests regarding particular facilities can provide you with occasions where the facility (such as health care programs, laboratories and child care) was found to be deficient in complying with the state's requirements, and whether it was required to prepare a plan to bring it into compliance.

- **Health Care Financing Administration** (www.os.dhhs.gov/about/opdivs/hcfa). This agency promulgates regulatory provisions of the Medicare and Medicaid programs; the development and implementation of health and safety standards of care providers in federal health programs; and the implementation of peer review. HCFA also regulates all laboratory testing (except research) in the U.S. through the Clinical Laboratory Improvement Amendments (CLIA) program.
- **Centers for Medicare and Medicaid Services** (www.cms.hhs.gov). This agency, which is a national network that includes all 50 states, administers the Quality Improvement Organization, which monitors the quality of care for Medicare and Medicaid recipients. Again, request information regarding particular facilities.
- **Food and Drug Administration** (www.fda.gov). This federal agency regulates food, drugs (prescription and over-the-counter), medical devices, vaccinations, cosmetics, and radiation-emitting products (cell phones, microwaves, etc.). Much information can be gathered from its website based upon which a more specific written request can be sent seeking, for example, reported adverse outcomes from the use of a particular drug, medical device or other product.
- **The Joint Commission** (www.jointcommission.org). The Joint Commission [formerly Joint Commission on Accreditation of Healthcare Organizations (JCAHO)] evaluates and accredits health care organizations and programs in the United States, and is the nation's

predominant standards-setting and accrediting body in health care. As discussed above, various aspects of surveys and performance reports such as those performed by the Joint Commission are not privileged nor protected by medical review committees and peer review privileges. Further, the Joint Commission includes the review of organizations' activities in response to sentinel events[10] in its accreditation process, including all full accreditation surveys and random unannounced surveys. In fact, you can contact the Joint Commission directly even by phone to learn whether a particular occurrence at a hospital that you may be investigating for potential malpractice suit was reported as a sentinel event[11]. You will only need to provide them with the date of the occurrence and address for the location where it occurred. However, they only keep the information for three years, so it's best to try to obtain this information as quickly as possible. In response to the reporting of a sentinel event, the hospital must conduct a root cause analysis, which may be done outside of traditional peer review and may be discoverable. But even if the hospital considers it peer review privileged, the factual material and original documents gathered during the root cause analysis or peer review process may be discoverable. The law in this area varies by state.

- **American Board of Medical Specialties** (www.abms.org). This organization is comprised of 24 medical specialty Member Boards, and is the main entity overseeing the certification of physician specialists in the United States. It assists member boards in developing and implementing educational and professional standards to evaluate and certify physician specialists.
- **American Medical Association** (www.ama-assn.org). The AMA is involved in advocacy efforts related to the important issues in medicine today. It sets standards for

medical education, practice and ethics, and much information is available online and for purchase on the website.

- **Agency for Healthcare Research & Quality** (www.ahrq.gov). This is the lead Federal agency charged with improving the quality, safety, efficiency, and effectiveness of health care. As one of 13 agencies within the Department of Health and Human Services, it supports health services research that improves the quality of health care.
- **Centers for Disease Control** (www.cdc.gov). The CDC is one of the 13 major operating components of the Department of Health and Human Services, which is the principal agency in the United States government for protecting the health and safety of all Americans and for providing essential human services. Many free downloadable governmental publications are available online that are very useful is pursuing medical malpractice claims.
- **State Board of Medical Examiners or physician licensing authorities**. Each state has an entity that regulates physician licensing, such as license issuance, renewal, suspension, revocation and disciplinary action. If disciplinary action was taken against a physician, you will be able to obtain the investigative and hearing materials and orders rendered in most instances.
- **Office of the Secretary of State and other state non-physician licensing authorities**. Each state also has an entity that regulates the following areas pertaining to healthcare providers (non-physician) licensing: issuance, renewal, suspension, revocation and disciplinary action. This is a great resource to check on the backgrounds of nurses, pharmacists, and technicians of various sorts which may be very helpful in deposition preparation and cross-examination. They also post public board orders that have been

entered against these types of practitioners, which I have used in the past to attach to complaints to demonstrate other similar incidents.

B. <u>Using FOIA-Obtained Information to Win in an Unexpected Way</u>

It is the Georgia Department of Human Resources and the Health Care Financing Administration that I would like to tell you about in a bit more detail and how I was able to use information I obtained from them to defeat a motion for partial summary judgment filed by a laboratory which evaluated Pap smears. Other states have similar agencies.

The defendants in the case filed multiple motions to dismiss and for summary judgment during the course of the litigation to avoid taking responsibility for three years of misread Pap smears, which lead to my client's death just five months after she was finally diagnosed with end-stage cervical cancer. In the last motion for partial summary judgment, the defendant pathologist (an MD), who was the laboratory director and supervisor of the laboratory I sued, used a novel argument to try to escape liability. I had of course filed the complaint with an expert that claimed medical malpractice against this pathologist, since he was an MD. Defendant's counsel attempted to argue semantics in an effort to avoid liability based upon the malpractice my expert indicated in her affidavit by stating that there cannot be a "medical" malpractice claim against the pathologist because he did not have a one-on-one relationship ("privity") with the patient since he never saw or spoke to her as a patient. This case arose in Georgia and the violation of the standard of care had to be couched in terms of malpractice because the pathologist was a medical doctor and required an affidavit, although he was acting as a pathologist, laboratory director and supervisor.

The defendant argued that doctor-patient privity is essential because it is this relation, which is the result of a consensual transaction, that establishes the legal duty to conform to a

standard of conduct.[12] However, I argued that he had other duties to this patient, for whose "benefit" the slide was read and the report issued to her treating physician, upon which the treating physician relied during the course of her care.

To his motion this pathologist attached an affidavit containing the self-serving conclusory statements that he had no liability as a director, supervisor, or anything else dealing with the laboratory or the patient. This was despite the fact that his name appeared on the Pap smear report in question as the laboratory director for the screen site.

I was able to contradict his statements with an affidavit from the team leader of the Office of Regulatory Services of the Georgia Department of Human Resources. This agency was charged with the licensing of pathology and cytology laboratories. I was previously able to obtain the CLIA evaluations for this laboratory from this office for the time periods at issue for the misread Pap smears, which included all of the laboratories' deficiencies documented by an on-site inspection by officials from the DHR. Within the materials I received were the laboratory's licensing and renewal documents.

I attached to the affidavit a copy of the laboratory's "Application for the Annual Licensure or Approval of Clinical Laboratory Under the Georgia Laboratory Licensure Law, 1970", otherwise known as a Renewal Application, for the time period at issue in this case. The affidavit stated that on both the first and second page of the Renewal Application, under "Scientific and Supervisory Staff," this pathologist was listed, and that he and another pathologist on a weekly basis served as the scientific and supervisory staff for the laboratory. In addition, his name appeared as laboratory director of the screen site on the Pap smear report. Based on the regulations of this agency, the official was able to add to her affidavit that:

> the laboratory director at a screen site, **even if not the lab issuing the final report of a cytology smear**, is responsible for that lab, the

> screener's competency, and the **accuracy of the slides screened at that location, even though the director may not have actually reviewed the slide**. The screen site laboratory director bears equal responsibility to that of the director of the issuing laboratory for the results coming from his location.

The judge entered a lengthy order denying the motion, citing to the case law and the affidavits. The defendants filed a motion for interlocutory appeal and then for certiorari, but we ultimately prevailed and were able to settle with the laboratory.

C. Independent Medical Research

A vast array of resources are available on the internet to assist you in researching a medical malpractice case, including medically-related sites to help in finding journal articles, as well as sites that can actually help you analyze data from a client's medical records so that you know what it may signify (such as with lab results).

This is but a small sampling of some of the websites you may find helpful in preparing a medical malpractice case:

- Medical Related Articles (www.findarticles.com)
- Medical Library (www.thriveonline.oxygen.com)
- Consumer Drug Information (www.fda.gov/cder/consumerinfo)
- Medical Dictionary (www.medicinenet.com)
- National Library of Medicine (www.nlm.nih.gov)
- U.S. Department of Health and Human Services (www.healthfinder.gov)
- College of American Pathologists (www.cap.org).

IV. Approaches to Preparation for taking the Deposition of a Defendant or Expert

A. Research Regarding an Individual Practitioner

Using the curriculum vitae, which you obtained in response to your initial set of discovery, or if no CV is available, then through other information you gained through interrogatory responses, you have a springboard to begin to research the background of a particular physician, be it the defendant or an expert witness. The following websites can be extremely helpful in providing much background information on a particular practitioner:

- American Medical Association (www.ama-assn.org). This organization is an advocate for both patients and physicians. It develops and promotes medical practice, research, and education across the United States. Also, remember to research your state's medical association (e.g., The Medical Association of Georgia: www.mag.org).
- American Board of Medical Specialties (www.abms.org). This is an umbrella organization that maintains a list of those physicians who are board certified. In addition to certification status, this organization includes the exact medical area(s) of the individual's certification with an explanation of his or her specialty.

Further, remember also to check the following areas for each practitioner:

- Memberships in organizations, societies, clubs (professional, personal and religious). Look at the website for each such organization, and try to find what the purpose of the group is, their credo, what type of pledge they may have taken when joining the organization or society.
- Military service.
- Additional business endeavors, including those that may not be medical related.
- The individual's personal, professional, and business websites.

- The individual's social media websites, such as Facebook, MySpace, LinkedIn, Twitter, etc. This is becoming more relevant every day.
- Applications for licensure, certification, malpractice insurance, and hospital/clinical privileges.
- Articles, research papers, or other medical writing that has been authored or co-authored.
- Educational lectures, speeches, and presentations that have been attended or given.
- Previous lawsuits, whether plaintiff or defendant, in addition to any previous depositions, including any expert witness testimony.

Conclusion

Medical malpractice cases are won and lost in discovery. Meticulous discovery can unearth relevant facts, inconsistencies, and incriminating evidence. Be thorough in the discovery you propound; however, remember that not all discovery weapons are derived from formal discovery. Use resources available in public records through FOIA to bolster your position, or to scuttle attempts to obfuscate relevant issues or play discovery shell games. A well thought out and complete discovery plan maximizes your chances for a fair settlement or a favorable trial outcome.

[1] When obtaining radiographic records, make sure to obtain copies of all films including scans, arteriograms, cystograms, cardiac catheterizations, nuclear scans, moving films and/or videos, angiograms, etc. Often x-rays exist, but no correlating report can be located, and visa versa. Remember to also provide your experts with copies of any and all films.

[2] When obtaining laboratory records, also obtain the original cytology slides and pathological specimens if they relate to your case (i.e.: pap smears, cultures, biopsies, surgical specimens, etc.). As with x-ray films, remember to provide your pathology/cytology expert with the actual slides and specimens. Since the originals of these specimens are often released to you for only a certain period of time, you may wish to have color photographs and copies made for future depositions, exhibits, etc.

[3] When obtaining billing records and insurance correspondence, make sure you include each and every defendant, and all third parties, hospitals, clinics, outpatient facilities, pharmacies, etc. These records not only assist you with your damage claim, but they often prove or disprove what services were and were not rendered by the defendant(s).

[4] For example, a request for production might read:

All advertising literature or documents of any kind whatsoever, including, but not limited to, newsletters provided by Defendant _____ Hospital or any other facility or organization on its behalf, to physicians, other health care providers and/or facilities, and the community as part of an effort to encourage the public to use _____ Hospital.

[5] 45 CFR § 60.10 covers information hospitals must request from the National Practitioner Data Bank:

> (a)When information must be requested. Each hospital, either directly or through an authorized agent, must request information from the Data Bank concerning a physician, dentist or other health care practitioner as follows:
>
> (1) At the time a physician, dentist or other health care practitioner applies for a position on its medical staff (courtesy or otherwise), or for clinical privileges at the hospital; and
>
> (2) Every 2 years concerning any physician, dentist, or other health care practitioner who is on its medical staff (courtesy or otherwise), or has clinical privileges at the hospital.
>
> (b) Failure to request information. Any hospital that does not request the information as required in paragraph (a) of this section is presumed to have knowledge of any information reported to the Data Bank concerning this physician, dentist or other health care practitioner.

45 CFR § 60.11 provides in pertinent part:

> (a) Who may request information and what information may be available. Information in the Data Bank will be available, upon request, to the persons or entities, or their authorized agents, as described below:
>
> ……..
>
> (5) An attorney, or individual representing himself or herself, who has filed a medical malpractice action or claim in a State or Federal court or other adjudicative body against a hospital, and who requests information regarding a specific physician, dentist, or other health care practitioner who is also named in the action or claim. Provided, that this information will be disclosed only upon the submission of evidence that the hospital failed to request information from the Data Bank as required by Sec. 60.10(a), and may be used solely with respect to litigation resulting from the action or claim against the hospital….

[6] *Candler General Hospital, Inc., v. Persaud*, 212 Ga. App. 762, 766 (2), 442 SE2d 775 (1994).

[7] OCGA § 31-7-131(1).

[8] According to the Joint Commission Public Information Policy, which can be viewed at www.jointcommission.org, the following information is not considered confidential:

- The dates of the triennial surveys;
- The accreditation decision based on those surveys;
- The organization's current accreditation status, including designation and the date on which that designation became effective;
- The date of any follow-up activity for the organization;
- The organization's overall evaluation score based on the triennial survey and national comparison to scores for comparable organizations;
- The organization's score for each performance area evaluated and national comparison to scores for comparable organizations;
- Subsequent resolution of recommendations for improvement and the date(s) of resolution;
- The organization's updated overall evaluation score and performance area scores;
- Organizational and operational components included in the accreditation survey;
- Performance areas that have recommendations for improvement;
- Subsequent change(s) in accreditation status;
- The organization's accreditation history;
- Any special recognition conferred on the organization;
- Survey fees paid by the accredited organization;
- The organization's scheduled survey date(s) once the organization has been notified of the dates;

- Confirmation of the occurrence of a sentinel event in an accredited organization and Joint Commission's intent to evaluate this occurrence;
- Applicable standards used for an accreditation survey;
- If a tailored survey was performed, the organizational component(s) contributing to a conditional accreditation or denial of accreditation decision;
- Whether there were any recommendations for improvement for which Joint Commission had no, or insufficient, evidence of resolution when an organization withdraws from accreditation;
- The performance areas for which Joint Commission had no, or insufficient, evidence of resolution of recommendations for improvement when an organization withdraws from accreditation;
- Whether an on-site evaluation of an organization in which a sentinel event has occurred is to be or has been conducted;
- The number of standard-related written complaints filed against an accredited organization and those that have met prospective criteria for further active review;
- The applicable standard areas involved in a specific complaint review;
- The performance areas in which a recommendation for improvement was issued as a result of complaint evaluation activities;
- Any determination that the complaint is not related to Joint Commission standards;
- If the complaint is related to standards, the course of action to be taken regarding the complaint;
- Whether Joint Commission has decided to take action regarding an organization's accreditation status following completion of the complaint investigation; and
- Any change in an organization's accreditation status following completion of the complaint investigation.

[9] 42 CFR §482.12(e) states:

> (e) *Standard: Contracted Services*. **The governing body must be responsible for services furnished in the hospital whether or not they are furnished under contracts.** The governing body must ensure that a contractor of services (including one for shared services and joint ventures) furnishes services that permit the hospital to comply with all applicable conditions of participation and standards for the contracted services.
>
> (1) The governing body must ensure that the services performed under a contract are provided in a safe and effective manner.
>
> (2) The hospital must maintain a list of all contracted services, including the scope and nature of the services provided. (Emphasis added)

[10] As stated on the Joint Commission's website, "[a] sentinel event is an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof. Serious injury specifically includes loss of limb or function. The phrase, "or the risk thereof" includes any process variation for which a recurrence would carry a significant chance of a serious adverse outcome. Such events are called "sentinel" because they signal the need for immediate investigation and response."

[11] The customer service number at the Joint Commission is (630)792-5800.

[12] In his brief the pathologist also misconstrued the holding of an important Georgia case dealing with exceptions to the privity rule and stated that it only applied to negligent misrepresentation cases. Smiley v. S & J Investments, Inc. et al., 260 Ga. App. 493, 580 SE2d 283 (2003), *cert. denied* on July 14, 2003) stating that at most it refers to negligent misrepresentation cases. However, it went further than that, and only discussed "cases involving misrepresentation of facts" as "an example" of where injury to third parties is foreseeable where the privity rule has its exception. Otherwise, without privity, there can be no liability unless there is willfulness, physical harm or property damage:

> [T]he trend in Georgia[, however,] has been **to relax the rule of strict contractual privity in malpractice actions, recognizing that under certain circumstances, professionals owe a duty of reasonable care to parties who are not their clients**. *Driebe v. Cox*, 203 Ga. App. 8, 9(1), 416 S.E.2d 314 (1992). **Exceptions to the privity rule have been carved out where injury to third parties is foreseeable**. For example, in cases involving negligent misrepresentation of facts, **liability extends to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly**.... [Otherwise] there will be no liability in the absence of privity,

> willfulness or physical harm or property damage. *Robert & Co. Assoc. v. Rhodes-Haverty Partnership*, 250 Ga. 680, 682, 300 S.E.2d 503 (1983). (Punctuation omitted.) *Samuelson v. Lord, Aeck & Sergeant*, 205 Ga. App. 568, 570-571(2), 423 S.E.2d 268 (1992) (architect for inherently dangerous design causing personal injury).

Smiley, 260 Ga. App. at 495 [emphasis added].

[Form - FOIA request regarding medical provider]

Georgia Composite Medical Board
Public Records Unit
2 Peachtree Street, NW—36th Floor
Atlanta, GA 30303-3465

RE: Freedom of Information Request for Public Records

To Whom It May Concern:

I am writing to ask that you please furnish a copy of any and all documentation, including but not limited to, applications, reference forms and letters, job descriptions, scope of duties, employment history, educational and training history, investigational reports, professional disciplinary actions, federal and state requirements, and any other form of public records your organization may possess relating the following physician:

XXX, MD
Georgia Physician License #XOXOX

This request is made pursuant to Title V of the United States Code § 552 and the First Amendment of the United States Constitution. If it is believed that any portions of the requested documents are exempt from disclosure under the Freedom of Information Act for public records, we initially consent to sanitized copies, deleting any such allegedly exempt material. Our initial consent is designed to obtain the documents requested expeditiously and does not waive our right to additional information, which we may need to pursue at a later date. In the event any material is considered exempt, please specify the statutory basis for denial and the name, title, and telephone number of the person or persons responsible for this decision.

We also ask that the copies that your division forwards to our firm please be certified as true and accurate reproductions of the original documents that are on file in your office and/or any archive facility.

Pursuant to sections (a)(6)(i) of the Freedom of Information Act, I ask that you please respond to this request within the next (10) ten working days by contacting me at _____. Thank you for your professional assistance and prompt attention to this matter, and please feel free to notify me of any charges that may accrue for the copying and certification of said documents so I may issue prompt payment.

Sincerely yours,

[Form - FOIA request regarding facility]

The Joint Commission
One Renaissance Boulevard
Oakbrook Terrace, IL 60181

RE: Freedom of Information Request

To Whom It May Concern:

Please furnish copies of any and all (applicable years) public documentation, including but not limited to, sentinel event reports, operational surveys, quality surveys, regulatory surveys, proficiency surveys, liability surveys, complaints, investigation reports, professional regulations, federal and state requirements, federal and state accreditations and/or validations, federal and state infractions and/or violations, operational methods, operational infractions and/or violations, internal corrections and/or suggestions, and any other form of documentation your organization may possess regarding:

XXX FACILITY/HOSPITAL/CLINIC, ETC.
123 Liability Lane
Tortville, USA 12345

In addition to copies of any request documents the last five years, we also wish to obtain any other certifications available on that facility for (applicable years).

These requests are made pursuant to Title V of the United States Code § 552 and the First Amendment of the United States Constitution. If it is believed that any portions of the requested documents are exempt from disclosure under the Freedom of Information Act, we initially consent to sanitized copies, deleting any such allegedly exempt material. Our initial consent is designed to obtain the documents requested expeditiously and in no way waives our right to additional information, which we may pursue later if necessary. In the event any of this material is considered exempt, please specify the statutory basis for denial and the name, title, and telephone number of the person or persons responsible for this decision.

We also ask that the copies that your division forwards to our firm please be certified as true and accurate reproductions of the original documents that are on file in your office and/or any archive facility.

Pursuant to sections (a)(6)(i) of the Freedom of Information Act, I ask that you please respond to this request within the next (10) ten working days.

Sincerely yours,

Anthony E Francis MD JD *Does defensive medicine exist?*
Dr. Francis Graduated with an MD degree in 1977, performed residency in Orthopedic Surgery and Pediatric Orthopedics, passed boards in Orthopedic and Neurological Surgery, Spinal Surgery, Arthroscopy and Legal Medicine. Received JD and LLD in 1987. LLD with emphasis in Legal Medicine. Graduated with Master of Science degree in Quantum Mechanics and Computational Chemistry in 1999. Practiced Orthopedic Surgery from 1977 to 1999. Founded "Legal Medicine Research" in 1996. Writes advisory reports for US federal judges and also reviews tort cases. Writes the medical-legal blog "The Verdict Is In" for WebMD/Medscape. On-line editor and feature columnist for WebMD/Medscape. Authored more than 30 articles for Wikipedia on Medieval English Common Law, Medieval Scholasticism, and other medical and legal topics. Interest in Medieval Common Law, Medieval Scholasticism, and Greek Philosophy.

Medical Malpractice and Defensive Medicine

Presented by Anthony E. Francis MD JD 4/25/13

Does defensive medicine exist? And if so, is it caused by the threat of malpractice suits?

Legal Blogs would lead us to believe there is no such thing as "defensive medicine" and that medical malpractice suits do not contribute to defensive medicine.

An example from the TortsProf blog Oct 27, 2012:

Center for Progressive Reform

February 1, 2012

Center for Progressive Reform White Paper No. 1203

In the debate about health care reform, "defensive medicine" has become a convenient culprit for rising costs and especially rising physician malpractice premiums. Vaguely defined, the phrase, "defensive medicine," is used to suggest that physicians make medical decisions to avoid potential litigation, instead of with their patients' health and safety in mind. On the strength of this assertion alone, some policymakers argue for restricting Americans' right to bring suit to recover damages for medical malpractice. This report demonstrates, however, that the proponents of medical malpractice "reform" lack persuasive evidence that tort litigation against physicians encourages them to make medical decisions that they would not have made otherwise.

Powerful business interests have compelling reasons to perpetuate the "defensive medicine" myth. Because the national health care debate has been framed around costs – not patient health and safety or access to care – the "defensive medicine" message has been successfully deployed to restrict Americans' access to the courts in many states. Meanwhile, "defensive medicine" also serves as a politically expedient straw man, allowing policymakers and the insurance industry to ignore or obscure the real drivers of rising medical costs, including the high costs of prescription drugs; the high demand for, and increasing use of, state-of-the-art technology; the growing incidence of chronic diseases; and an aging population that lives longer and consumes more medical care.

This report first establishes that an intact and robust civil justice system is necessary to the health of society and exposes how rarely doctors are actually being sued. Next, it examines why doctors order tests and procedures. It then surveys available empirical evidence showing that a supposed "defensive medicine" mindset has little impact on medical decisions or on medical practice costs. The report also exposes extraordinary shortcomings in the methodology and academic rigor of the evidence most frequently cited by civil justice opponents.

The evidence reveals that "defensive medicine" is largely a myth, proffered by interests intent on limiting citizen access to the courts for deserving cases, leaving severely injured patients with no other recourse for obtaining the corrective justice they deserve. These changes would limit the deterrent effect of civil litigation and diminish the regulatory backstop that the civil justice system provides to the professional licensing system, leading to more medical errors. Restricting lawsuits might save doctors a negligible amount on malpractice premiums but the vast majority of any savings will most certainly line the pockets of the insurance companies demanding these restrictions. On the other hand, buying into this myth has very real and dangerous consequences. Allowing civil justice opponents to pretend that constraining the civil justice system equates to meaningful health care reform distracts us from doing the things that must be done to fix the system, including avoiding the 98,000 deaths caused by preventable medical errors every year and reducing the unacceptable number of uninsured Americans.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139682

Is the assertion “The evidence reveals ‘defensive medicine’ is largely a myth” true?

Let’s define “defensive medicine.”

1.) Ordering every test available, no matter how unlikely it is to give any positive finding.

2.) Referring to other consultants. Referring to other specialists to “spread the risk.” Referring to other consultants to maximize profit to the clinic or hospital.

3.) Ordering unnecessary tests to avoid litigation. To avoid problems with peer review committees.

Does “defensive medicine exist”? Yes. However standard of care has changed over the years so that “more testing and referrals rather than less” is now the accepted “standard of care.” This is potentiated by hospital and clinic peer review committees, risk managers and hospital lawyers.

Doctors have no understanding of the legal system.

Hospital administrators and clinic managers have no understanding of the legal system.

Nurses, nurse practitioners and other mid-levels have no understanding of the legal system.

Lawyers hired by hospitals and clinics as risk advisors act like they have no understanding of the legal system. Everything could potentially be a lawsuit to hear them talk about it.

Change in medical practice

There are two ways to diagnose – the old fashioned way – by history and physical examination with a minimum of tests and consultation. This is the way doctors used to be trained.

Then there is the modern way, order everything, and consult profusely. This is the way doctors have been trained since the late 1980s. Part of this is in response to the threat of litigation.

Example: Old way – patient comes into ER with RLQ pain – positive rebound - white count 13000, rectal tender in the RLQ – call general surgeon who comes in to look at the patient and decides whether to operate or observe.

New way – general surgeon says, “Don’t call me until you have ordered every test under the sun, an ultrasound, a CT scan, an MRI and gotten a reading from the radiologist.”

Since the 1980s, the persistent and perceived threat of malpractice suits has changed standard of care, driving toward more testing and referrals on the outside chance “something might be missed.” We could be sued becomes the excuse to do everything.

What Drives the cost of medicine?

1.) Increased number of tests and imaging studies are available– MRI’s CT scans, blood tests, etc.

2.) Consumerism – Hospitals and Clinics are run by CEOs with a business background. Consumer satisfaction is paramount. Yet selling hamburgers, potato chips or cars is inherently different from dispensing good medical care, especially where the public is not directly paying, and there is a perception that “more is better.” Direct to consumer drug advertising.

3.) Fear of litigation – often unfounded, but real. This has been present since the 1970s.

4.) Cost shifting – rather than solve this problem, ObamaCare makes it worse.by political mandates of “standard of care” and coverage of the “50 million without insurance.”

5.) Computerized records

6.) Governmental Mandates (e.g. Emergency Medical Treatment and Active Labor Act – EMTALA),

The three “L’s” of Defensive Medicine

Laziness, Lucrative and Liability

Why do patients sue?

The main reason isn’t a bad outcome. It is a perception that the doctor and medical system “didn’t care.” Only 1% to 7% of “adverse outcomes” get filed as malpractice cases. Most if not all med mal cases occur because of some other doctor saying it was substandard care.

What is a school of thought?

There are two ways to look at "school of thought."

A group of physicians who practice in a certain way. Allopathic physicians, chiropractors, podiatrists, etc. Nowadays these are held to a national standard of care.

There are also schools of thought within a given discipline.

Examples:

Physicians who practice a certain surgical procedure.

Physicians who use a medication for an FDA off-label use.

A school of thought can be identified by:

A group of licensed physicians who practice in a given way or philosophy with ongoing credible research into the methods which is published in peer review journals of international circulation and which are generally available. There should be dissemination of information in meetings, handouts, trade publications and other forms of communication. There should be peer review.

Side bar – this can become a powerful tool to discredit an expert who either doesn't believe in a given school of thought or doesn't practice it, hence can't credibly testify about it.

What is standard of care?

Standard of care is the norm of a given school of thought.

For tort and administrative law (and criminal law):

Standard of care is defined by expert testimony. Distinguishing an "adverse event" from a "substandard care" is a question for trier of fact based on the credibility of expert testimony.

The American College of Medical Quality

POLICY 3 Standard of Care

The Standard of Care is a case- and time-specific analytical process in medical decision-making, reflecting a clinical benchmark of acceptable quality medical care. This benchmark, which is used to evaluate and guide the practice of medicine, encompasses the learning, skill and clinical judgment ordinarily possessed and used by prudent health care providers or payors of good standing in similar circumstances. The standard of care must reflect the art (consensus of opinion of clinical judgment) and

science (published peer reviewed literature) of medicine and must be uniform for all health care personnel whether they are providing direct clinical care or reviewing the medical necessity of past, present or future medical care. A violation of standard of care may result in under-utilization of medical care, but also occurs when unnecessary care (over-utilization) is provided. The standard of care has a national and clinical basis, rather than a local provider community or payor review basis.

POLICY 4 The Medical Decision-Making Process

The medical decision-making process used in medical quality management reflects a consensus of opinion of clinical judgment that is supported by published peer reviewed scientific literature. This decision-making process must be conducted in a uniform, timely and consistent manner utilizing risk-benefit analysis. The medical decision-making process applies not only to all direct patient care but also to the medical review of care a patient receives. This decision-making process must be documented in writing, reflecting how it is consistent with the applicable standard of care, and must be performed by qualified and credentialed health care professionals.

Peer Review

Peer review is governed by state and federal law.

Federal law provides protections for peer reviewers if the process meets federal standards.

Improper peer review can result in civil and criminal liability.

Adverse peer review decisions must be reported to the National Practitioner Data Bank.

Physicians have few rights in managed care deselection procedures.

In the 1980s, peer review of physicians for hospital medical staff privileges was the central legal battle ground for professional review. Physicians who were denied privileges or removed from hospital medical staffs sued, claiming unfair or illegal treatment. Physicians who conducted the reviews demanded legal protection because of the potential liability and costs associated with defending an action brought by a physician denied privileges. The federal government responded with sweeping immunity from damages in peer review–related lawsuits, effectively limiting the legal review of these decisions, if the peer review committee complied with the due process standards of the federal law. This has made peer review for hospital privileges less important as a legal issue, just as deselection by managed care organizations (MCOs) rises in importance.

Deselection is the process by which an MCO terminates a physician's contract to provide services. The term deselection is used, rather than peer review, because deselection is usually done for reasons that do not implicate preserving or improving the quality of medical care. This section reviews the law on traditional peer review, then discusses deselection and the laws that are applicable to deselection decisions.

http://biotech.law.lsu.edu/map/PeerReviewandDeselection.html

Comment: It is almost impossible for a doctor to sue a peer review committee under any federal law, including RICO. Peer review can even be malicious and done by business competitors.

The Federal Peer Review Law – Patrick Case (**Patrick v Burget 486 U.S. 94 (1988)**

The HCQIA [42 U.S.C.A. §§ 11101, et seq.] was passed by Congress in response to the consumer demands for better control of the quality of medical care and lobbying by hospital and medical organizations who said that the potential damages from peer review–related litigation were chilling their ability to conduct proper peer review. At the same time, Congress was concerned with abuses of the peer review process, which were in the news with the district court decision in the Patrick case. The law they passed provided immunity for damages, but did not provide immunity from lawsuits. Thus an aggrieved physician with sufficient money to pay an attorney without relying on a contingent fee can file a lawsuit against a hospital and the peer review committee members, litigate it to a jury verdict, then let the judge throw out any damages the jury awards. This can be little consolation to the defendants who may have to spend a lot of money defending the lawsuit. (They cannot just ignore it because they have to make sure that the judge finds that they did comply with the act.) In reality, however, eliminating any potential recovery has limited this litigation and has encouraged medical malpractice insurers to include peer review under their policies.
The more important provision of the act may be the National Practitioner Data Bank. This is meant to be a clearinghouse for information on peer review actions, payments in medical malpractice cases, and other information bearing on the competence of physicians. The intent of the databank is to facilitate peer review and to prevent physicians from escaping disciplinary actions by moving to a different state. This information is available to malpractice plaintiffs in only very limited circumstances.

http://biotech.law.lsu.edu/map/TheFederalPeerReviewLaw.html

What have been the effects of peer review?

1.) Consolidation of physicians – solo practitioners and small groups are wiped out. Brought about large clinics and hospital employment.

2.) Brought more physicians (now most if not all) under the umbrella of corporate management, where multiple layers of peer review are carried out on all aspects of practice, under the supervision of risk managers and defense lawyers.

3.) Corporate interests (providing the best service or product available at the lowest cost to maximize profits) are balanced against the risk of malpractice suits. Malpractice suits are expensive and lead to a bad corporate image. Therefore risk managers will do everything to avoid a lawsuit.

4.) ObamaCare speeds up the corporatization of medicine, which will likely be controlled by four or five megacorporations. This is corporatization.

What about that one in a million case? Some adverse event which, if missed or mistreated could lead to significant damages to the patient?

Every patient who comes in will now be tested for that rare condition. This represents a gross misallocation of resources. This is defensive medicine.

So the idea that lone physicians are practicing “bad medicine” is misguided.

Standard of care has changed over the years. More tests available. More specialists available. Corporate and peer review forces have changed the nature of the practice of medicine propelling it toward more rather than less. Some of this is based on an irrational fear of being sued. Removing the threat of lawsuits will not change “defensive medicine.”

Summary

Defensive medicine exists. It is the result of multiple factors:

1.) Fear of litigation – fear which is magnified beyond reality.

2.) Peer review committees which also fear litigation and have no understanding of the legal system.

3.) A change in the practice of medicine toward more testing and referrals which now has become standard of care.

William Callaham- *Medical Malpractice Trial Presentation Techniques: Make them Persuasive, Powerful and Moving*

Mr. Callaham has 37 years' experience as a trial lawyer and has tried approximately 150 civil jury trials to conclusion. He has handled a variety of cases throughout California and also in Washington, Idaho, Minnesota, Wisconsin, Nevada and Montana. He has a balanced career of 18 years practicing as a defense attorney (defending major corporations, insurance companies, physicians and other individuals), as well as 18 years on the plaintiffs' side exclusively representing injury victims and their families in a variety of personal injury, wrongful death and catastrophic loss litigation.

SAVANNAH DISMUKES
v.
MERCY SAN JUAN MEDICAL CENTER

CLOSING ARGUMENT

S D

S S

What You Have Learned the Last Few Weeks:

- **How Savannah Developed a Severe Bacterial Meningitis While a Patient at Mercy San Juan Medical Center;**
- **How the Meningitis Caused Her to Suffer Severe Permanent Brain Damage;**
- **And the Resulting Effects That Brain Damage Has Caused**

LEGAL ISSUES

CACI 400. ESSENTIAL FACTUAL ELEMENTS

Savannah Dismukes claims that she was harmed by Mercy San Juan Medical Center's negligence. To establish this claim, Savannah Dismukes must prove all of the following:

1. That Mercy San Juan Medical Center was negligent;
2. That Savannah Dismukes was harmed; and
3. That Mercy San Juan Medical Center's negligence was a substantial factor in causing Savannah Dismukes' harm.

Judicial Council of California Jury Instructions

LEGAL ISSUES

- ☐ **LIABILITY**: MERCY SAN JUAN MEDICAL CENTER
- ☐ **CAUSATION**: Substantial Factor in Causing Harm.
- ☐ **DAMAGES**: SAVANNAH was Harmed.

CACI 502. STANDARD OF CARE FOR MEDICAL SPECIALISTS

A neonatologist is negligent if he or she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful neonatologists would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

You must determine the level of skill, knowledge, and care that other reasonably careful neonatologists would use in similar circumstances based only on the testimony of the expert witnesses who have testified in this case.

Judicial Council of California Jury Instructions

CACI 504. STANDARD OF CARE FOR NURSES

A neonatal intensive care nurse is negligent if he or she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful neonatal intensive care nurses would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

You must determine the level of skill, knowledge, and care that other reasonably careful neonatal intenstive care nurses would use in similar circumstances based only on the testimony of the expert witnesses who have testified in this case.

Judicial Council of California Jury Instructions

CACI 3705. EXISTENCE OF "AGENCY" RELATIONSHIP DISPUTED

SAVANNAH DISMUKES does not claim that the neonatologists who cared for her were employees of MERCY SAN JUAN MEDICAL CENTER, however, SAVANNAH DISMUKES does claim that the neonatologists who cared for her were agents of the Defendant and that MERCY SAN JUAN MEDICAL CENTER is therefore responsible for the neonatologists' conduct.

Judicial Council of California Jury Instructions

CACI 3705. EXISTENCE OF "AGENCY" RELATIONSHIP DISPUTED

SAVANNAH DISMUKES does not claim that the neonatologists who cared for her were employees of MERCY SAN JUAN MEDICAL CENTER. However, SAVANNAH DISMUKES does claim that the neonatologists who cared for her were agents of the Defendant and that MERCY SAN JUAN MEDICAL CENTER is therefore responsible for the neonatologists' conduct.

Judicial Council of California Jury Instructions

CACI 3709. OSTENSIBLE AGENT

SAVANNAH DISMUKES claims that MERCY SAN JUAN MEDICAL CENTER is responsible for the neonatologists' conduct because they were MERCY SAN JUAN MEDICAL CENTER'S apparent employee or agent.

To establish this claim, SAVANNAH DISMUKES must prove all of the following:

1. That MERCY SAN JUAN MEDICAL CENTER intentionally or carelessly created the impression that the neonatologists were MERCY SAN JUAN MEDICAL CENTER'S employees or agents;

2. That Lindsey Smith, on behalf of SAVANNAH DISMUKES, reasonably believed that the neonatologists were MERCY SAN JUAN MEDICAL CENTER'S employees or agents; and

3. That SAVANNAH DISMUKES was harmed because of reasonable reliance on that belief.

OSTENSIBLE AGENCY

WHY THE NEONATOLOGISTS WERE OSTENSIBLE AGENTS OF THE HOSPITAL

-
-
-

Contractors"

- **Lindsey Given No Choice of Doctors**
- **No Consent/Admission Form Given for Savannah's Admission**

EVIDENCE OF NEGLIGENCE

THE "TEAM" APPROACH

Duties of Both the Doctors & the Nurses:

- **To Recognize Savannah was at High Risk for Infection**
- **To be Aware of Signs & Symptoms of Infection**
- **To be Aware that Signs & Symptoms May be Quite Subtle**
- **To be Aware of Necessity for Prompt Diagnosis & Treatment of Infection**
- **To be Aware of Catastrophic Consequences of Delayed Diagnosis/Treatment**

SIGNS/SYMPTOMS OF INFECTION IN SAVANNAH

- **Temperature Instability**
- **Abnormal Lab Values**
  - **White Blood Cell Count**
  - **Bilirubin**
  - **Glucose Values**
- **Feeding Difficulties**
- **Increasing Average Heart Rate**
- **Tachypnia (Increased Respiration Rate)**

JUNE 3, 2006

REQUIRED TO CONTINUE ANTIBIOTICS

- **MUST Rule Out Sepsis or Continue**
- **Did NOT Rule Out Sepsis**
- **Negligent to Stop Antibiotics**
- **Risk of Continuing Antibiotics – Negligible**
- **Risk of Stopping Antibiotics – Catastrophic**

BETTER TO BE SAFE THAN SORRY

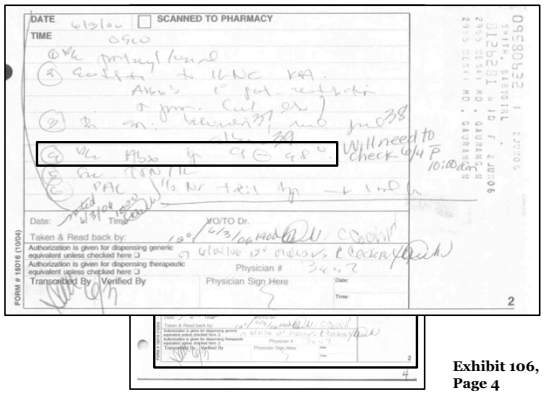
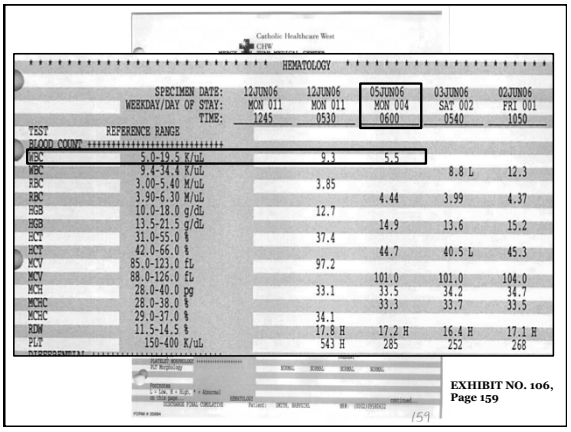


Exhibit 106, Page 4

JUNE 5, 2006

A CRITICAL DAY

- **No More Antibiotics**
- **Different Neonatologist – Dr. Kahle**
- **Blood Work Abnormalities**

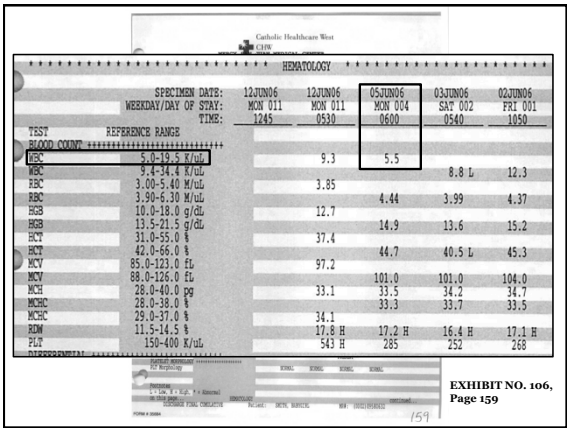


HEMATOLOGY

	SPECIMEN DATE:	12JUN06	12JUN06	05JUN06	03JUN06	02JUN06
	WEEKDAY/DAY OF STAY:	MON 011	MON 011	MON 004	SAT 002	FRI 001
	TIME:	1245	0530	0600	0540	1050
TEST	REFERENCE RANGE					
BLOOD COUNT						
WBC	5.0-19.5 K/uL		9.3	5.5		
WBC	9.4-34.4 K/uL				8.8 L	12.3
RBC	3.00-5.40 M/uL		3.85			
RBC	3.90-6.30 M/uL			4.44	3.99	4.37
HGB	10.0-18.0 g/dL		12.7			
HGB	13.5-21.5 g/dL			14.9	13.6	15.2
HCT	31.0-55.0 %		37.4			
HCT	42.0-66.0 %			44.7	40.5 L	45.3
MCV	85.0-123.0 fL		97.2			
MCV	88.0-126.0 fL			101.0	101.0	104.0
MCH	28.0-40.0 pg		33.1	33.5	34.2	34.7
MCHC	28.0-38.0 %			33.3	33.7	33.5
MCHC	29.0-37.0 %		34.1			
RDW	11.5-14.5 %		17.8 H	17.2 H	16.4 H	17.1 H
PLT	150-400 K/uL		543 H	285	252	268

159

EXHIBIT NO. 106, Page 159



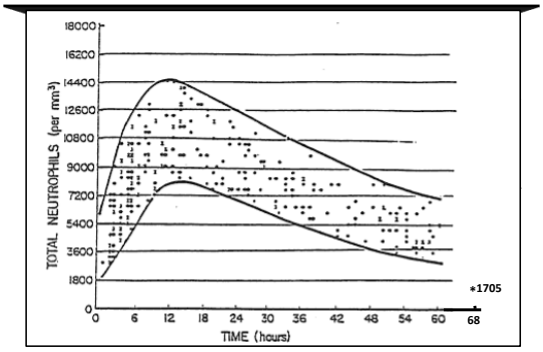
HEMATOLOGY

	SPECIMEN DATE:	12JUN06	12JUN06	05JUN06	03JUN06	02JUN06
	WEEKDAY/DAY OF STAY:	MON 011	MON 011	MON 004	SAT 002	FRI 001
	TIME:	1245	0530	0600	0540	1050
TEST	REFERENCE RANGE					
BLOOD COUNT						
WBC	5.0-19.5 K/uL		9.3	5.5		
WBC	9.4-34.4 K/uL				8.8 L	12.3
RBC	3.00-5.40 M/uL		3.85			
RBC	3.90-6.30 M/uL			4.44	3.99	4.37
HGB	10.0-18.0 g/dL		12.7			
HGB	13.5-21.5 g/dL			14.9	13.6	15.2
HCT	31.0-55.0 %		37.4			
HCT	42.0-66.0 %			44.7	40.5 L	45.3
MCV	85.0-123.0 fL		97.2			
MCV	88.0-126.0 fL			101.0	101.0	104.0
MCH	28.0-40.0 pg		33.1	33.5	34.2	34.7
MCHC	28.0-38.0 %			33.3	33.7	33.5
MCHC	29.0-37.0 %		34.1			
RDW	11.5-14.5 %		17.8 H	17.2 H	16.4 H	17.1 H
PLT	150-400 K/uL		543 H	285	252	268

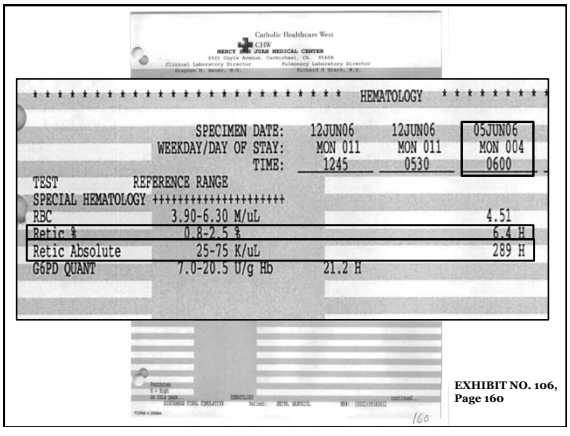
159

EXHIBIT NO. 106, Page 159

MANROE GRAPH



PLAINTIFF'S EXHIBIT NO. 28

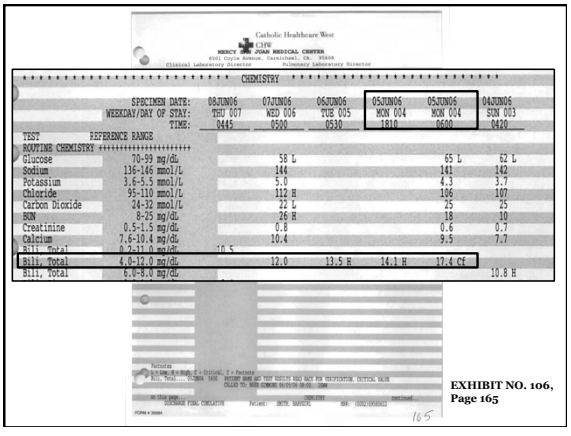


HEMATOLOGY

	SPECIMEN DATE:	12JUN06	12JUN06	05JUN06
	WEEKDAY/DAY OF STAY:	MON 011	MON 011	MON 004
	TIME:	1245	0530	0600
TEST	REFERENCE RANGE			
SPECIAL HEMATOLOGY				
RBC	3.90-6.30 M/uL			4.51
Retic %	0.8-2.5 %			6.4 H
Retic Absolute	25-75 K/uL			289 H
G6PD QUANT	7.0-20.5 U/g Hb		21.2 H	

160

EXHIBIT NO. 106, Page 160

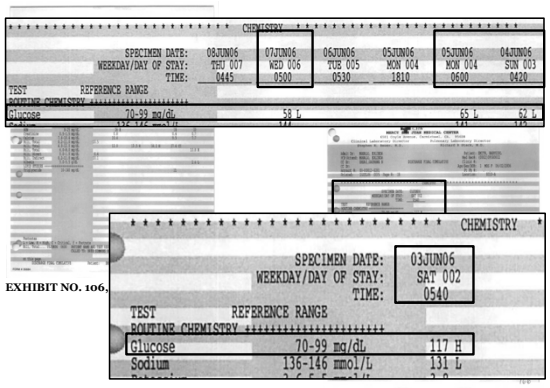


CHEMISTRY

	SPECIMEN DATE:	08JUN06	07JUN06	06JUN06	05JUN06	05JUN06	04JUN06
	WEEKDAY/DAY OF STAY:	THU 007	WED 006	TUE 005	MON 004	MON 004	SUN 003
	TIME:	0445	0500	0530	1810	0600	0420
TEST	REFERENCE RANGE						
ROUTINE CHEMISTRY							
Glucose	70-99 mg/dL		58 L			65 L	62 L
Sodium	136-146 mmol/L		144			141	142
Potassium	3.6-5.5 mmol/L		5.0			4.3	3.7
Chloride	95-110 mmol/L		112 H			106	107
Carbon Dioxide	24-32 mmol/L		22 L			25	25
BUN	8-25 mg/dL		26 H			18	10
Creatinine	0.5-1.5 mg/dL		0.8			0.6	0.7
Calcium	7.6-10.4 mg/dL		10.4			9.5	7.7
Bili, Total	0.2-11.0 mg/dL	10.5					
Bili, Total	4.0-12.0 mg/dL			12.0	13.5 H	14.1 H	17.4 Cf
Bili, Total	6.0-8.0 mg/dL						10.8 H

165

EXHIBIT NO. 106, Page 165


CHEMISTRY

	SPECIMEN DATE:	08JUN06	07JUN06	06JUN06	05JUN06	05JUN06	04JUN06
	WEEKDAY/DAY OF STAY:	THU 007	WED 006	TUE 005	MON 004	MON 004	SUN 003
	TIME:	0445	0500	0530	1810	0600	0420
TEST	REFERENCE RANGE						
ROUTINE CHEMISTRY							
Glucose	70-99 mg/dL		58 L			55 L	62 L

EXHIBIT NO. 106,

CHEMISTRY

	SPECIMEN DATE:	03JUN06
	WEEKDAY/DAY OF STAY:	SAT 002
	TIME:	0540
TEST	REFERENCE RANGE	
ROUTINE CHEMISTRY		
Glucose	70-99 mg/dL	117 H
Sodium	136-146 mmol/L	131 L

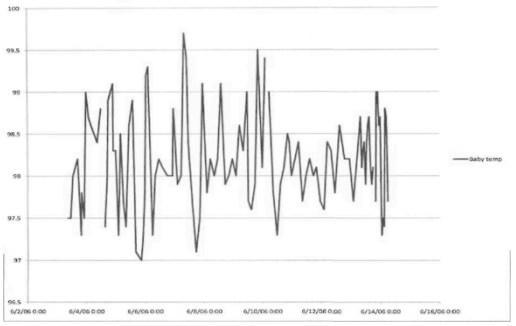
EXHIBIT NO. 106, Page 166

JUNE 5, 2006

A CRITICAL DAY

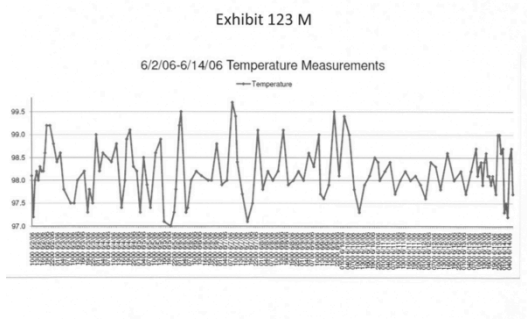
- **No More Antibiotics**
- **Different Neonatologist – Dr. Kahle**
- **Blood Work Abnormalities**
- **Temperature Instability**

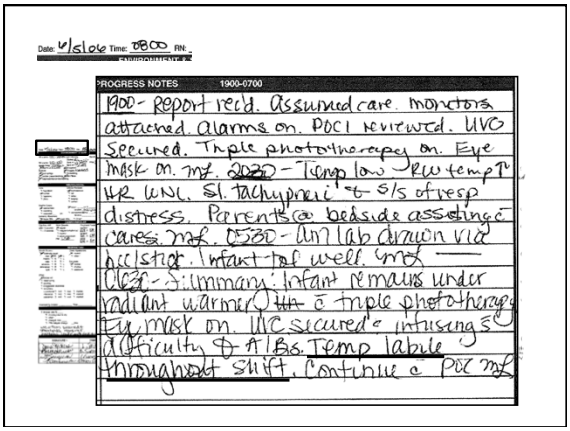
SAVANNAH'S TEMPERATURES



PLAINTIFF'S EXHIBIT NO. 27

SAVANNAH'S TEMPERATURES




Date: 6/5/06 Time: 0800 RN:

PROGRESS NOTES 1900-0700

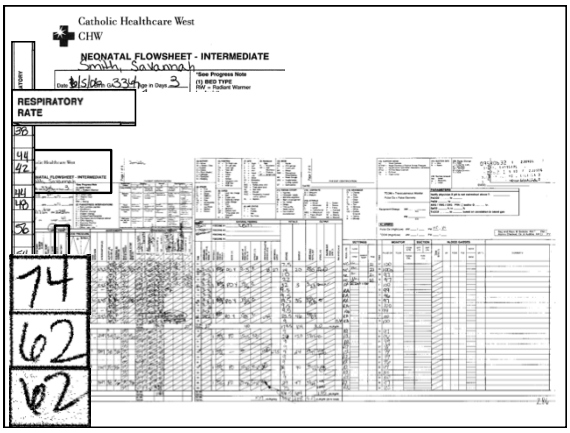
1900- Report recd. Assumed care. Monitors attached. Alarms on. POC reviewed. UVC secured. Triple phototherapy on. Eye mask on. MF. 2030 - Temp low. RW temp ↑ HR WNL. Sl. tachypneic & S/S of resp distress. Parents @ bedside assisting c cares. MF. 0530 - Am lab drawn via UVC/stat. Infant MF well. MF

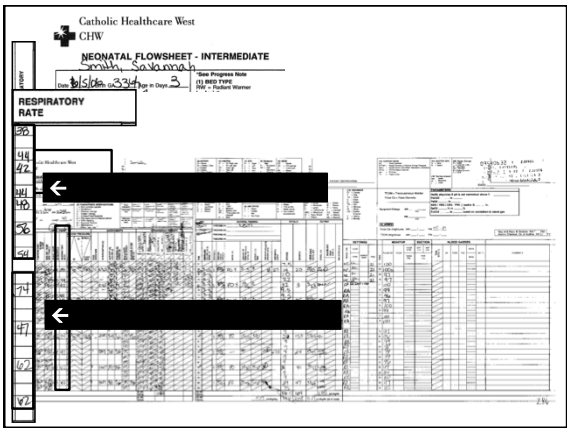
0630 - Summary: Infant remains under radiant warmer (Hx) c triple phototherapy. Eye mask on. UVC secured c infusing. Difficulty ↓ A/Bs. Temp labile throughout shift. Continue c POC MF

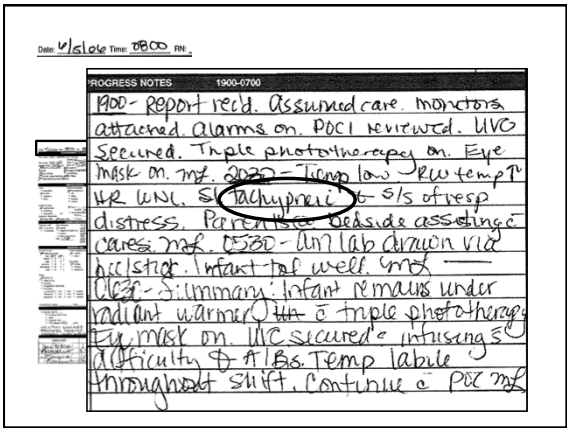
JUNE 5, 2006

A CRITICAL DAY

- **No More Antibiotics**
- **Different Neonatologist – Dr. Kahle**
- **Blood Work Abnormalities**
- **Temperature Instability**
- **Tachypnia**





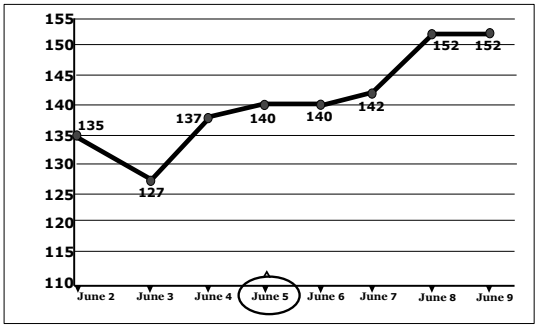


JUNE 5, 2006

A CRITICAL DAY

- **No More Antibiotics**
- **Different Neonatologist – Dr. Kahle**
- **Blood Work Abnormalities**
- **Temperature Instability**
- **Tachypnia**
- **Heart Rate Trending Upward**

SAVANNAH'S AVERAGE HEART RATE

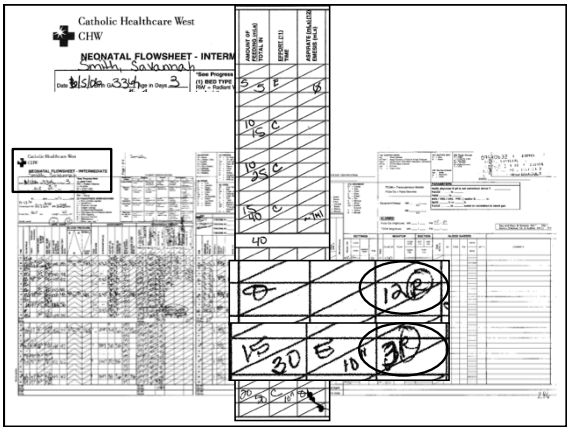


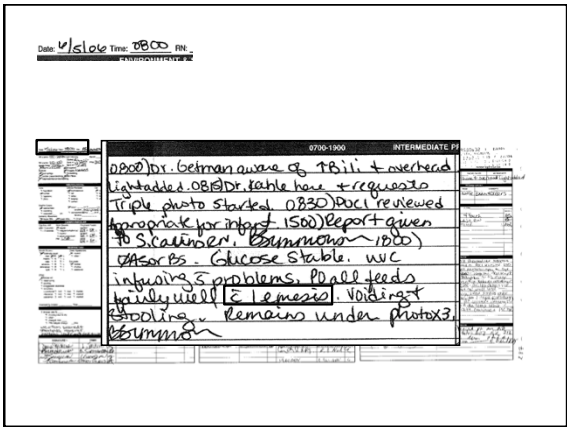
PLAINTIFF'S EXHIBIT NO. 26 A

JUNE 5, 2006

A CRITICAL DAY

- **No More Antibiotics**
- **Different Neonatologist – Dr. Kahle**
- **Blood Work Abnormalities**
- **Temperature Instability**
- **Tachypnia**
- **Heart Rate Trending Upward**
- **Feeding Difficulties**





JUNE 5, 2006

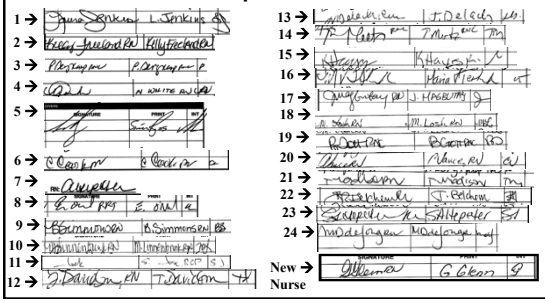
A CRITICAL DAY

- **No More Antibiotics**
- **Different Neonatologist – Dr. Kahle**
- **Blood Work Abnormalities**
- **Temperature Instability**
- **Tachypnia**
- **Heart Rate Trending Upward**
- **Feeding Difficulties**

CRITICAL DELAYS ON JUNE 12th & 13th

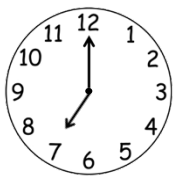
THE SETTING

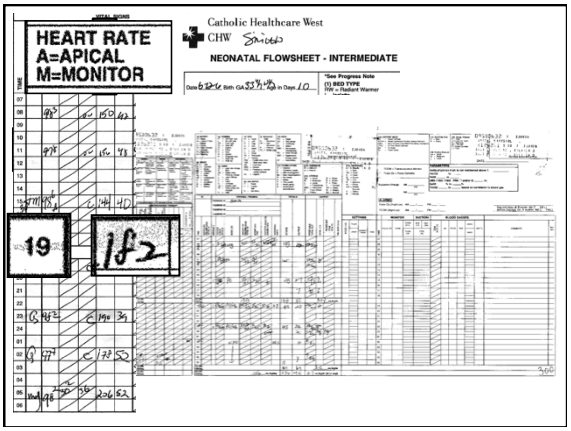
- **A New Nurse After 24 Different Nurses…**



CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182**!

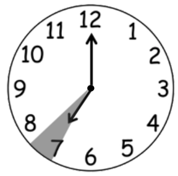


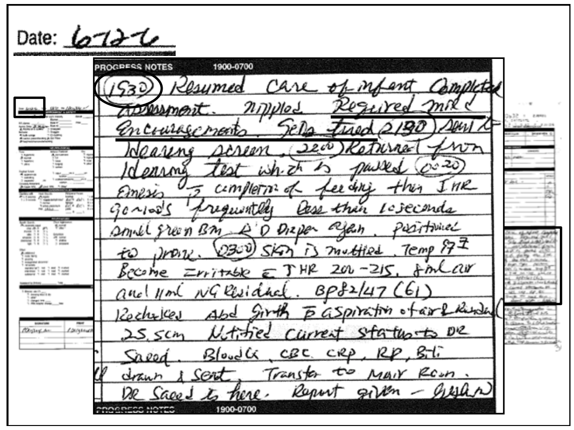


CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182!**

1930 Required More Encouragement to Eat; Tired



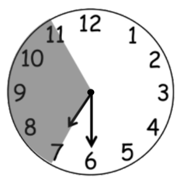


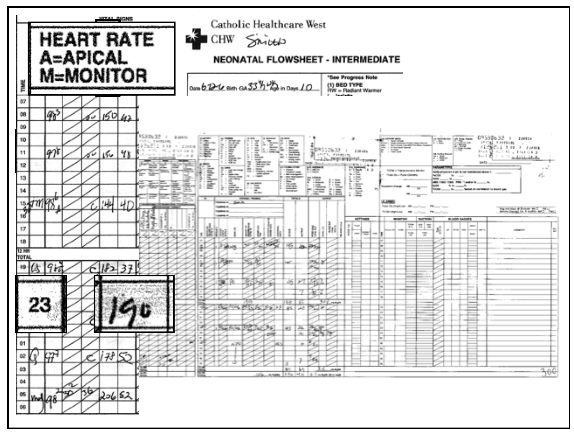
CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182!**

1930 Required More Encouragement to Eat; Gets Tired

2300 ASSESSMENT: **Heart Rate = 190!!**





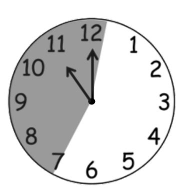
CRITICAL DELAYS ON JUNE 12th & 13th

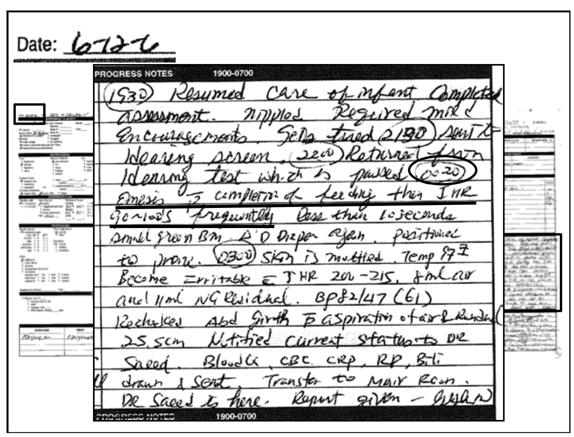
1900 ASSESSMENT: **Heart Rate = 182!**

1930 Required More Encouragement to Eat; Tired

2300 ASSESSMENT: **Heart Rate = 190!!**

0020 Emesis; Heart Rate 90-100 Frequently!





CRITICAL DELAYS ON JUNE 12th & 13th

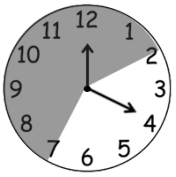
1900 ASSESSMENT: **Heart Rate = 182**!

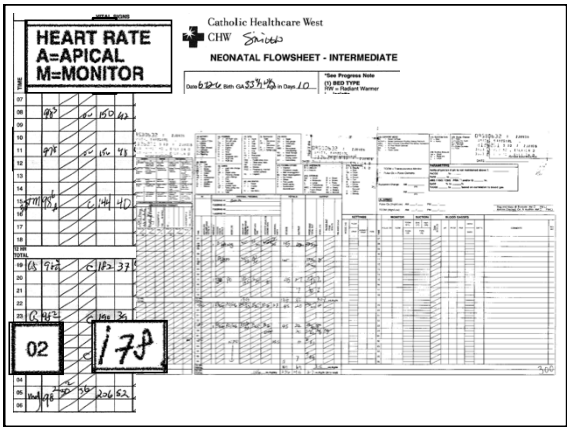
1930 Required More Encouragement to Eat; Tired

2300 ASSESSMENT: **Heart Rate = 190**!!

0020 Emesis; Heart Rate 90-100 Frequently!

0200 ASSESSMENT: **Heart Rate = 178**!





CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182**!

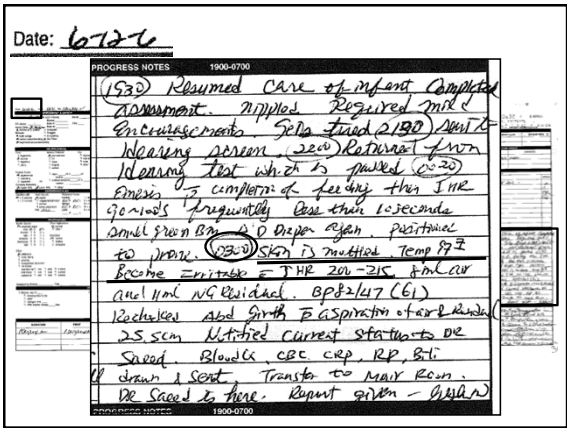
1930 Required More Encouragement to Eat; Tired

2300 ASSESSMENT: **Heart Rate = 190**!!

0020 Emesis; Heart Rate 90-100 Frequently!

0200 ASSESSMENT: **Heart Rate = 178**!

0300 "Skin Mottled"; Irritable; Heart Rate up to 215!!!



CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182**!

1930 Required More Encouragement to Eat; Tired

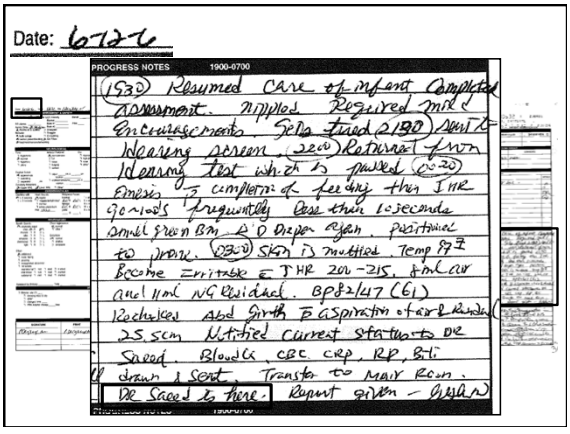
2300 ASSESSMENT: **Heart Rate = 190**!!

0020 Emesis; Heart Rate 90-100 Frequently!

0200 ASSESSMENT: **Heart Rate = 178**!

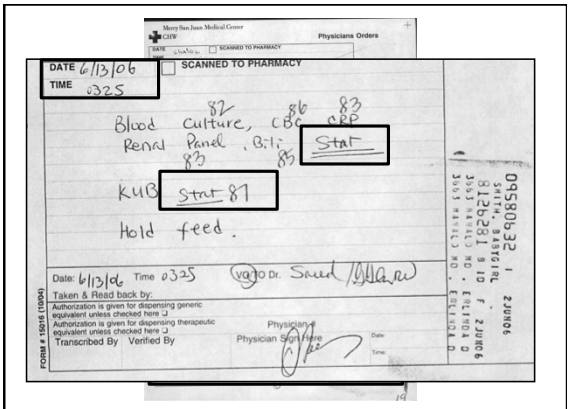
0300 "Skin Mottled"; Irritable; Heart Rate up to 215!!!

0320 Doctor Finally Arrives



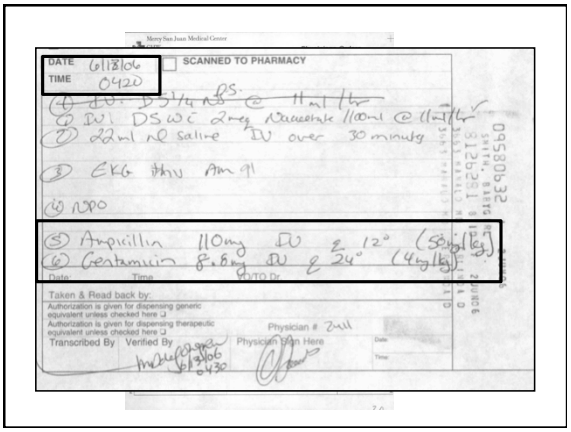
CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182**!
1930 Required More Encouragement to Eat; Tired
2300 ASSESSMENT: **Heart Rate = 190**!!
0020 Emesis; Heart Rate 90-100 Frequently!
0200 ASSESSMENT: **Heart Rate = 178**!
0300 "Skin Mottled"; Irritable; Heart Rate up to 215!!!
0320 Doctor Finally Arrive
0325 Labs Ordered STAT



CRITICAL DELAYS ON JUNE 12th & 13th

1900 ASSESSMENT: **Heart Rate = 182**!
1930 Required More Encouragement to Eat; Tired
2300 ASSESSMENT: **Heart Rate = 190**!!
0020 Emesis; Heart Rate 90-100 Frequently!
0200 ASSESSMENT: **Heart Rate = 178**!
0300 "Skin Mottled"; Irritable; Heart Rate up to 215!!!
0320 Doctor Finally Arrive
0325 Labs Ordered STAT
0420 Antibiotics Ordered NOT STAT



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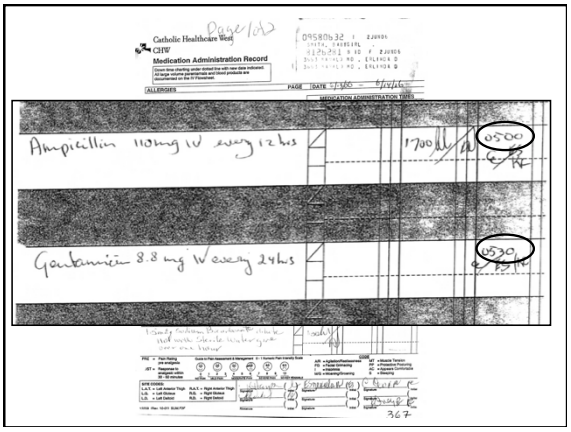

10 HOUR DELAY

AFTER

OBVIOUS

SIGNS OF INFECTION

PLAINTIFF'S LIABILITY EXPERTS

LIABILITY:

- **Dr. Jill Hoffman – Pediatric Infectious Diseases**
- **Dr. Michelle Hyla – Pediatrician**
- **Marsha Anderson –**

THE DEFENSE CASE ON LIABILITY

What They Admit Now:

-
-

Signs & Symptoms of Developing Infection

- **Savannah Developed Group B Strep in MSJ NICU**
- **Savannah's Infection Caused Bacterial Meningitis which Led to Severe Irreversible Brain Damage**

AND

- **NICU Nurse Was Negligent on June 12-13**
- **Neonatologist Was Negligent on June 13**

DEFENDANT'S EXPERTS

- **Dr. Michael Radetsky: Abnormal isn't really abnormal**
- **Donna Loper, R.N.: An explanation for everything, but admits negligence**
- **Dr. Denise Suttner : An explanation for everything, but admits negligence**
- **Dr. Suttner: Tries to explain what NICU nurse was thinking**

CACI 203. PARTY HAVING POWER TO PRODUCE BETTER EVIDENCE

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

CACI 205. FAILURE TO EXPLAIN OR DENY EVIDENCE

You may consider whether a party failed to explain or deny some unfavorable evidence.

Failure to explain or to deny unfavorable evidence may suggest that the evidence is true.

Post-Incid Brennan

DEFENDANT'S LIABILITY EXPERTS

- **Dr. Michael Radetsky: An explanation for everything**
- **Donna Loper, R.N.: An explanation for everything, but admits negligence**
- **Dr. Denise Suttner : An explanation for everything, but admits negligence**
- **Dr. Suttner: Tries to explain what NICU nurse was thinking**

LEGAL ISSUES

☑ **LIABILITY**: Defendant MERCY SAN JUAN MEDICAL CENTER was Negligent.

☐ **CAUSATION**: Defendant's Negligence was a Substantial Factor in Causing Harm.

☐ **DAMAGES**: Savannah was Harmed.

LEGAL ISSUES

CACI 430. CAUSATION: SUBSTANTIAL FACTOR

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

Judicial Council of California Jury Instructions

LEGAL CAUSATION

- **Defendant's Negligence Was A Substantial Factor In Causing Savannah's Harm By:**
- **Failing to Continue Antibiotics After June 4**
- **Failing to Recognize Signs & Symptoms of Infection For 10 Full Days**
- **Failing to Promptly Call Neonatologist on June 13**
- **Failing to Immediately Begin Antibiotics When Infection Was Absolutely Clear**

LEGAL ISSUES

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PLAINTIFF'S DAMAGES EXPERTS

DAMAGES:

- **Dr. Dennis Hart – Pediatric PM&R**
- **Carol Hyland – Life Care Planner**
- **Albert Gutowsky, PhD - Economist**

SAVANNAH'S DAMAGES

SAVANNAH'S CURRENT DIAGNOSES:

- Cerebral Palsy
- Severe Spastic Quadriplegia
- Severe Seizure Disorder
- Hydrocephalus
- Gastroesophageal Reflux
- Reactive Airway Disease
- Laryngomalacia
- Severe Developmental Delays
- Cortical Visual Impairment

SAVANNAH'S CURRENT PHYSICIANS

- Pediatrician
- Gastroenterologist
- Endocrinologist
- Pulmonologist
- Neurologist
- Orthopedist
- Pediatric Surgeon
- Ophthalmologist
- Pediatric Neurosurgeon
- Pediatric Physiatrist
- Otolaryngologist

SAVANNAH'S FUTURE NEEDS

- Medications
- Equipment
- Medical Evaluations
- Nursing Services
- Physical Therapy
- Occupational Therapy
- Speech Therapy
- Vision Therapy
- Music Therapy
- Future Surgical Procedures

LIFE CARE PLANS

- Carol Hyland's Plan Accepted/Adopted by Defense Experts – Plaintiff's Ex. #24
- Linda Olzack's Life Care Plan – Plaintiff's Ex. # 31

DEFENDANT'S DAMAGES EXPERTS

- Dr. Joseph Cappel: Agrees with Dr. Hart Except on Life Expectancy
- Linda Olzack , R.N.: Agrees with Carol Hyland
- Erik Volk, Economist: Agrees with Dr. Gutowsky

Savannah's Signs & Symptoms of Infection

- June 2, 2006: 97.8 – 99.2, Variance of 1.4°
- June 2, 2006, 2323: Sodium Level 121 C
- June 2, 2006, 1050: WBC 12.3/Neutrophil 23 L
- June 3, 2006, 0540: Bili Total = 5.9
- June 3, 2006, 0540: WBC 8.8 L
- June 3, 2006: 97.3 – 99.0, Variance of 1.7°
- June 3, 2006, 0540: Glucose Level 117 H
- June 3, 2006, 0540: CRP-High .32
- June 3, 2006, 0537: Sodium Level 126 L
- June 3, 2006, 0951: Sodium Level 122 C

Savannah's Signs & Symptoms of Infection

- June 4, 2006, 0420 : Bili Total = 10.8 H
- June 4, 2006: 97.3 – 99.1, Variance of 1.8°
- June 4, 2006: Blood Pressure 23 & 33
- June 4, 2006, 1300: Heart Rate 160
- June 4, 2006, 0420: Glucose Level 62 L
- June 4, 2006, 0405: Sodium Level 132 L
- June 5, 2006, 0600 : Bili Total = 17.4 C
- June 5, 2006, 1810 : Bili Total = 14.1 H
- June 5, 2006, 0600 : WBC 5.5

Savannah's Signs & Symptoms of Infection

- June 5, 2006: T = 97.0 – 99.5, Variance of 2.5°
- June 5, 2006, 2300: 12ml Residual, No Feeding
- June 5, 2006, 2030: Heart Rate 152
- June 5, 2006, 0600: Glucose Level 65 L
- June 5, 2006: Respiratory Rate 62 to 74
- June 6, 2006, 0530 : Bili Total = 13.5 H
- June 6, 2006: 97.9 – 99.5, Variance of 0.9°
- June 6, 2006, 1100: 12ml Residual, No Feeding
- June 6, 2006, 1400: 8ml Residual
- June 6, 2006: Heart Rate 160

Savannah's Signs & Symptoms of Infection

- June 7, 2006: 97.1 – 99.7, Variance of 2.6°
- June 7, 2006: Blood Pressure 31
- June 7, 2006: Heart Rate 164
- June 7, 2006, 05:00: Glucose Level 58 L
- June 8, 2006: 97.9 – 99.1, Variance of 1.2°
- June 8, 2006: Not taking feeds - Infant is too tired
- June 8, 2006, 0200: Heart Rate 159
- June 8, 2006: Abdominal Girth 25 cm
- June 9, 2006: Abdominal Girth 28.5 cm

Savannah's Signs & Symptoms of Infection

- June 9, 2006: 97.6 – 99.5, Variance of 1.9°
- June 9, 2006, 0830 tired - difficulty coordinating suck, swallow, breathe reflex.
- June 9, 2006, 2330: Blood Pressure 34
- June 9, 2006, 2030: Heart Rate 165
- June 10, 2006, 0550: Bili Total = 11.1 H
- June 10, 2006, 0830: Infant very sleepy with fatigue
- June 10, 2006, 0555: Glucose Level 74 L
- June 12, 2006, 0530 : WBC 9.3

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Judicial Council of California Jury Instructions

SAVANNAH'S DAMAGES

- **ECONOMIC**

Post-Incident Photograph – Whitney Graham Brennan

- **NON-ECONOMIC**

ECONOMIC DAMAGES

- **MEDICAL TREATMENT AND EXPENSES**
  - **Medical & Hospital Care**
  - **Medical Supplies**
  - **Medical & Other Equipment**
  - **Attendant Care**
  - **Housing Modifications**
- **LOSS OF FUTURE EARNING CAPACITY**

PERIODIC PAYMENT ELECTION

PERIODIC PAYMENTS

Under California law a defendant in a medical malpractice case may elect to pay for future damages by way of periodic payments should the jury decide in favor of plaintiff. In this case should defendant MERCY SAN JUAN MEDICAL CENTER be found liable, it has elected to pay any award to SAVANNAH DISMUKES for future damages by making periodic payments, which will cease upon her death.

Accordingly, evidence presented by economic experts in this case discussed future damages which were not reduced to present cash value.

ECONOMIC DAMAGES

*** Testimony of Plaintiff's Expert Dr. Gutowsky**

MEDICAL TREATMENT AND EXPENSES

	Private Hire	Agency Hire
25 Years	$ 7,789,000	$17,198,000
35 Years	$13,739,000	$35,397,000

LOSS OF FUTURE EARNING CAPACITY

High School Only	Bachelor's Degree
$ 6,536,000	$11,899,000

ECONOMIC DAMAGES

*** Testimony of Defendant's Expert Erik Volk**

MEDICAL TREATMENT AND EXPENSES

	Private Hire	Agency Hire
25 Years	$ 7,321,091	$13,997,985
35 Years	$11, 655,940	$24,096,969

LOSS OF EARNING CAPACITY IN FUTURE

High School	Bachelor's Degree
$ 4,125,166	$10,425,081

ECONOMIC DAMAGES

*** Comparison of Dr. Gutowsky & Mr. Volk**

MEDICAL TREATMENT AND EXPENSES

	Private Hire	Agency Hire
25 Years	$7,789,000 | $7,321,091	$17,198,000 | $13,997,985
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LOSS OF EARNING CAPACITY IN FUTURE

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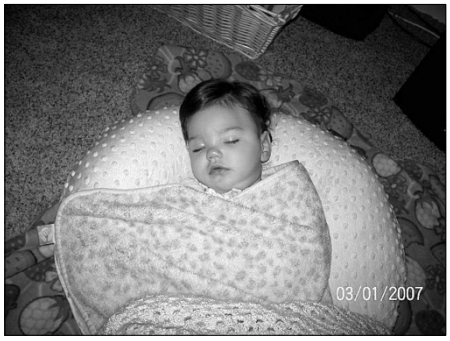
SAVANNAH DISMUKES



SAVANNAH'S DAMAGES

- **ECONOMIC**
- **NON-ECONOMIC**

CACI 3905A. PHYSICAL PAIN, MENTAL SUFFERING, AND EMOTIONAL DISTRESS (NONECONOMIC DAMAGE)

Past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress.

To recover for future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress, Savannah Dismukes must prove that she is reasonably certain to suffer that harm.

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

For future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress, determine the amount in current dollars paid at the time of judgment that will compensate Savannah Dismukes for future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress.

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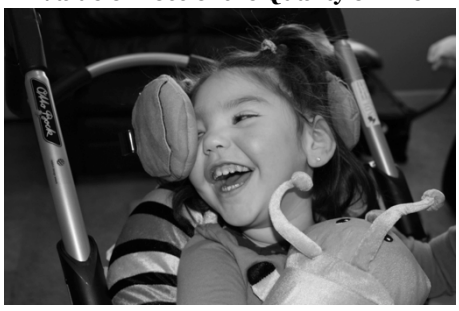
NON-ECONOMIC DAMAGES

Value of Loss of the Quality of Life



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SAVANNAH DISMUKES - JUNE 2, 2006

SAVANNAH DISMUKES

SAVANNAH DISMUKES – April 30, 2009

THE SPECIAL VERDICT

SPECIAL VERDICT FORM

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

1. Were any of the NICU nurses who provided care and treatment to Plaintiff, SAVANNAH DISMUKES, negligent?

   ✓Yes ___No

If your answer to question No. 1 is "yes," then answer question No. 2. If the answer is "no," skip question No. 2 and answer question No. 3.

2. Was the negligence of the NICU nurses a substantial factor in causing injury, damage or loss to Plaintiff, SAVANNAH DISMUKES?

   ✓Yes ___No

If your answer to question No. 2 is "yes," then answer question No. 3. If the answer is "no," answer question No. 3.

//

3. Were any of the neonatologists who provided care and treatment to Plaintiff, SAVANNAH DISMUKES, negligent?

   ✓Yes ___No

If your answer to question No. 3 is yes, then answer question No. 4. If your answer is "no," but you answered "yes" to question No. 2, skip questions Nos. 4 and 5, and answer question No. 6. If you answered "no," to question Nos. 1 or 2 and "no" to question No. 3, stop here, answer no further questions, and sign and date the form and advise the Court Attendant you have completed deliberations.

4. Was the negligence of the neonatologists a substantial factor in causing injury, damage or loss to Plaintiff, SAVANNAH DISMUKES?

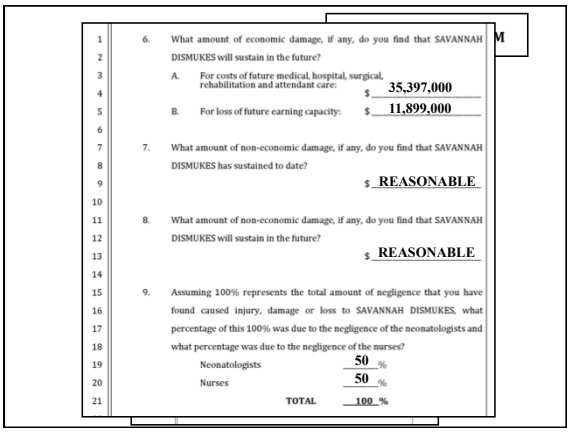
   ✓Yes ___No

If your answer to question No. 4 is "yes," then answer question No. 5. If your answer to question No. 4 is "no," but you answered "yes" to question No. 2, answer question No. 6. If you answered "no," to question No. 2, and "no" to question No. 4, stop here, answer no further questions, and sign and date the form and advise the Court Attendant you have completed deliberations.

5. Were the neonatologists whom you found to be negligent acting as ostensible agents for Defendant, MERCY SAN JUAN MEDICAL CENTER?

   ✓Yes ___No

If you answered "yes" to question Nos. 1 and 2, or to question Nos. 3 and 4, then answer questions Nos. 6, 7, 8 and 9.



6. What amount of economic damage, if any, do you find that SAVANNAH DISMUKES will sustain in the future?

A. For costs of future medical, hospital, surgical, rehabilitation and attendant care: $ 35,397,000

B. For loss of future earning capacity: $ 11,899,000

7. What amount of non-economic damage, if any, do you find that SAVANNAH DISMUKES has sustained to date?

$ REASONABLE

8. What amount of non-economic damage, if any, do you find that SAVANNAH DISMUKES will sustain in the future?

$ REASONABLE

9. Assuming 100% represents the total amount of negligence that you have found caused injury, damage or loss to SAVANNAH DISMUKES, what percentage of this 100% was due to the negligence of the neonatologists and what percentage was due to the negligence of the nurses?

Neonatologists 50 %

Nurses 50 %

TOTAL 100 %

Post-Incident Photograph – Whitney Graham Brennan

Warren R Trazenfeld Esq. - *How to Defeat Affirmative Defenses in a Legal Malpractice case from the Plaintiffs Perspective*

Trazenfeld graduated from the University of Florida School of Law in 1980 after receiving his bachelor's of science degree in management, with high distinction, from Babson College in 1977. The focus of his civil trial practice is suing negligent attorneys and accountants. Mr. Trazenfeld authored articles in the January 1995 edition of The Florida Bar Journal entitled "Legal Malpractice: A Framework for Assessing Potential Claims" and the Fall 2002 Nova Law Review entitled "Legal Malpractice in Florida," participated as a panel member for an on-line computer seminar conducted by Lexis Counsel Connect titled "The Malpractice Explosion: Limiting Your Exposure" and has spoken on the topic of legal malpractice at numerous seminars and conferences. In every edition since 1999, the South Florida Legal Guide has named Mr. Trazenfeld as one of South Florida's best lawyers. He has also been selected as one of The Best Lawyers in America in the area of legal malpractice since 2005, was included in the Florida Super Lawyers Magazine in 2006 under the category of plaintiff's professional liability and is board certified in legal malpractice by The American Board of Professional Liability Attorneys.

How to Defeat Affirmative Defenses in a Legal Malpractice Case from the Plaintiff's Perspective

The purpose of my presentation is two-fold. First, to describe the most used affirmative defenses in a legal malpractice case to provide a framework for evaluating the viability of these types of cases. Secondly, to provide the benefit of my experience in defeating these affirmative defenses.

Affirmative defenses to a legal malpractice claim are for the most part creatures of state law and will vary widely from jurisdiction to jurisdiction. Certain of these defenses may not be applicable in your jurisdiction. Others may not yet be the subject of a ruling in your jurisdiction. In either case, it is a useful exercise to think about the defenses since nothing is static in the law.

Certain of the concepts mentioned below are not true affirmative defenses. Instead, they involve the elements or a limiting factor for a legal malpractice case. The limiting factors include reducing damages and binding arbitration clauses.

The analysis is not deep or comprehensive. It is meant to be a checklist for further pondering.

Binding arbitration

If the engagement letter contains a binding arbitration provision, is it enforceable?

What rules will apply?

Do the chosen arbitrators affect the damage analysis?

Will discovery be restricted?

Employment

Is there a provable attorney client relationship? Although this is generally a subjective test concerning the reasonable belief of the client, an actual consultation may be a prerequisite to forming a reasonable belief supporting an attorney-client relationship.

Did the attorney represent the entity or the shareholder/limited partner/member?

When an insurance company seeks to sue an attorney retained on behalf of its insured, is the insurer in privity of contract with the attorney hired to represent insured individuals or a third-party beneficiary of the relationship between the attorney and the insured?

Duty

Does the engagement letter limit the scope of the lawyer's duty?

Did the lawyer ignore an issue that came to his attention?

Would the lawyer have reasonably been expected to advise the client on the matter at issue?

In a transactional matter, did any of the documents reviewed by the lawyer raise the missed or mishandled issue?

Proximate Cause

Generally, no damages may be recovered where losses do not usually result from or could not have been foreseen as a proximate result of a particular negligence

An attorney is not a guarantor that documents he drafts will be litigation free or accomplish everything the client might want.

Was there an intervening cause?

Did the client create his own damages?

Standing

Is the corporate plaintiff current on payment of state fees?

Has the out of state plaintiff paid any necessary fees to gain access to the court system?

In an estate matter, can it be established the plaintiff was to be an intended beneficiary of the decedent's estate plan?

Can a derivative suit be brought against the attorney for the corporation?

Can you prove the case within a case?

In litigation malpractice, is the proof to establish the underlying case available?

Was the underlying case winnable?

Immunity

Generally prosecutors and judges have complete immunity, public defenders

to not.

Is there a qualified immunity available which would change the proof elements?

Judgmental Immunity

The rule of judgmental immunity is premised on the understanding that an attorney, who acts in good faith and makes a diligent inquiry into an area of law, should not be held liable for providing advice or taking action in an unsettled area of law.

Was there diligent inquiry, or was the issue simply ignored?

Was the area of law unsettled?

What do the communications with the client reveal?

Does the lawyer's file reflect any research into the unsettled area of the law?

Is the attorney's good faith and diligent inquiry questions of fact not subject to summary judgment?

Collectibility

General rule is that the plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation but for the negligence of the attorney/defendant and that any judgment which could have been recovered would have been collectible.

Was there an insurance policy in favor of the defendant in the underlying case?

Did the defendant in the underlying case have assets that could have been reached to collect a judgment?

Comparative/Contributory Negligence

The analysis turns on whether the client's actions contributed to his damages, in which case the defense is viable, or whether the client is required to second guess his attorney's advice or get a second opinion, in which case the defense is not applicable.

Look at the underlying case, if a contributory negligence defense is available, the legal malpractice case will be challenging.

In Pari Delicto

***In pari delicto* is a common law rule, an equitable principle and defense, that**

prevents a plaintiff who has participated in the wrongdoing from recovering damages resulting from the wrongdoing. Normally, under agency principles, if the plaintiff acted wrongfully through an agent in the scope of that agency relationship, then the wrongdoing of the agent is attributed to the plaintiff.

Does the adverse interest exception apply? (When an agent is acting adversely to the interest of the principal, the knowledge and conduct of the agent are no longer imputed to the principal unless the principal benefitted from the wrongdoing.)

Does the sole actor exception apply? (The general principle of the "sole actor" exception provides that, if an agent is the sole representative of a principal, then that agent's fraudulent conduct is imputable to the principal regardless of whether the agent's conduct was adverse to the principal's interests. The rationale for this rule is that the sole agent has no one to whom he can impart his knowledge, or from whom he can conceal it, and that the corporation must bear the responsibility for allowing an agent to act without accountability.)

Can you defeat the sole actor exception? (The plaintiff may defeat the sole actor exception that imputes the wrongdoing to the plaintiff by showing that there was someone involved in management who was ignorant of the ongoing fraud and could and would if advised of facts known to defendant have taken steps to bring the fraudulent conduct to an end.)

Abandonment

This defense is used when an appeal is not taken from the underling case.

Is the filing and prosecution of an appeal before filing a legal malpractice case based upon negligence occurring in the underlying case required?

Would the appeal have been successful?

Can you add a lawyer as an expert who will testify the appeal would not have been successful?

Distinguish from settlement of the underlying case which would be a reasonable mitigation of damages caused by the lawyer's negligence.

Release

Generally arises when a release is obtained at the conclusion of the attorney client relationship.

Can this ethically be done? (Model Rules of Professional Conduct 1.8)

Did the client know about the claim at the time of the release?

Did the client have independent counsel review the release?

Estoppel

Judicial estoppel is used to prevent a party from raising a claim that should have been raised in another action, and the failure to raise it was relied upon by a third party to his or her detriment The elements for this defense are a judicial declaration, a contradiction of such declaration in a subsequent action, the prior and subsequent actions involve the same parties and a party has relied upon the former testimony to his detriment. However, in order to work an estoppel, the parties must be the same, the same issues must be involved, and the position assumed in the former trial must have been successfully maintained.

Collateral estoppel applies if: (a) an identical issue is being litigated by the parties in the subsequent litigation; (b) the issue was previously fully litigated; (c) the issue was litigated by the same parties or their privies; and (d) a final decision was reached by a court of competent jurisdiction."

Were the attorneys "virtually represented" to satisfy the same party requirement of collateral estoppel?

If offensive collateral estoppel does not apply, and it rarely does, the underlying issue can be retried in the malpractice case which could result in inconsistent judicial findings and destroy the malpractice claim.

Res Judicata

The prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second, the judgment must be final and on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding.

Statute of Limitations

Does the continuous representation rule apply?

Does fraudulent concealment extend the time period?

Any tolling mechanism available?

Does the limitation period vary if the error results from a transactional or litigation matter?

Does a counterclaim to a fee suit resurrect the statute of limitations?

If the claimed malpractice results in a substantive judgment and a later attorney's fee or cost judgment, does the statute start at different times for each judgment?

Damage limitations

Are the punitive damages from the underlying case available in the malpractice case as compensatory damages?

Are the damages too speculative?

Are the contingent fees from the underlying case deducted from the damage claim in the malpractice case?

Alternative Remedy

Can the underlying case be salvaged?

Paul D Bekman *Ten Essentials for Legal Malpractice*

Paul D. Bekman enters his fourth decade of practice as one of the most respected trial attorneys in the state of Maryland. Mr. Bekman is a tenacious and successful advocate for his clients' interests, as demonstrated by the significant number of multi-million dollar awards he has won. The effectiveness of his practice is confirmed year after year by peer professionals. *Best Lawyers in America* has recognized him as one of the top personal injury lawyers in the country since 1989, and locally, *Baltimore Magazine* has recognized him similarly on multiple occasions. Along with two of his partners, Mr. Bekman is a Fellow in the American College of Trial Lawyers, a distinguished honor achieved by less than 1% of the nation's lawyers. In 1997-98, he served as President of the Maryland State Bar Association the only plaintiff's attorney ever to hold that position for the 19,000-member organization. In 2007, he was recognized as the 2nd highest vote getter in Maryland's *SuperLawyers*.

Mr. Bekman enthusiastically shares his expertise with other lawyers and students of the law through bar leadership positions, as a longstanding member of the MICPEL faculty, and most recently, as Chair of the University of Maryland School of Law Board of Visitors.

PUSHING THE ENVELOPE IN LEGAL MALPRACTICE CASES

American Board of Professional Liability Attorneys

April 26, 2013

PAUL D. BEKMAN
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PUSHING THE ENVELOPE IN LEGAL MALPRACTICE CASES

1) Taking the Case

Attorneys deciding whether or not to accept a legal malpractice claim should take several factors into account. First, an attorney must look at the relevant statute of limitations. If the claim has expired, or is close to expiring, an attorney may choose not to accept the case. Second, an attorney should find out the name of the attorney against whom negligence is alleged. If this is an attorney with whom a close working relationship is maintained, it might be prudent to pass on the case. Lastly, a malpractice lawyer must look at the merits of the underlying case. A legal malpractice claim involves a "case within a case" whereby a plaintiff must prevail in the underlying action in order to succeed on the claim of legal malpractice. By assessing the merits of the underlying claim, a legal malpractice attorney can conclude whether the underlying case is a strong one, and whether to take on the client. *See* "Ten Questions to Ask Before Taking A Legal-Malpractice Case" 90 ILL. B.J. 369 (2002).

2) Elements of a Legal Malpractice Claim

"[I]n a legal malpractice case a plaintiff must prove, basically, the same [elements] that must be proven in an ordinary negligence suit. Thus the elements [a plaintiff] must prove in order to support his legal malpractice claim are a duty, a breach of that duty, an injury, that the breach was the proximate cause of the injury, and damages. [Additionally,] [i]n a legal malpractice case, the plaintiff must show that but for the defendant's negligence, he would have recovered in the underlying cause of action, or must offer proof that the outcome of the case would have been different." *Independent Stave Co., Inc. v. Bell*, 678 So.2d 770 (1996) (internal citations omitted).

"To prevail on a legal malpractice claim, the plaintiff client must plead and prove (1) that the defendant attorney owed the plaintiff client a duty of due care arising from the attorney-client relationship, (2) that the defendant attorney breached that duty, and (3) that as a proximate result, the plaintiff client suffered injury." *Warnock v. Karm Winand & Patterson*, 376 Ill.App.3d 364 (2007) (citing *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294 (2005)).

"In order to prevail on a claim of legal malpractice, a plaintiff is required to show (1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage. Additionally, to prove legal malpractice in the handling of litigation, a plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error." *Canaan v. Bartee*, 276 Kan. 116 (2003).

"To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred." *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wash.App. 677 (2002) (citing *Hizey v. Carpenter*, 119 Wash.2d 251 (1992) (citations omitted)).

3) Is an Expert Necessary?

Texas

"Breach of the standard of care and causation are separate injuries, however, and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other. Thus, even when negligence is admitted, causation is not presumed." *Haynes & Boone v. Bowser Bouldin, Ltd*, 896 S.W.2d [179, 181-82 (Tex. 1995)]. "Moreover, the trier of fact must have some basis for understanding the causal link between the attorney's negligence and the client's harm." *Id.*, 896 S.W.2d at 181; *see also* 5 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §33.16 at 116 (5th ed.2000). In some cases the client's testimony may provide this link, but in others the connection may be beyond the jury's common understanding and require expert testimony. *See* Tex.R.Evid.702 (Testimony by Experts). *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (2004).

Alabama

"Generally, a plaintiff alleging a legal-malpractice claim must prove that claim through expert testimony. However, in *Valentine v. Watters*, 896 So.2d 385 (Ala.2004), [the Supreme Court of Alabama] recognized the 'common knowledge' exception to that general rule." *Guyton v. Hunt*, 61 So.3d 1085 (2010) (internal citations omitted).

The *Guyton* court continues, and gives examples:

"In *Valentine*, [the Alabama Supreme] Court held that the [Alabama Legal Services Liability Act, §6-5-570 et seq., Ala.Code 1975 ("the ALSLA")] applied to Linnie Valentine's legal malpractice claims against Richard Watters. 896 So.2d at 390–91. Valentine had consulted Watters about representing her in litigation regarding defective breast implants, and one of her claims was that Watters had misrepresented to her that 'he was very familiar with litigation regarding breast implants and that he had represented several clients in breast-implant litigation.' 896 So.2d at 386.

In response to the contention that she had failed to offer expert testimony in support of her claim, Valentine argued 'that her case is analogous to medical-malpractice suits and that the exception applied in those cases to the requirement of expert testimony should also apply to legal-malpractice cases. See *Ex parte HealthSouth Corp.,* 851 So.2d 33, 38 (Ala.2002) (stating that expert testimony is not required in a case " ' "where want of skill or lack of care is so apparent ... as to be understood by a layman, and requires only common knowledge and expertise to understand it." ' " (quoting *Tuscaloosa Orthopedic Appliance Co. v. Wyatt,* 460 So.2d 156, 161 (Ala.1984))). 896 So.2d at 391.

The Supreme Court noted that the statutory scheme for establishing a legal-malpractice claim is similar to the requirements imposed by the Alabama Medical Liability Act of 1987, §§ 6–5–540 to 6–5–552, Ala.Code 1975 ('the AMLA'), for medical-malpractice claims and that even though neither the ALSLA nor the AMLA includes an express requirement that a plaintiff offer expert testimony in support of his or her claim, generally expert testimony is required. The Supreme Court thoroughly examined the exception to the expert-testimony requirement in medical-malpractice actions ' "where the want of skill or lack of care is so apparent as to be within the comprehension of the average layman and thus requires only common knowledge and experience to understand it." ' 896 So.2d at 392 (quoting *Rosemont, Inc. v. Marshall,* 481 So.2d 1126, 1129–30 (Ala.1985)).

The Supreme Court stated: Many other jurisdictions recognize a "common knowledge" exception to the requirement that a plaintiff in a legal-malpractice case must present expert testimony. *McIntyre v. Rumsey,* 80 P.3d 1201 (Kan.Ct.App.2003) (unpublished opinion) (stating that expert testimony is not necessary where the attorney's breach of duty is so clear and obvious that the determination that the attorney deviated from the standard of care is within the common knowledge of the trier of fact); *Dubreuil v. Witt,* 80 Conn.App. 410, 418, 835 A.2d 477, 483 (2003) (stating that the exception to the need for expert testimony applies when "the defendant's conduct was such an obvious and gross want of care and skill that the neglect would be clear to the average layperson"); *Roberts v. Hutton,* 152 Ohio App.3d 412, 423, 787 N.E.2d 1267, 1276 (2003) ("The only exception to this [expert-testimony] requirement is when the alleged breach of care is so obvious that it can be determined from the ordinary knowledge and experience of laymen."); *Mazuca & Assocs. v. Schumann,* 82 S.W.3d 90, 97 (Tex.Ct.App.2002) ("Expert testimony is not required if the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge."); *Hall v. Fedor,* 349 S.C. 169, 561 S.E.2d 654 (S.C.Ct.App.2002) (noting that expert testimony is normally required to establish the applicable standard of care except when the matter is within the common knowledge of laypersons).

Expert testimony is generally required in a legal malpractice case because a jury that is unfamiliar with the principles of law governing the underlying case might be incapable of

discerning whether a lawyer's professional conduct falls outside an acceptable standard of care. Generally, an expert may testify when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Ala. R. Evid. 702. However, "Alabama historically and generally has refused expert testimony or opinion on a subject that is within the understanding of the average layperson." Ala. R. Evid. 702, Advisory Committee's Notes.

The Supreme Court of Alabama held that where the attorney had told the Plaintiff he had represented prior clients in litigation involving breast implants and that he later admitted he had not, the Court concluded that Valentine was not required to present expert testimony to support her claim that Watters breached the applicable standard of care in misrepresenting his qualifications to her in this manner. The Court held that a trier of fact with common knowledge and experience could determine that an attorney's representation that he or she has had experience in a certain type of litigation, when that representation is not true, violates the standard of care. 896 So.2d at 393–95. *Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C.,* 42 So.3d 667, 679–81 (Ala.2009) (footnote omitted).

New Jersey

"Expert testimony is required in cases of professional malpractice where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable. However, the facts of a given case may be such that a layperson's common knowledge is sufficient to permit a finding that the duty of care has been breached." *Sommers v. McKinney*, 670 A.2d 99 (1996) (internal citations omitted).

The *Sommers* court continues with examples:

"In rare cases, expert testimony is not required in a legal malpractice action where the duty of care to a client is so basic that it may be determined by the court as a matter of law. *Brizak v. Needle,* 239 *N.J.Super.*415, 429, 571 *A.*2d 975 (App.Div.) (failure to conduct investigation into personal injury claim resulting in untimely medical malpractice suit), *certif. denied,* 122 *N.J.* 164, 584 *A.*2d 230 (1990); *see also Stewart v. Sbarro,* 142 *N.J.Super.* 581, 591, 362 *A.*2d 581 (App.Div.) (failure to execute and record bond and mortgage), *certif. denied,* 72 *N.J.* 459, 371 *A.*2d 63 (1976); *Fuschetti v. Bierman,* 128 *N.J.Super.* 290, 295, 319 *A.*2d 781 (Law Div.1974) (failure to file suit before running of statute of limitations). Further, expert testimony may not be necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's legal malpractice and the client's loss is so obvious

that the trier of fact can resolve the issue as a matter of common knowledge. *2175 Lemoine Ave. Corp., supra,* 272 *N.J.Super.* at 490, 640 *A.*2d 346 (expert testimony necessary for trial of legal malpractice arising from complex commercial transaction). On the other hand, if the adequacy of an investigation or the soundness of an opinion is the issue, a jury will usually require the assistance of an expert opinion. *Aldrich v. Hawrylo,* 281 *N.J.Super.* 201, 214, 656*A.*2d 1304 (App.Div.1995)."

4) Locality Rule

"A single, statewide professional standard of care exists for attorneys practicing law in Tennessee. Therefore, experts testifying in legal malpractice cases in Tennessee must be familiar with the professional standard of care for the entire state." *Chapman v. Bearfield,* 207 S.W.3d 736 (2006).

"In the context of legal malpractice, most courts which originally adopted a strict locality rule have expanded the relevant geographical region to create a statewide standard of care. The rationale for this development is that attorneys are generally regulated on a statewide basis, with state rules of procedure and different substantive laws. Accordingly, [the Supreme Court of South Carolina] adopt[s] the majority view and rule that the standard to be applied in determining legal malpractice issues is statewide." *Smith v. Kaynsworth, Marion, McKay & Geurard,* 472 S.E.2d 612 (1996) (internal citations omitted).

5) Burden of Proof

Preponderance of the Evidence

In a legal malpractice case, a client must prove by a *preponderance of the evidence* that, *but for* the negligence of the attorney, she would have prevailed in the underlying claim or has suffered actual damages. *Kituskie,* 552 Pa. at 282; *Ferguson v. Lieff, Cabraser, Hiemann & Bernstein, LLP,* 30 Cal.4th 1037, 1049, 135 Cal.Rptr. 2d 46, 69 P.3d 965 (2003); *Shaw v. State of Alaska, Department of Administration,* 861 P. 2d 566, 573 (Alaska 1993); *Hicks,* 253 Wis. 2d at 754; *McKenna v. Forsyth & Forsyth,* 280 A.D.2d 79, 84, 720 N.Y.S.2d 654 (2001); *Whitmore v. Paul,* 2003 WL 1383465, (Cal.App. 2 Dist.). A plaintiff in a legal malpractice case does not need to prove "what outcome a particular fact-finder in the underlying claim would have reached." *Hummer v. Pulley, Watson, King & Lischer, P.A.,* 157 N.C.App. 60, 66, 577 S.E.2d 918 (2003). The jury must apply the relevant law, as instructed by the court, to the facts of the underlying claim, and then render a decision. *Id.*

Louisiana has modified the trial-within-a-trial method by shifting the burden of proof. In Louisiana, the defendant attorney must, by a preponderance of the evidence, produce

sufficient proof to overcome plaintiff's *prima facie* case that the attorney caused some loss. *Bauer v. Dyer,* 782 So. 2d 1133, 1140 (La.App. 5th Cir. 2001).

6) Causation

"For the reasons given above, we conclude that, just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely that no that the plaintiff would have obtained a more favorable result." *Viner v. Sweet*, 30 Cal.4th 1232 (2003).

This appears to be consistent across all states. *See* LEGAL MALPRACTICE, Mallen, Smith and Rhodes §8:5 (2013 ed.).

7) Statute of Limitations

The Ohio Supreme Court explained the statute of limitations in legal-malpractice actions in *Smith v. Conley*, 109 Ohio St.3d 141, 2006, holding..."[A]n action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank Nat'l. Assn.*, 189 Ohio App.3d 260 (2010) (internal citations omitted).

"The limitations period [for a legal malpractice action] begins to run when a plaintiff knows or should know the facts underlying those elements, not necessarily when a plaintiff learns the legal effect of those facts." *Grunwald v. Bronkesh*, 621 A.2d 459 (1993) (citing *Burd v. New Jersey Tel. Co.*, 386 A.2d 1310 (1978)).

"Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Epstein v. Brown*, 610 S.E.2d 816 (2005).

8) Collectibility/Solvency – Must the plaintiff show that, but for the attorney's negligence, the plaintiff would have recovered against a solvent defendant?

b. Yes

California: "The element of collectibility requires a showing of the debtor's solvency. '[W]here a claim is alleged to have been lost by an attorney's negligence, in order to recover more than nominal damages it must be shown that

it was a valid subsisting debt, *and that the debtor was solvent.*'"
DiPalma v. Seldman, 27 Cal. App. 4th 1499, 1509 (1994) (emphasis original).

Illinois: "Where the malpractice claimant seeks to recover for loss of a cause of action, he must also plead and prove that he would have won a judgment against a solvent defendant.
Visvardis v. Ferleger, 375 Ill. App. 3d 719, 725 (2007).

Pennsylvania: "[C]ollectibility of damages is an issue which should be considered in legal malpractice actions… [and] the defendant/lawyer bears the burden of proving that the underlying case which formed the basis of the damages award in a legal malpractice action would not have been fully collectible."
Kituskie v. Corbman, 714 A.2d 1027, 1031–32 (1998).

b. No

D.C: "Collectibility is not a specific element of a legal malpractice claim in the District of Columbia. The courts of the District of Columbia have never addressed whether the issue of collectibility should be part of a legal malpractice case and, if so, who bears the burden of demonstrating collectibility or non-collectibility."
Smith v. Haden, 868 F. Supp. 1, 2 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995).

9) Negligence

a. Contributory Negligence

North Carolina: "In a negligence action alleging legal malpractice, summary judgment for the defendant is proper where the evidence fails to establish negligence on the part of the defendant, establishes contributory negligence on the part of the plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury." *Belk v. Cheshire*, 159 N.C. App. 325, 328 (2003).

District of Columbia:

Citing evidentiary insufficiency, the trial court set aside the jury's verdict and entered judgment as a matter of law in favor of GDC. In the alternative, the court granted a new trial. Further, the trial court concluded that Breezevale had engaged in bad faith litigation and ordered it to pay GDC $5,356,633 in fees and costs, punitive damages, and unpaid legal fees. On initial appeal by Breezevale, a division of this court reversed the entry of judgment as a matter of law insofar as it relates to two of the three claims underlying the litigation, but affirmed the entry of judgment as to the third underlying claim. In addition, the division

remanded the grant of a new trial for further consideration, and vacated without prejudice the order awarding sanctions for bad faith litigation and unpaid legal fees. *Breezevale Ltd. v. Dickinson,* 759 A.2d 627 (D.C.2000).

GDC's petition for rehearing en banc was granted primarily to consider its contention that, as a matter of law (or, more precisely, of policy), Breezevale should be absolutely barred from suit against its attorneys because the jury and later the trial judge (he by clear and convincing evidence) found that Breezevale, without GDC's knowledge, had forged documents in an attempt to bolster its underlying suit for breach of contract in which GDC had represented it. GDC bases its estoppel argument upon the principle that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Hunter v. Wheate,* 53 App.D.C. 206, 208, 289 F. 604, 606 (1923).

The Court considered this argument carefully, but was unable to agree with the sweeping nature of an assertion that regardless of malpractice, a client who engages in wrongdoing in connection with any aspect of litigation thereby as a matter of law forfeits all rights of recovery against the attorney. Matters must be judged in relative context and with an eye to other available measures of compensation and sanction." *Breezevale Ltd. v. Dickinson*, 783 A.2d 573 (2001)

See also *Pair v. Queen*, 2 A.3d 1063 (2010) (holding that contributory negligence did not bar a legal malpractice claim where it was unclear who was at fault for the facts underlying the assertion of contributory negligence).

Virginia: "With respect to contributory negligence, we discern no logical reason for treating differently legal malpractice and medical malpractice actions. Both are negligence claims, and actions against attorneys for negligence are governed by the same principles applicable to other negligence actions." *See Allied Productions v. Duesterdick,* 217 Va. 763, 765, 232 S.E.2d 774, 775 (1977). "Therefore, we hold that contributory negligence is available as a defense in a legal malpractice action." *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.,* 249 Va. 426, 432 (1995).

Indiana: "The contributory negligence of a client, as in other negligence cases, is a viable defense to a legal malpractice action, and may preclude recovery where comparative negligence is not recognized or serve to reduce recovery in jurisdictions which do apply principles of comparative negligence." *Fricke v. Gray*, 705 N.E.2d 1027, 1034 (Ind. Ct. App. 1999) (quoting Susan J. Thomas, Annotation, *Legal Malpractice: Negligence or Fault of Client as Defense,* 10 A.L.R. 5th 828, 842-843, § 2[a] (1993)).

b. Comparative Fault

Massachusetts: "We recognize the doctrine of comparative negligence in medical malpractice actions and there is no reason not to do so in legal malpractice actions." *Clark v. Rowe*, 428 Mass. 339, 344 (1998).

Florida: "A client cannot be found to be comparatively negligent for relying on an attorney's erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise." *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 331 (Fla. Dist. Ct. App. 1998).

Kansas: "Under the comparative fault principles adopted in Kansas, because the fault of those parties is greater than 50%, no judgment [is proper] against [the defendant attorney]." *Pizel v. Whalen*, 252 Kan. 384, 392 (1993).

10) Damages

a. Monetary Damages

i. Can the Client Negate the Original Lawyer's Contingent or Charged Fees

Wyoming: [Some courts] state that the benefit the client gets from not having the negligent attorney's contingent fee deducted from his malpractice award is "canceled out" by the fee the client incurred in prosecuting the malpractice action. *See, e.g., McCafferty,* 817 P.2d at 1045; *Winter v. Brown,* 365 A.2d 381, 386 (D.C.Ct.App.1976); *Togstad v. Vesely, Otto, Miller & Keefe,* 291 N.W.2d 686, 695–96 (Minn.1980), citing with approval dicta in *Christy v. Saliterman,* 288 Minn. 144, 179 N.W.2d 288, 306–07 (1970). Employing a related, though somewhat different, rationale, some courts have held that the client may recover his attorney's fee in the legal malpractice action as a consequential or incidental damage resulting from his attorney's negligence. *Foster v. Duggin,* 695 S.W.2d 526, 527 (Tenn.1985). *Horn v. Wooster*, 165 P.3d 69, 72 (Wyo. 2007).

Maryland: "It is not unusual for a successful party in a legal malpractice claim to recover fees previously paid." *See Lockhart v. Cade,* 728 A.2d 65, 69–70 (D.C.1999)("A client who has advanced sums to an attorney to cover litigation costs and expenses is frequently allowed to recover those sums, as compensatory damages, in a subsequent malpractice action against the attorney.") *Abramson v. Wildman*, 184 Md. App. 189, 206 (2009).

New Jersey: "Ordinarily, an attorney may not collect attorney fees for services negligently performed. In addition, a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in

prosecuting the legal malpractice action. These are consequential damages that are proximately related to the malpractice. In the typical case, unless the negligent attorney's fee is determined to be part of the damages recoverable by a plaintiff, the plaintiff would incur legal fees and expenses associated with prosecuting the legal malpractice suit.

A subsequent New Jersey appellate decision quoted this principle to allow recovery of attorneys' fees and costs in prosecuting the malpractice claim. Neither decision discussed whether the corollary of the exposure, entitled attorneys to recover their cost of a successful defense. Thus, New Jersey is described as an exception to the 'prevailing rule.'" *Distefano v. Greenstone*, 357 N.J. Super. 352, 359-60 (App. Div. 2003).

ii. Can the Client Recover as Damages the Contingent or Charged Fees Necessitated by Pursuit of the Legal Malpractice Claim

New York

"We reject defendants' contention that this rule of damages permits plaintiff a windfall by allowing her to recover her attorney's fees in the legal malpractice action in contravention of the long-standing American rule that litigants pay their own attorney's fees (*see, Alyeska Pipeline Co. v. Wilderness Socy.*, 421 U.S. 240, 248, 95 S.Ct. 1612, 1617, 44 L.Ed.2d 141). Contrary to the assertion of the dissent (dissenting opn., at 48, at 245 of 556 N.Y.S.2d, at 617 of 555 N.E.2d), our decision is not premised on compensating plaintiffs for attorneys fees incurred in actions for legal malpractice. We neither authorize the recovery of legal fees in this case as consequential damages, nor "shift" the amount of defendants' contingency fee to plaintiff as part of the value of her claim. We hold only that plaintiff's recovery is not to be diminished by the amount of defendants' unearned fee. Thus, under our analysis, the fact that, as a practical matter, plaintiff may expend some portion of her recovery on legal fees is of no moment; the legal fees are not an aspect of her damages and her recovery is the same whether she hires a lawyer to pursue her malpractice claim or proceeds *pro se.*" *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38 (1990).

New Jersey

"In a quartet of cases, we have created carefully limited and closely interrelated exceptions to the American Rule that are not otherwise reflected in the text of *Rule* 4:42-9. In the context of an attorney malpractice action, we allowed the malpractice plaintiff to recover, as consequential damages, the attorneys' fees incurred in prosecuting the malpractice action, reasoning that "[a] client 'may

recover for losses which are proximately caused by the attorney's negligence or malpractice.' " *Saffer v. Willoughby,* 143 *N.J.* 256, 271, 670 *A.*2d 527 (1996) (*citing Lieberman v. Employers Ins.,* 84 *N.J.* 325, 341, 419 *A.*2d 417 (1980)). We explained that a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting the legal malpractice action. Those are consequential damages that are proximately related to the malpractice. In the typical case, unless the negligent attorney's fee is determined to be part of the damages recoverable by plaintiff, the plaintiff would incur the legal fees and expenses associated with prosecuting the legal malpractice suit. (*Id.* at 272, 670 *A.*2d 527.)

In *Packard-Bamberger & Co. v. Collier,* 167 *N.J.* 427, 771 *A.*2d 1194 (2001), we extended the limited exception allowing the recovery of attorneys' fees in attorney malpractice actions created in *Saffer v. Willoughby, supra,* to include actions for attorney misconduct, reasoning that an attorney who intentionally violates the duty of loyalty owed to a client commits a more egregious offense than one who negligently breaches the duty of care. A client's claim concerning the defendant-attorney's breach of a fiduciary duty may arise in the legal malpractice context. Nonetheless, if it does not and is instead prosecuted as an independent tort, a claimant is entitled to recover attorneys' fees so long as the claimant proves that the attorney's breach arose from the attorney-client relationship. Accordingly, we hold that a successful claimant in an attorney-misconduct case may recover reasonable counsel fees incurred in prosecuting that action. (*Packard-Bamberger & Co. v. Collier, supra,* 167 *N.J.* at 443, 771 *A.*2d 1194)

The fulcrum of the analysis for these limited exceptions to the American Rule was thus shifted from *Saffer v. Willoughby*'s allowance of attorneys' fees as consequential damages arising out of an attorney's malpractice to *Packard-Bamberger & Co. v. Collier*'s focus on the recovery of attorneys' fees as damages directly and proximately arising from the attorney's breach of fiduciary duty to the plaintiff." *In re Estate of Vayda*, 184 N.J. 115 (2005).

iii. Mitigation of Monetary Damages

New Jersey: "In legal malpractice actions, injured parties have a duty to take reasonable steps to mitigate damages. The burden of proving facts in mitigation of damages rests upon the defendant." *Grubbs v. Knoll*, 376 N.J. Super. 420, 436 (App. Div. 2005).

New York: "The measure of the plaintiffs' damages, if any, will be the value of their lost claims as against the resort. The defendants are entitled to mitigate such

damages, if any, by offering evidence that such damages would have been reduced by the collateral source rule." *Stein v. Levine*, 8 A.D.3d 652, 653 (2004).

Idaho: "The defendant bears the burden of proving that the proposed means of mitigation were reasonable under the circumstances, could be accomplished at a reasonable cost, and were within the plaintiff's ability." *Id.* Proof of the latter of these three requires more than a mere suggestion that a means of mitigation exists. *McCormick Int'l USA, Inc. v. Shore*, 152 Idaho 920, 924 (2012).

b. Mental Anguish:

Texas: "This Court has not yet addressed whether mental anguish damages are recoverable for legal malpractice, although without analyzing the issue we allowed an award of mental anguish damages arising out of attorney negligence to stand in *Cosgrove v. Grimes,* 774 S.W.2d 662, 666 (Tex.1989). Reasoning that mental anguish is not generally a foreseeable consequence of an attorney's negligence, and that recovery of economic loss usually suffices to make a plaintiff whole, other courts have concluded that a plaintiff may not recover mental anguish damages when those damages are a consequence of economic loss. *See generally Boros v. Baxley,* 621 So.2d 240, 244 (Ala.1993); *Reed v. Mitchell & Timbanard, P.C.,* 183 Ariz. 313, 903 P.2d 621, 626–27 (App.1995); *Merenda v. Superior Court,* 3 Cal.App.4th 1, 4 Cal.Rptr.2d 87, 92 (1992); *Gavend v. Malman,* 946 P.2d 558, 563 (Colo.Ct.App.1997); *Segall v. Berkson,* 139 Ill.App.3d 325, 93 Ill.Dec. 927, 487 N.E.2d 752, 756 (1985); *Richards v. Cousins,* 550 So.2d 1273, 1278 (La.Ct.App.1989); *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.,* 556 N.W.2d 557, 562 (Minn.1996); *Selsnick v. Horton,* 96 Nev. 944, 620 P.2d 1256, 1257 (1980); *Gautam v. DeLuca,* 215 N.J.Super. 388, 521 A.2d 1343, 1348–49 (App.Div.1987); *Sanders v. Rosen,* 159 Misc.2d 563, 605 N.Y.S.2d 805, 810 (N.Y.Sup.Ct.1993); *Hilt v. Bernstein,* 75 Or.App. 502, 707 P.2d 88, 95–96 (1985); *Wehringer v. Powers & Hall, P.C.,* 874 F.Supp. 425, 429–30 (D.Mass.1995) (applying Massachusetts law); *see also* 2 Ronald E. Mallen & Jeffrey M. Smith, legal Malpractice § 19.11, at 612 (4th ed. 1996) ("The prevailing rule is that damages for emotional injuries are not recoverable if they are a *consequence* of other damages caused by the attorney's negligence."). *But see Beis v. Bowers,* 649 So.2d 1094, 1096 (La.Ct.App.1995) (permitting recovery of mental anguish damages for legal malpractice); *Salley v. Childs,* 541 A.2d 1297, 1300 (Me.1988) (same); *Gore v. Rains & Block,* 189 Mich.App. 729, 473 N.W.2d 813, 818–19 (1991) (same).

Some courts have allowed mental anguish claims to proceed when the client's direct injury is not exclusively economic, but is more personal in nature, for example, loss of child custody or loss of liberty. These courts recognize that

economic recovery alone would not make the plaintiff whole because of the very personal nature of the injury. *See Wagenmann v. Adams,* 829 F.2d 196, 221 (1st Cir.1987) (applying Massachusetts law) (confinement in mental hospital); *Snyder v. Baumecker,* 708 F.Supp. 1451, 1464 (D.N.J.1989) (applying New Jersey law) (incarceration); *Holliday v. Jones,* 215 Cal.App.3d 102, 264 Cal.Rptr. 448, 458 (1990) (criminal conviction later reversed); *Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112, 118 (1984) (arrest); *Kohn v. Schiappa,* 281 N.J.Super. 235, 656 A.2d 1322, 1324–25 (Law Div.1995) (adoption).

Some of the same courts following the general rule that mental anguish is not a compensable element of damages in legal malpractice cases would permit such damages when an attorney has acted with heightened culpability. *See, e.g., Boros,* 621 So.2d at 244–45; *Bowman,* 686 P.2d at 118; *Lickteig,* 556 N.W.2d at 562; *Selsnick,* 620 P.2d at 1257; *Gautam,* 521 A.2d at 1348; *Timms,* 713 F.Supp. at 954. The court of appeals in this case may have had this kind of standard in mind when it determined that Gertrude presented evidence of "egregious or extraordinary circumstances," and thus that she was entitled to mental anguish damages. 948 S.W.2d at 495. The court focused, however, not on any heightened culpability on the part of DKW, but on the severity of the anguish Gertrude suffered. We have discovered no other court explicitly adopting such a test that focuses not on the attorney's conduct but on the client's condition."*Douglas v. Delp*, 987 S.W.2d 879, 884-85 (Tex. 1999).

New York: "Emotional damages are not recoverable in a legal malpractice action." *Taylor v. Paskoff & Tamber, LLP,* 908 N.Y.S.2d 861, 862 (Sup. Ct. 2010).

New Jersey: "[E]motional distress damages should not be awarded in legal malpractice cases at least in the absence of egregious or extraordinary circumstances." *Gautam v. De Luca*, 215 N.J. Super. 388, 399 (App. Div. 1987).

c. Punitive/Exemplary Damages:

Illinois: "... [T]he availability of punitive damages depends on whether plaintiffs' breach of fiduciary duty claim falls within the rubric of [legal] malpractice. In other words, in determining the applicability of section 2–1115, the court must look to the "nature of the behavior alleged" in plaintiffs' complaint to "determine whether the activities fall within the term 'legal malpractice'." *Safeway Insurance Co. v. Spinak,* 267 Ill.App.3d 513, 518 (1994); *Cripe,* 291 Ill.App.3d at 158–59 (section 2–1115 is only applicable if the conduct alleged in the complaint amounts to legal malpractice). *Brush v. Gilsdorf*, 335 Ill. App. 3d 356, 360 (2002).

Tennessee: "...[W]e hold that as to punitive damages, the evidence supported a finding that the defendant engaged in intentional, fraudulent, malicious, or reckless conduct and that there is no requirement that a defendant's attempts to lie about or conceal his conduct must be contemporaneous with the underlying malpractice... [A]n award of punitive damages must be made on the basis of the same conduct that warrants an award of compensatory damages." *Metcalfe v. Waters*, 970 S.W.2d 448, 449 (Tenn. 1998).

Maryland: "Punitive damages may be awarded in an action for deceit 'where the wrong involved some violation of duty springing from a relationship of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness.'" *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 357 (1992).

Texas: "The factors to consider when reviewing exemplary damages are set out in *Alamo Nat'l Bank v. Kraus,* 616 S.W.2d 908 (Tex.1981). These five factors 'are (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety.' *Id.* Further, the amount of exemplary damages awarded must be reasonably proportioned to the amount of actual damages awarded. *Id.* at 910.... Based on the facts discussed earlier in this opinion, we find the nature of the wrong, the character of appellant's conduct, the degree of culpability of appellant, the situation and sensibilities of appellant and Batilla, and the extent to which appellant's conduct offends the public sense of justice and propriety sufficient to support this award of exemplary damages." *Rhodes v. Batilla*, 848 S.W.2d 833, 843 (Tex. App. 1993).

Kansas: "Punitive damages are allowed in Kansas, not because of any special merit of the injured party's case, but are imposed to punish the wrongdoer for malicious, vindictive or willful and wanton invasion of the injured party's rights. The purpose of punitive damages is to restrain and deter others from the commission of like wrongs. Punitive damages may be recovered for a breach of a contract when an independent tort is proven.... An award of punitive damages is to punish the wrongdoer, not to compensate for the wrong." *Bowman v. Doherty*, 235 Kan. 870, 881-82 (1984).

d. Pre-judgment Interest:

Illinois: "The request for interest failed because the claim against Burke was one at law and our state does not allow nonstatutory prejudgment interest on any type

of claim at law." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 257 (2006).

Florida: "[W]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, [the] plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss." *de Manio v. Burns*, 642 So. 2d 807, 807 (Fla. Dist. Ct. App. 1994).

Washington: "A prejudgment interest award in a legal malpractice action may be calculated on the amount of a lost settlement without deducting for the hypothetical contingency fee the negligent attorney would have earned had he fully performed." *Shoemake ex rel. Guardian v. Ferrer*, 168 Wash. 2d 193, 203 (2010).

Vermont: "Even if the damages in this case were not readily ascertainable... the trial court maintains the ability to award prejudgment interest.... [Furthermore], the award of prejudgment interest [is] mandatory where damages [are] readily ascertainable and discretionary..." *Estate of Fleming v. Nicholson*, 168 Vt. 495, 500–501 (1998).

Georgia: "A plaintiff is only entitled to prejudgment interest under OCGA § 51-12-14(a) if the judgment for compensatory damages is for an amount not less than the amount demanded. In this case, in his statutory letter, Peters demanded $85,000 and the jury awarded $10,000 nominal damages and $35,545.10 attorney fees and expenses of litigation. Peters was not entitled to prejudgment interest because the amount demanded exceeded the amount the jury awarded, exclusive of punitive damages." *Peters v. Hyatt Legal Services*, 220 Ga. App. 398, 401 (1996)

Bennett Wasserman - *Legal Malpractice: Getting the most out of your Expert Witness*

His practice focuses on the law governing lawyers, with emphasis on legal malpractice, professional ethics, lawyer advertising, billing disputes and the fiduciary duties of practicing lawyers. He has been involved in more than 1000 such cases, prosecuting, defending and consulting on substantial claims in these areas. Lawyers, Law Firms and Professional Liability insurance companies frequently call upon Ben to serve as their strategic consultant and expert witness on liability and causatlon issues in legal malpractice litigation. Public and private corporations seek him out when they have been damaged by the substandard legal representation in major commercial transactions and litigations. Several important reported court decisions in state and federal courts have cited Ben's expert opinions as the basis for their decisions. He is credited with recently getting his client, a publicly traded corporation, one of the largest settlements against a major international law firm.

Since 1990, Ben has served as Special Professor of Law at Hofstra University School of Law, where he has taught a full semester course in Lawyer Malpractice. He has also been a guest lecturer at other law schools at home and abroad and has served on the faculty of continuing legal education programs in New Jersey, New York and Pennsylvania.
Ben is the lead author of the New Jersey Law Journal's Annual Review of the New Jersey Supreme Court's decisions in the areas of legal ethics and malpractice. He is the Editor of the Legal Malpractice Law Review, a popular internet based blog.

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ON BEING AN

EXPERT WITNESS IN

LEGAL MALPRACTICE CASES:

New Jersey, New York & Pennsylvania

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INTRODUCTION[1]

The expert witness can be the most important witness in a legal malpractice case. Just as the plaintiff can get to the jury on the strength of his expert's opinions so the defendant can prevent that from ever happening and sometimes win a summary judgment--on the strength of his or her expert's report.

In the nearly 40 years that I have been a practicing lawyer (Yikes! Time flies when you're having fun!), I have had the privilege of serving as an Affidavit or Certificate of Merit Expert and the Consulting and/or Testifying Expert in more than 1,000 cases involving legal malpractice and legal ethics. I have appeared on behalf of defendants and their professional liability carriers and on behalf of plaintiffs. I have also had the good fortune of serving as attorney of record defending and, sadly, prosecuting many lawyers and law firms accused of malpractice, ethics violations, advertising rule breaches and billing abuses. With that experience, I have also had the pleasure of serving on the faculty of Hofstra University School of Law where, since 1990, I have taught advanced law students how ***not*** to practice law-- in a full semester course called "Lawyer Malpractice". Most recently, I have developed with my law students and other experienced colleagues The "***Legal Malpractice Law Review***", a growing internet based archive of summaries of legal malpractice decisions which the New Jersey Law Journal has called a "cutting edge"… " 'blawreview'—part blog, part law review…[that] includes lawyers on all sides of the malpractice wars…".You can visit it at www.legalmalpracticelawreview.com

Since I entered this field of law, more and more lawyers and law firms, who would never have thought of taking on legal malpractice cases, are now doing so. As distasteful as that might seem to some, the fact is that holding bad lawyers accountable for malpractice makes us all better lawyers and, as important, helps our clients. But I've also noticed that many meritorious cases are unjustifiably dismissed because the expert's opinion falls short of what it must be. So, what follows is an effort to explain my understanding of the law in this area, to highlight some essential practice pointers that I have gleaned from my experience and to set out what I believe is required of all lawyers and their legal malpractice experts on both sides of the litigated battle.

And so, we introduce you to three kinds of expert witnesses in the legal malpractice case.

[1] My gratitude to one young colleague, Melissa Kanbayashi, Esq., now an associate with Marks, O'Neill, O', BrienDoherty & Kelly, P.C. who assisted me in this effort and who deserves my special thanks for her fine work.

I. The Expert and the Attorney Client Relationship

1. There is no attorney client relationship between the expert and the client.

2. ABA Formal Opinion 94-047:

"A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a "law-related service" to the party within the purview of Model Rule 5.7 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a duty to protect the party's confidential information from use or disclosure to the adverse party." (See **Appendix A** for the full text of this Opinion)

The Affidavit of Merit Expert in N.J.

Legislative History:

The Affidavit of Merit statute [N.J.S.A. 2A:53A-26, 27] was enacted in 1995 as part of a comprehensive package of tort reform bills passed in an effort to "bring common sense and equity to the state's civil litigation system". See Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 228 (1998) (quoting Office of the Governor, News Release 1 (June 29, 1995)).

> The legislative history pertinent to the Affidavit of Merit supports the conclusion that its purpose was to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation.

See Petition of Hall By and Through Hall, 147, N.J. 379 (1997). See also Peter Verniero, Chief Counsel to Governor, Report to the Governor on the Subject of Tort Reform (Sept. 13, 1994).

The stated purpose of the Affidavit of Merit is to limit the number of frivolous lawsuits filed against professionals by requiring a "threshold showing by a knowledgeable professional that such claim is meritorious, [that is, that] there exists a reasonable probability that the care, skill or knowledge exercised by the professional being sued fell outside acceptable professional standards." Cornblatt v. Barow, 153 N.J. at 218. See also Fink v. Thompson, 167 N.J. 551 (2001) and Galik v. Clara Maass Med. Ctr., 167 N.J. 341 (2001). In other words, the Affidavit of Merit expert's opinion is focused on the liability aspect of the malpractice cause of action. The New Jersey statute, unlike

in other states, does not require the Affidavit of Merit expert to express any opinion related to the proximate cause or damages elements of a legal malpractice cause of action.

As the Court held in Petition of Hall, failure to provide the statutory threshold showing that a malpractice claim is meritorious constitutes a failure to state a cause of action against that defendant. See Petition of Hall, 147 N.J. 379, 390 (1997). See also N.J.S.A. 2A:53A-29. (If plaintiff fails to provide an affidavit or a statement in lieu thereof, it shall be deemed a failure to state a cause of action.) Therefore, where a plaintiff fails to comply with the filing requirements of the statute, a motion to dismiss should be granted "with prejudice in all but extraordinary circumstances." See Cornblatt v. Barow, 153 N.J. 218, 242 (1998). Thus, the consequences of failing to follow the procedure of furnishing an Affidavit of Merit from an appropriate expert can result in a dismissal with prejudice on the merits.

Lastly, the Affidavit of Merit Statute applies only to those cases where the underlying legally-significant facts happen, arise, or take place on or after the effective date of the statute, June 29, 1995. See Cornblatt, supra, at 236.

A. **Statutory Requirement- N.J.S.A. 2A:53A-27**

> In any action for damages for personal injuries, wrongful death or property damages resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional or occupation standards or treatment practices.

B. Who is considered a licensed person?

A licensed person has been defined by N.J.S.A. 2A:53A-26 as any person who is licensed as:

> a. an accountant pursuant to P. L.1997, c. 259 (C.45:2B-42 et seq.);
>
> b. an architect pursuant to R.S.45:3-1 et seq.;
>
> **c. an attorney admitted to practice law in New Jersey;**
>
> d. a dentist pursuant to R.S.45:6-1 et seq.;

e. an engineer pursuant to P.L.1938, c. 342 (C.45:8-27 et seq.);

f. a physician in the practice of medicine or surgery pursuant to R.S.45:9-1 et seq.;

g. a podiatrist pursuant to R.S.45:5-1 et seq.;

h. a chiropractor pursuant to P.L.1989, c. 153 (C.45:9-41.17 et seq.);

i. a registered professional nurse pursuant to P.L.1947, c. 262 (C.45:11-23 et seq.);

j. a health care facility as defined in section 2 of P.L.1971, c. 136 (C.26:2H-2);

k. a physical therapist pursuant to P.L.1983, c. 296 (C.45:9-37.11 et seq.);

l. a land surveyor pursuant to P.L.1938, c. 342 (C.45:8-27 et seq.);

m. a registered pharmacist pursuant to P.L.2003, c. 280 (C.45:14-40 et seq.);

n. a veterinarian pursuant to R.S.45:16-1 et seq.;

o. an insurance producer pursuant to P.L.2001, c. 210 (C.17:22A-26 et seq.); and

p. a certified midwife, certified professional midwife, or certified nurse midwife pursuant to R.S.45:10-1 et seq.

C. Requirements of a Licensed Person

1. In Legal Malpractice and all other non-medical Professional Malpractice cases:

The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least 5 years. The person shall have no financial interest in the outcome of the case under review. See N.J.S.A. 2A:53A-27.

2. In a Medical Malpractice Case:

In a medical malpractice case, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in

N.J.S.A. 2A:53A-41 which generally requires that the affidavit of merit expert be board certified in the same specialty as the defendant doctor.

D. Time Period for Furnishing the Affidavit of Merit.

While Plaintiff is required to "provide each defendant" with the Affidavit within 60 days of the date Defendants answer the Complaint, the Court may grant no more than one additional period, not to exceed 60 days, to file the affidavit upon a finding of good cause. See N.J.S.A. 2A:53A-27. While the statute does not define "good cause", case law has provided some guidance. In Familia v. University Hosp. of University of Medicine and Dentistry, 350 N.J. Super. 563 (2002), the Court opined that decisions whether to grant an extension of time to file an affidavit of merit in medical malpractice and the appropriate amount of time a party should be afforded are discretionary determinations. "Inadvertence of counsel may justly be deemed to constitute good cause where the delay does not prejudice the adverse party and a rational application under the circumstances present favors a determination that provides justice to the litigant." See Burns v Belfasky, 166 NJ 466, 478 (2000), citing Burns v. Belafsky, 326 N.J. Super. 462, 471 (App. Div. 1999)

The Court noted in Fink v. Thompson, 167 N.J. 551 (2001) that attorneys in malpractice cases should not rely on an intention to conduct later discovery to excuse non compliance with the affidavit of merit statute. Rather, attorneys should begin discovery promptly when facts are needed to comply with the requirements of the statute. Id. Attorneys should time their discovery, with court intervention if necessary, so that facts necessary to comply with the statute are available by the statutory deadlines. See Id. at 552. The statute does not require Plaintiff to file the Affidavit of Merit with the Court, although some practitioners nonetheless do so to show that it was timely provided to the defendant. **The better practice though has been that Plaintiff attach the Affidavit of Merit to the Complaint and file it with the Court and serve it on the Defendants at the same time. This practice eliminates the possibility of overlooking the statutory time limit within which the Affidavit of Merit must be served.**

Sworn Statement in Place of an Affidavit is Permitted

Where a defendant has failed to provide plaintiff with records that are essential for the Affidavit of Merit expert to review before furnishing his Affidavit of Merit, under N.J.S.A. 2A:53A-28, Plaintiff may provide a sworn statement in lieu of an Affidavit. The statement shall set forth the following:

1. The defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit;

2. a written request therefore along with, in necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and

3. at least 45 days have elapsed since the defendant received the request.

This provision has generally applied in medical malpractice cases, but it has also been seen in legal malpractice cases when the prospective defendant lawyer withholds release of the client's file to subsequent counsel. In this regard, Frenkel v. Frenkel, 252 N.J. Super. 214 (App. Div. 1991) holds that there is no justification – even the assertion of a retaining lien, to withhold a client's file after it is requested.

E. Substantial Compliance Doctrine:

N.J.S.A. 2A:53A-29 provides that if a plaintiff fails to provide an affidavit or sworn statement in place of an affidavit of merit, it shall be deemed a failure to state a cause of action. However, the Court in Cornblatt permitted the limited application of the doctrine of substantial compliance to avoid technical defeats of a valid claim. See Cornblatt v. Barow, 153 N.J. 218 (1998). The Court opined that "despite the legislature's clear language requiring an affidavit, there is nothing reflective in the objectives of the Affidavit of Merit Bill or its history that suggests the legislature intended to foreclose [this doctrine]". Cornblatt, supra, at 240. The Court recognized that in certain circumstances, a certification could satisfy the purpose of the affidavit requirement as well as the general purpose of the statute. Id.

The Supreme Court expanded the application of the doctrine of substantial compliance in 2001 holding that service of an expert report may substantially comply with the Affidavit of Merit statute. In Galik v. Clara Maass Medical Ctr., the executrix of patient's estate brought a medical malpractice action against physicians for failure to timely diagnose a fractured cervical spine. The question posed to the Court on appeal from the trial court's decision to dismiss the complaint is whether the plaintiff's conduct, i.e. serving two detailed expert reports on the insurance company for the defendants prior to filing suit, was sufficient in attempting to satisfy the Affidavit of Merit Statute. Galik v. Clara Maass Medical Ctr., 167 N.J. 341, 345 (2001). The Supreme Court reversed the trial court's dismissal, opining that the Court's decision in Cornblatt did not intend to restrict the power of our courts in their application of the doctrine of substantial compliance when appropriate. See Galik, supra, at 355. The Court then set out five elements to be considered in a fact sensitive analysis of whether the plaintiff has substantially complied with the Affidavit of Merit statute:

1. the lack of prejudice to the defending party;

2. a series of steps taken to comply with the statute involved;

3. a general compliance with the purpose of the statute;

4. a reasonable notice of petitioner's claim; and

5. a reasonable explanation as to why there was not a strict compliance with the statute.

Id. at 353.

The Court noted that establishing these "substantial compliance" elements could well impose a heavy burden. Id. at 358. However, the Court concluded that while Plaintiff's service of the expert reports prior to filing suit was in substantial compliance with the Affidavit of Merit statute, going forward, attorneys should file a timely and substantively appropriate Affidavit of Merit in every case to avoid unnecessary litigation and to avoid dismissal of meritorious cases. See Id. at 358.

F. Is an Affidavit of Merit Required in a Case of Common Knowledge?:

In the case of Hubbard v. Reed, 168 N.J. 387 (2001), the Supreme Court held that an Affidavit of Merit is not required in a common-knowledge case when an expert will not be called to testify regarding the care, skill or knowledge of the professional fell outside acceptable professional or occupational standards or treatment practices. See Id. at 387. In Hubbard, Plaintiff filed suit against his dentist, for extracting the wrong tooth. The Plaintiff did not serve an Affidavit of Merit since it has a common knowledge case. The case was dismissed by the trial court for failure to serve an Affidavit of Merit and one Appellate Court affirmed such ruling. The Supreme Court, however, opined that in common knowledge cases, an expert is not needed to demonstrate that a defendant breached a duty of care. Hubbard, supra, at 394.

The Court noted that, as observed by the Appellate Division, "the Affidavit of Merit statute is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint, but whether there is some objective threshold merit to the allegations. See Hubbard, supra, 331 N.J. Super. 283, 292-293 (App. Div. 2000). The Court further states that to demonstrate the objective threshold merit, the statute requires plaintiffs to provide an expert opinion, given under oath, that a duty of care existed and same was breached. Yet, by definition, in common knowledge cases, an expert is not needed to demonstrate that the defendant breached a duty of care. Hubbard, 168 N.J. 387, 395 (2001). The Court again warned that while an Affidavit of Merit is not required in common knowledge cases, the wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial. Id. at 397.

G. The "Ferreira" Case Management Conference

In Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), the Supreme Court reversed the dismissal of a malpractice complaint where Plaintiff's attorney, through pure inadvertence, had failed to timely serve an Affidavit of Merit, although he had received one from an appropriate expert within ten (10) days after the defendant had served an Answer to the Complaint. Recognizing that it would be inequitable if an otherwise meritorious complaint were dismissed under such circumstances, the Supreme Court exercised its equitable powers, and established a procedure that requires an accelerated mandatory case management conference to make sure that the dual purpose of the Affidavit of Merit statute be fulfilled: First, to eliminate frivolous malpractice claims and second, to make sure that meritorious cases are shepherded expeditiously toward trial. With such a mandatory conference held within the statutory 120 day period for serving the Affidavit of Merit, there would be adequate time permitted for plaintiff to still serve the Affidavit if one had not yet been. In addition, in those cases where the Affidavit has already been served, the defendant must come forward to voice any objections to the Affidavit or the expert furnishing it so those objections can be speedily resolved. This accelerated case management conference thus permits meritorious claims to proceed and eliminates the "sideshows" to discovery that Affidavit of Merit compliance had become.

See **Appendix B** for a sample of an Affidavit of Merit with appropriate attachments of the expert's qualifications and the documents reviewed in support of the Affidavit. Notice that in New Jersey, the Affidavit of Merit is limited to the issue of whether the defendant has deviated from the applicable standard of care. Unlike other states, such as Pennsylvania, there is no requirement that the Affidavit of Merit expert opine on proximate cause or damages.

See **Appendix C** for a sample of a Certificate of Merit used in Pennsylvania legal malpractice cases.

See **Appendix D** for a sample of an Expert Disclosure statement under NY CPLR 3101 D.

II. The Testifying Expert in a Legal Malpractice Case:

Background – Establishing Legal Malpractice

From a substantive perspective, an attorney is obligated to exercise the degree of reasonable knowledge, skill and care that lawyers of ordinary ability and skill possess and exercise. See St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 588 (1982). In order to establish a legal malpractice claim, a plaintiff must establish that:

1) there existed an attorney-client (or foreseeable relying non-client) relationship that gives rise to a duty of care on the part of the attorney;

2) a definition of the specific duty and how the attorney breached it;

3) that the defendant/attorney's breach was a proximate cause of plaintiff's injury; and

4) that the plaintiff suffered actual damages.

See, e.g., Froom v. Perel, 377 N.J. Super. 298, 313 (2005). See also Conklin v. Hannoch Weisman, 145 N.J. 395, 416-420 (1996) and Albright v. Burns, 206 N.J. Super. 625, 632 (App. Div. 1986).

The legal malpractice plaintiff client bears the burden of proof by a preponderance of competent credible evidence that injuries were suffered as a proximate consequence of the attorney's breach of duty. See Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996). To establish the requisite causal connection between a defendant's negligence and plaintiff's harm, plaintiff must present evidence to support a finding that defendant's negligent conduct was a "substantial factor" in bringing about plaintiff's injury, even though there may be other concurrent causes of harm. Conklin v. Hannoch Weisman, 145 N.J. 395 (1996), Froom v. Perel, supra, at 313. See also, 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 487-488 (App. Div. 1994).

It is up to the expert to establish what the applicable standard of care (i.e., the attorney's duty) is and how the defendant attorney or law firm departed from that standard. The malpractice expert usually expresses an opinion on proximate cause and damages too, but, depending on the unique particulars of each case, these elements can be established by other witnesses, both lay and expert.

A. When Do you Need an Expert Witness?

Generally, to prove each element of the legal malpractice cause of action:

1. Standards of Care:

The sources for standards of care applicable to attorneys include:

a. Statutory law (state and federal)

b. Rules of Court (Rules of Civil Practice, Criminal Practice, Appellate Practice, etc.;

c. Rules of Professional Conduct (i.e., Fiduciary Duties);

d. Accepted (or Acceptable) Practice in all areas of law;

e. Retainer Agreements (generally to define the scope of the lawyer's responsibility;

f. Client-defined objectives of legal representation from specific engagement and prior representation;

g. Specialization of lawyer

h. The Conduct of the Lawyer in prior cases

i. Form Books in a law library (See, Fiorentino v. Rapoport, 693 A. 2nd 208 (1997)

2. Deviation (Breach of Duty)

a. The expert must prove how the conduct of the defendant lawyer or law firm failed to comply with accepted standards of practice (i.e., the applicable standard of care).

3. Causation

a. The expert must testify that the defendant's deviation was a "substantial factor" in causing the plaintiff's damages. Vort v. Hollander, 257 N.J. Super. 56, 61 (App. Div. 1992) (Conklin v. Hannoch Weissman, 145 N.J. 395, 678 A.2d 1060 (1996).

b. *Litigation malpractice: Suit within a suit* – need to prove the underlying claim would have been successful. Generally requires experts that would normally be required to prove the elements in the underlying case – i.e., non-lawyer witnesses. However, there have been significant changes on how to prove the underlying case. Now, instead of actually calling all witnesses who would have been called, an expert witness can be called to testify on what the likely outcome would have been had the case been tried. See, Lieberman v. Employers Ins. Of Wausau, 84 N.J. 325, 344 (1980) and Garcia v.

Kozlov, Seaton, Romanini & Brooks, PC 179 N.J. 343 (2004). (Hoppe v. Ranzini, 158 N.J. Super. 158 (App. Div. 1978).

Lieberman v. Employers of Wausau 84 N.J. 325, 344 (1980): ("Another option [to the suit within the suit approach], is to proceed through the use of expert testimony as to what as a matter of reasonable probability would have transpired at the original trial.") See also Ziegelheim v. Apollo, 128 N.J. 250, 262 *et seq.* (1992).

The expert is permitted to testify as to what the reasonable value of the underlying case would have been had the lawyer not been negligent. Kelly v. Berlin, 300 N.J.Super 256 (App. Div. 1997).

The jury sitting in the malpractice case can decide what a reasonable jury would have awarded in the underlying action. Fuschetti v. Bierman, 128 N.J. Super 290 (1974).

c. *Underlying transactional matters* – need to show that alternative transaction could have been structured differently so as to protect client's interests. (2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 640 A.2d 346 (1994). Where the claim is that the defendant attorney did not include a clause in a contract that would have protected the client, the client plaintiff must show that the underlying adverse party in the transaction would have agreed to the clause. Froom v. Perel, 377 N.J. Super. 298 (2005).

4. Damages

a. If required to prove the suit within the suit, then use the type of experts that would have been used in the underlying suit. If the claim is that the client had to take an inadequate settlement, then the value of the underlying suit, if handled properly, would be well within the expertise of a trial lawyer. See, Kelly v. Berlin, supra

b. Consider using experts such as economists, accountants, appraisers, and the like.

c. The legal malpractice expert can testify to the value of the underlying case if it went to trial or its settlement value. Kelly v. Berlin, 300 N.J. Super. 256 (App. Div. 1997).

("…the trial court properly concluded that laypersons do not have the knowledge, from their common experience, to evaluate and determine damages in a case of this kind, this is, to determine the difference

between the amount plaintiff actually received in his settlement and the amount he would have received [but for his lawyer's malpractice].

("An expert in the settlement of claims, such as an experience torts attorney or an experienced claims adjuster, is necessary to explain the various factors which are taken into consideration in the settlement of a case of this kind. Such as expert could explain which factors are relevant and how they affected this matter to enable the jury to determine whether the defendant [lawyer's] negligence caused plaintiff to settle for a lower amount than he otherwise would have, and, if so, the amount of damages plaintiff sustained as a result.")

B. Pertinent Rules:

1. N.J.R.E. 702[2]

   If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. N.J.R.E. 703[3]

   The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field forming opinion or inferences upon the subject, the facts or data need not be admissible in evidence.

When is expert testimony necessary/not necessary?

[2] The corresponding federal rule is FRE. 702 which states that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

[3] The corresponding federal rule FRE 703 states that "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

To be admissible, expert testimony (1) must concern a subject matter beyond the knowledge of the average juror, (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. See State v. Reeds, 197 N.J. 280 (2009).

The party asserting malpractice must present expert testimony that establishes the standard of care against which the attorney's actions are to be measured. See Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo M.D., 345 N.J. Super. 1, 12 (App. Div.2001). See also Brizak v. Needle, 239 N.J. Super. 415, 431-432 (App. Div. 1990). Expert testimony is required in cases of professional malpractice where the matter to be addressed is sufficiently esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable. See Sommers, supra, at 10. If the adequacy of an investigation or the soundness of an opinion is the issue, a jury will usually require the assistance of an expert opinion. See Aldrich v. Hawrylo, 281 N.J. Super. 201, 214 (App. Div. 1995); Brizak v. Needle, 239 N.J.Super. 415 (App. Div. 1990).

Only in rare cases is expert testimony **not required** in a legal malpractice action. One instance, where expert testimony may not be required is where a duty of care to the client is so basic that it may be determined by the court as a matter of law. See Brizak v. Needle, 239 N.J. Super. 415 (App. Div. 1990) (attorney failed to protect a client's claim against the running of the statute of limitations); See also Sommers, supra, 287 N.J. Super., 8-12 (lawyer failed to submit a legal argument in the client's defense). Expert testimony may also not be necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's legal malpractice and the client's loss are so apparent that the trier of fact can resolve the issue as a matter of common knowledge. See 2715 Lemoine Ave. Corp., supra, at 490. See also Aldrich v. Hawrylo, 281 N.J.Super. 201, 214 (App. Div. 1995).

In Sommers, plaintiff asserted a legal malpractice claim against her attorney for allegedly failing to submit a legal argument to support her claim and misrepresented the state of the case to her. Plaintiff claimed that no work was done to advance her case and that her attorney knew the shortcomings of the defendant's case but misrepresented the strength of the defense in an effort to induce Plaintiff to settle the case and collect his fee. See Id. at 11. The Court in Sommers concluded that Plaintiff was not required to have an expert opine that (1) her attorney should have briefed an issue and that failure to do so was a breach of the duty to plaintiff; (2) her attorney was required to report the settlement discussions accurately and recommend a disposition of the case based on an accurate rendition of each party's position; or (3) if she were told that the defendant had no defense to her claim, she would have changed her settlement position. See Id. at 12. The Court held that these allegations could have been resolved by the trier of fact as a matter of common knowledge. See Id. However, to the extent that Plaintiff challenges the quality of work done on her

behalf, the Court opined that the motion judge properly dismissed her claim because of her failure to submit an expert report.

In Brizak v. Needle, 239 N.J. Super. 415 (App. Div. 1990), the court ruled that expert testimony is not required to prove that an attorney acted unreasonably when he failed to conduct any investigation of his client's claims. But, if he conducted some investigation, expert testimony is required to determine whether the investigation that was conducted complied with accepted standards of care and was thus reasonable.

1. Res Ipsa Loquitur and Common Knowledge Cases.

Experts are not needed to establish the appropriate professional standard of care where either the doctrine of *res ipsa loquitur* or the doctrine of common knowledge applies.

Res ipsa loquitur applies where

(a) the occurrence itself ordinarily bespeaks negligence;

(b) the instrumentality was within the defendant's exclusive control; and

(c) there is no indication in the circumstances that the injury was the result of plaintiff's own voluntary act or neglect.

See Kelly v. Berlin, 300 N.J Super. 256, 265 (App. Div. 1997). See also Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 269 (1958).

The *res ipsa* doctrine permits a jury to infer negligence, although the jury is free to accept or reject the inference. See Kelly, supra, at 265. The common knowledge doctrine applies when the facts are such that the common knowledge and experience of a lay person enables a jury to conclude, without expert testimony, in a malpractice case that a duty of care has been breached. See Id. "Usually, the common knowledge doctrine will be applied where the carelessness of defendant is readily apparent to anyone of average intelligence and ordinary experience." Id.

The Supreme Court made a distinction between the two doctrines, explaining that in *res ipsa loquitur* cases, plaintiff need only prove injury and need not prove a standard of care or specific act or omission, while the common knowledge doctrine is applied in malpractice cases after the plaintiff proves his injury and a causally related act or omission by the defendant. See Sanzari v. Rosenfeld, 34 N.J. 128 , 141 (1961).

In Jerista v. Murray, 185 N.J. 175 (2005), the underlying claim that a supermarket's automatic door malfunctioned, thus injuring the plaintiff, could not be proved because the evidence of malfunction was spoliated due to the plaintiffs' attorney negligence in the underlying case. Then,

when plaintiff sued her attorney for malpractice, that case was dismissed because she could not prove the underlying case as a result of the unavailable evidence of lack of maintenance or malfunction. The Supreme Court held that in such a case, the plaintiff was entitled to prove the proximate cause element of the legal malpractice cause of action (i.e., that she would have prevailed in the underlying case against the supermarket) with the benefit of *res ipsa loquitor*. Her legal malpractice expert needed only to testify about the lawyer's deviations from the standards of care applicable to the mishandling of the case, but as to whether she would have prevailed on the liability aspects (the malfunctioning of the automatic door) in the underlying case, no expert testimony was necessary.

1. "Common Knowledge Doctrine" and *Res Ipsa Loquitor*
2. Statute of Limitations

   (*Fuschetti v. Bierman*, 128 N.J. Super 290 (Law Div., 1974)

3. Complete failure to investigate a client's claim

   (*Brizak v. Needle,* 239 N.J. Super. 415 (App. Div. 1990)

4. Where attorney admits fault and causation in the underlying case

   (*Briggs v. King*, 714 S.W. 2d 694 (Mo. App., 1986)

5. Egregious conduct on the part of the attorney

   (*Aldrich v. Hawrylo*, 281 N.J. Super. 201 (App. Div. 1995)

6. Obvious casual link

   (*2175 Lemoine Avenue Corp. v. Finco, Inc.*, 272 N.J. Super. 478 (1994)); *Vort v. Hollander,* 257 N.J. Super. 56 (1994)

7. Where attorney used unclear and ambiguous language in contracts

   (*Belfer v. Leckstein*, Dkt#A-4372-96T3; Superior Court of NJ, App. Div., decided 10/17/97 – unpublished thus far.)

A. <u>The Net Opinion Rule</u>:

An expert's opinion must be based on facts, data or another expert's opinion, either perceived by or made known to the expert, at or before trial. <u>See</u> N.J.R.E. 703; <u>Froom</u>, <u>supra</u>, at 317. The net opinion rule makes an expert's opinion consisting of bare conclusions that are unsupported by competent factual evidence inadmissible. <u>Id.</u> The rule often focuses on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom. <u>See</u>, <u>Kaplan v. Skoloff & Wolfe, P.C.</u>, 339 N.J.Super.

97,102 (App. Div. 2001). An expert must give the why and wherefore of his or her opinion, rather than simply a mere conclusion. Id. at 102.

In Kaplan, plaintiff's expert offered no evidential support that established the existence of a standard of care in a legal malpractice action, other than standards that were personal to the expert. Id. Plaintiff's expert failed to reference any written document or unwritten custom accepted by the legal community that would support its claim that the property settlement agreement plaintiff entered into was less than she should have received. Rather, the plaintiff's expert provided his own personal view, rather than the standard of the profession in general. This is the equivalent of a net opinion. See Id. at 103. Plaintiff's expert failed to render a comparison of similar property settlement agreements and failed to provide an analysis of how legal issues would have affected the settlement amount. Id. at 104. The Court held that the "net opinion" rule precluded the admission of testimony by client's expert on the issue of liability and affirmed the trial court's grant of summary judgment.

In Celucci v. Bronstein, 277 N.J. Super. 506 (App. Div. 1994), a law professor's expert testimony was "untenable" because it ignored uncontroverted factual evidence, and was based on criticizing the Defendant lawyer for "an error of judgment" rather than a deviation from the standard of care. Errors in judgment however, are not generally recognized to be malpractice.

In Froom v. Perel, 377 N.J. Super. 298 (App. Div 2005), a former appellate judge from New York who served as Plaintiff's expert confused proximate cause with liability since there were no facts to establish proximate cause. His opinion was not allowed to support Plaintiff's verdict below and the Appellate Division dismissed the legal malpractice cause of action.

By contrast, in Carbis Sales, Inc. v. Eisenberg, et al. 397 N. J. Super 64 (App. Div. 2007), where the defendant appealed a jury verdict on the basis of a net opinion offered by plaintiff's expert, the Court stated:

> Defendants contend that Wasserman's opinion was nothing more than a net opinion because he "failed to reference, in either his report or at trial, any written document or unwritten custom accepted by the legal community recognizing the standards that he claimed to exist." We disagree. In his report, Wasserman specifically referenced extensive case law, as well as *R.P.C.* 1.3, establishing that an attorney has an obligation to carefully investigate his case and diligently pursue his or her client's claims before formulating legal strategies. He also cited to cases and treatises indicating that an attorney cannot be held liable for an erroneous judgment call unless that judgment was not properly informed…[W]asserman then went on to identify the deficiencies he perceived in Eisenberg's preparation of the case and the resulting

> ill-informed judgments defendant made as to the presentation of Carbis' defense to the jury. Such deviations, he opined, constitute a violation of the tenets of the Rules of Professional Responsibility and of the general duty to exercise that degree of care, knowledge, judgment and skill that a reasonably prudent lawyer of ordinary ability would have exercised in the same or similar circumstances.
>
> We are satisfied that Wasserman's opinion is clearly based on factual evidence of record, to which he applied generally accepted standards of care as reflected in both our case law and Rules of Professional Conduct. *St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571 (588), 443 A.2nd 1052 (1982).* As such, and contrary to defendants'… contention, we find the expert opinion as to defendants' violation of these rules to be competent evidence of legal malpractice, sufficient to support the jury's verdict.

B. Disclosure of the Expert

The discovery rules require that the substance of a testifying expert's opinion be conveyed to the adversary prior to trial. According to R. 4:10-2(d)(1):

> A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness….The interrogatories may also require, as provided for by R. 4:17-4(a) the furnishing of a copy of that person's report.

By declaring that an expert witness will be produced at trial and providing his/her identity and opinion to another party, the original proponent is waiving his/her claim that the information is privileged. Therefore, a party may call an adversary's expert when the expert has been designated a "testifying expert" without a showing of exigent circumstances. See Fitzgerald v. Stanley Roberts, 186 N.J. 286, 302 (2006).

C. The Expert's Report:

a. Expert Report Rule.

According to R. 4:17-4(e), an expert report shall contain:

> A complete statement of that person's opinions and basis therefore; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether

compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation.[4]

b. Structure of the Expert's Report:

The experts report should contain:

1. A statement as to whether the report is preliminary or final – No final report without review of all pertinent discovery.

2. A section listing "Documents Reviewed" which distinguishes those in the legal malpractice case and those in the underlying case or transaction.

3. Section called "Factual Summary which is supported by references to specific documents listed in "Documents Reviewed".

4. Section called "Opinions and Analysis" wherein the specific standard or a statement thereof is contained, discussed and how the factual evidence shows deviation or compliance. If a specific standard is at issue, such as an RPC quote it. If, however, a general duty is at issue it is generally best not to cite to cases. If you do, the report then becomes a brief and the expert becomes your client's advocate, which should be avoided.

5. Section called "Conclusion". The expert should state that the factual evidence demonstrates that the defendant lawyer did (or did not) deviate from the standard of care. This is NOT an opinion. It should then contain the "magic words": "It is my opinion, which I base on reasonable probability (or certainty) that the defendant lawyer's conduct was (or was not) a substantial factor in causing the damages alleged by plaintiff.

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[4] Federal courter part to the N.J. Court Rule is F.R.C.P. Rule 26(a)(2)

(A) … a party shall disclose to other parties the identity of any person we may be used at trial to present evidence under Rules 702, 703 of the Federal Rules of Evidence.

(B) … this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case on whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness informing the opinions; any exhibits to be used as, a summary of or support for the opinions; the qualifications authored by the witness, within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

c. Time limit for producing a report:

The time for furnishing a report must be reasonable both in respect of the obligation of the party furnishing it and the fixing of a trial date. See Pressler, Comments to New Jersey Court Rules, R. 4:17-4(e), at Section 5.1 (2009). An Appellate Division Court ruling opined that it may be an abuse of discretion for a court to refuse to consider a late report sought to be submitted in opposition to a motion for summary judgment, particularly if the motion was made prior to the expiration of the time allowed for the completion of discovery. See Baldyga v. Oldman, 261 N.J. Super. 259 (App. Div. 1993).

d. Discoverability of Drafts of Expert's Report Rule 4:10-2(d) (1): The "Collaborative Process Privilege"

"Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R.4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule. ("only upon a showing of substantial need" and "unable without undue hardship to obtain the substantial equivalent by other means.")

e. FRCP 26 (b) (4) (A)-(C)

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by

interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

The Non Testifying (Consulting) Expert:

New Jersey Court Rule 4:10-2(d)(3)[5] states that:

> A party may discover facts known or opinions held by an expert…who has been retained or specially employed by another party in anticipation of litigation or preparation of trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The rule is intended to provide protection for work performed by consulting experts who will not testify at trial but who aid the attorney in preparing for trial. See Fitzgerald v. Roberts, 186 N.J. 286, 300 (2006). The work performed as a proposed expert for trial is subject to discovery while that performed as a non testifying adviser is not. See Franklin v. Milner, 150 N.J. Super. 456 (App. Div. 1977). And the manner in which a consultant has performed his or her consulting functions may remove the protections generally afforded by the rule. See In re Long Branch Manufactured Gas Plant, 388 N.J. Super. 254, 269 (Law. Div. 2005). See also ABA Formal Ethics Opinion 97-407, May 13, 1997 ("A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a "law related service" to the party within the purview of Model Rule 5.7[6] such as would render his services as a testifying expert

[5] Federal Counterpart to this New Jersey Rule is F.R.C.P. 26(b)(4)(B), which provides that "a party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only…upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." Federal Courts have noted that this rule is designed to "promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation, to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation, and more specifically, to prevent one party from utilizing the services of the opponent's experts by means of a deposition." See Eliasen v. Hamilton, 111 F.R.D. 396 (N.D. Ill. 1986). See also In Re Long Branch, 388 N.J. Super. at 262.

[6] Model Rule 5.7 states

subject to the MRPC. However, to avoid any misunderstanding the testifying expert should make his limited role clear at the outset.")

The Court held in Graham v. Gielchinsky, 126 N.J. 361 (1991) that in the absence of exceptional circumstances, as defined by R. 4:10-2(d)(3), courts should not allow the opinion testimony of an expert originally consulted by an adversary.(emphasis added). Communications between an attorney and consulting expert are protected as part of the attorney's work product under R. 4:10-2(c), receiving only qualified protection and are discoverable upon a showing of (1) substantial need of the materials in preparation of the case and (2) inability without undue hardship to obtain the substantial equivalent of the materials by other means. However, even if a party establishes this type of showing, mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation remain protected. See Franklin v. Milner, 186 N.J. 286 (2006). Even though certain documents may be discoverable in unusual circumstances, the opinions of other representatives of a party, including experts, remain privileged.

The exceptional circumstances test is difficult to meet and rarely satisfied. See Graham, supra, at 361. See also In re Long Branch Manufactured Gas Plant, 388 N.J. Super. 254, 261 (Law Div. 2005). The high burden of proving "exceptional circumstances" promotes fairness by precluding unreasonable access to an opposing party's diligent trial preparation. See In re Long Branch Manufactured Gas Plant, supra, at 261. The inquiry into whether there are exceptional circumstances turns to the fact of whether it is impracticable to obtain information on the same subject by alternative means. Id.

"Calling someone a non testifying consulting expert does not mean that he or she is automatically and absolutely shielded from discovery on issues that the party knowingly has injected into the case; as to those issues, the expert is nothing more than an ordinary fact witness." See In re Long Branch, 388 N.J. Super, at 256. Furthermore, the non testifying expert disclosure rules were not intended to immunize consultant experts from discovery when they have played other roles in a controversy, i.e. when the expert consultant acts as a public spokesperson for a

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(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services to clients; or
  (1) By the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
  (2) By a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

company, those actions are not consultative, and therefore not protected by the consulting expert privilege rule. See Id.

REFLECTIONS ON CHOOSING YOUR EXPERT WITNESS

For the *AFFIDAVIT OF MERIT* EXPERT:

1. Make sure he or she has at least five (5) years of practice experience in the substantive area of law of the underlying case and in legal malpractice.

2. Make sure he or she has no financial interest in the outcome of the case.

3. Be aware that the Affidavit of Merit Expert need not be the same as your Testifying Expert.

4. Consider Board Certification and its significance under the Affidavit of Merit Statute

For the *TESTIFYING and CONSULTING EXPERT WITNESS*

1. Effective Writer.

    a. Experienced in how to write a winning report;

    b. Report must be consistent with theory of liability or defense.

2. Effective Verbal Communication Skills – choose an expert who is comfortable in the courtroom and who knows how to effectively communicate with the Jury.

    a. Talks in plain language;

    b. Talks *with,* not down to the jury;

    c. Uses plain and simple language and is able to explain complex cases in an understandable way.

3. Credibility – choose an expert who has testified for both Plaintiffs and Defendants.

    a. Willing to testify for the client wronged by the attorney;

    b. Willing to testify for the attorney where he is in the right;

    c. No bias for or against the client or the attorney;

    d. Should not testify that certain conduct is malpractice when in fact it is not (e.g. errors of judgment – *Celucci v. Bronstein*, 277 N.J. Super. 506, *certif. denied* 139 NJ 441 (1995).

4. Competence – choose an expert who is fully familiar with accepted standard of care applicable to the underlying case or matter and with the law of legal malpractice.

   a. Carefully review expert's CV;

   b. Specialization?

   c. Review expert's publications – will always be used to try to trip him;

   d. Choose an expert with practice, academic, consulting, testifying and publishing credentials.

5. Reliability.

   a. Check out references – get names of other attorneys for whom expert has worked; name of Judges before whom expert testified. Try to get copies of former reports and deposition testimony. Get reported decisions which evaluate the expert's opinions.

   b. Is the expert available for consultations with counsel? Does he comply with requests to schedule depositions on dates requested of him? Is he available for trial?

   c. Choose an expert whose opinions have been upheld in reported decisions.

6. Reasonable charges – NO CONTINGENCY FEES!

7. Make sure your expert has a clean ethics record and not reported decisions where the Court has criticized the expert. (*Celucci v. Bronstein*, 277 N.J. Super. 506; *Froom v. Perel*, 377 N.J. Super. 298 (2005).

   a. Require your proposed expert to do a "conflicts check".

8. Shy away from purely or primarily academic experts. They probably do not have expertise in accepted standards of practice and may very well not be qualified by the Court. (See, e.g., *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W. 2d 400 (Tenn. 1991)) The ideal expert has a balance of both practice and academic experience.

9. The expert should be objective and point out the weaknesses of your claim or defenses. He should also recommend ways to correct or strengthen your position.

10. The legal malpractice expert must be self-confident and committed to the notion that what he does is for the betterment of the legal profession. He should have an abiding faith in our adversary system of justice and that through it legal malpractice suits will serve to better our profession.

SHOULD YOU HAVE ANY QUESTIONS OR SUGGESTIONS, PLEASE DON'T HESITATE TO SEND US AN EMAIL:

benwasserman@legalmalpractice.com or experts@legalmalpractice.com.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 97-407 **May 13, 1997**
Lawyer as Expert Witness
or Expert Consultant

A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a "law-related service" to the party within the purview of Model Rule 5.7 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a duty to protect the party's confidential information from use or disclosure adverse to the party.

Model Rules 1.7(b) and 1.10(a) apply to the lawyer's representation of a client adverse to a party for whom he is serving as a testifying expert. If the duty of confidentiality to the party on whose behalf the lawyer serves as a testifying expert would "materially limit" the responsibilities of the lawyer to one of his clients, the lawyer and any firm with which the lawyer is associated may be prohibited from concurrently representing that client. Ordinarily it would not be reasonable for the lawyer to believe in those circumstances that the representation of the client will not be adversely affected, and thus client consent would not permit the representation. Moreover, even though these requirements of the Model Rules are satisfied, other law, including the law of client-lawyer privilege and the law of agency, may prohibit the lawyer and his law firm from representing the

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

client, unless the party on whose behalf the lawyer serves as a testifying expert waives its right to object.

After the testifying expert relationship has concluded, the testifying expert and his law firm may be precluded from representing a client in a matter in which use of the party's confidential information would be necessary. Model Rules 1.9(a) and 1.9(c) do not apply because the party for whom the lawyer was asked to testify is not a former client. Nevertheless, the responsibilities of the lawyer under other law to maintain the confidentiality of the party's information may materially limit the representation in the subsequent matter, and it may not be reasonable for the lawyer to believe that the representation would not be adversely affected; if so, Model Rules 1.7(b) and 1.10(a) would bar the subsequent representation.

Opinion

The Committee has been asked whether, under the Model Rules of Professional Conduct, a lawyer who is retained to testify as an expert witness on behalf of a party who is another law firm's client may undertake a representation directly adverse to that party. Further, if the lawyer expert may not undertake the representation adverse to a party on whose behalf he is currently serving as a testifying expert, may the lawyer undertake the adverse representation *after* his testimony on behalf of the party has been concluded? Finally, if the lawyer in either situation is disqualified, may another lawyer with whom the lawyer is associated in a firm nevertheless undertake the representation?

The answers to these and related questions discussed in this Opinion depend in part upon whether the lawyer expert either has a client-lawyer relationship with the party or is engaged in providing the party with a "law-related service" within the purview of Model Rule 5.7. In either case, the lawyer expert would in that capacity be subject to the Model Rules, including Rule 1.7 ("Conflict of Interest: General Rule") and Rule 1.9 ("Conflict of Interest: Former Client"), and the conflict of interest of the lawyer expert would be imputed under Rule 1.10 to all lawyers associated with him in a firm. Based on the analysis and assumptions in Part I of this Opinion, the Committee concludes that under the Model Rules a lawyer serving solely as a testifying expert witness on behalf of another law firm's client, as distinct from a consultant providing expert legal advice to the firm and its client, does not thereby occupy a client-lawyer relationship with the party for whom he may be called to testify, and is not thereby providing law-related services. The lawyer nevertheless should take reasonable precautions to avoid confusion in the minds of the retain-

ing law firm and its client as to the different duties applicable to service as a testifying expert.

Moreover, the lawyer expert witness has duties under other law, such as a duty to protect the confidences of the party for whom the lawyer may testify, that may limit the lawyer and his law firm in the representation of a client in a matter adverse to the party for whom he serves or previously has served as a testifying expert.[1] These limitations on the lawyer testifying expert are analyzed in Part II of this Opinion.

I. A Lawyer Serving Solely as a Testifying Expert as Distinct from an Expert Consultant Does Not Thereby Occupy a Lawyer-Client Relationship or Provide a "Law-related Service."

A lawyer who is expert on a legal subject may be engaged to serve one of two distinct roles: as an expert witness who is expected to testify at a trial or a hearing as a "testifying expert," or as a nontestifying "expert consultant." In this Part I, the Committee (a) analyzes the role of the lawyer testifying expert as distinguished from the role of the lawyer expert consultant in respect of whether the testifying expert forms a client-lawyer relationship; (b) cautions as to the lawyer's duty to clarify his responsibilities in either role, especially in circumstances where the roles become blurred; and (c) examines whether the role of testifying expert falls within the purview of Model Rule 5.7.

(a) A lawyer employed as a testifying expert does not form thereby a client-lawyer relationship.

The Model Rules note that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." MODEL RULES OF PROFESSIONAL CONDUCT, Scope [15] (1995). Thus, the question whether a testifying expert and the party for whom he is expected to testify have formed a relationship sufficient to invoke the ethical obligations of the Model Rules is generally a question of fact determined by principles beyond those set forth in the Model Rules.

The Committee previously has stated that, as a general matter, a client-lawyer relationship can "come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations." ABA Formal Opinion 95-390 at 8; *see also* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:103-105 (1989).

1. The Committee neither makes factual findings nor decides purely legal questions. The Committee nevertheless may assume factual and legal conclusions in order to render an opinion as to ethical responsibilities under the Model Rules, and here does so.

Clients reasonably expect that lawyers whom they consult to perform legal services for them are bound by certain basic professional obligations, including duties of confidentiality and loyalty, and avoidance of conflict of interest.

The Committee believes, however, as long as the lawyer's role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert's services cannot reasonably expect that the relationship thus created is one of client-lawyer. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert. Moreover, if an expert may testify at trial and his name has been provided to opposing counsel pursuant to applicable procedural rules, he may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable.[2]

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2. *See, e.g.,* Fed. R. Civ. Proc. 26(a)(2) and 26(b), which permit broad discovery of testifying experts, but sharply limit discovery of consulting experts retained to advise in the litigation. Some courts require production of all oral and written communications by counsel with a testifying witness even though ordinarily protected as opinion work product. *E.g.,* Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991). Other courts continue to employ a case-by-case analysis and, absent compelling circumstances, deny discovery of lawyers' opinions and mental impressions communicated to testifying experts notwithstanding the 1993 changes to FRCP §26. *E.g.,* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995), following Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1993). *See also* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE: Civil 2d (1994) §2031 at 439, noting that *Bogosian* probably was overruled by the 1993 amendments. *See also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §141(Proposed Final Draft No. 1 March 29, 1996) (adopting the *Bogosian*

State bar ethics committees have rendered opinions on related issues that support the conclusion that a lawyer serving as a testifying expert does not thereby occupy a client-lawyer relationship with the party for whom he is engaged to testify. The Virginia State Bar, Standing Committee on Legal Ethics, Opinion 1884 (1989) was asked whether a lawyer had a conflict of interest if the lawyer executed affidavits as an expert for both the plaintiffs and the defendants in the same litigation, but on different issues. Noting that the issue, whether the expert had a client-lawyer relationship, involved a "factual determination and is beyond the purview of the committee," the committee added:

> Should the attorney's capacity have been purely that of an expert witness, the Code of Professional Responsibility should be inapplicable in that situation as it does not in any way preclude an individual from serving as an expert witness for both parties to an action.[3]

In contrast, protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify. That role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client. In short, a legal consultant acts like a lawyer representing the client, rather than as a witness. Unlike the testifying expert, the expert consultant need not be identified,

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approach). Assuming, however, that questions are not asked at the deposition or trial about all such communications, the lawyer expert as an agent has duties of confidentiality to the principal under other law apart from duties under specific Model Rules. *See* RESTATEMENT (SECOND) OF AGENCY §387 (agent's use of principal's confidences for the agent's or another's benefit is improper absent principal's consent), and §395 (agent must not use or communicate principal's confidential information whether or not related to the transaction unless generally known or otherwise agreed) (1958); and *see also id*. §396 (agent's duties continue following termination of the agency).

3. Other state bar ethics opinions also have found that a client-lawyer relationship does not arise between a testifying expert and the party for which the lawyer is engaged to testify. *See, e.g.,* State Bar of S.D., Ethics Comm. Opinion 91-22 (1992) (lawyer serving as testifying expert for insurance company A defending a bad faith claim brought by insurance company B may represent an insured of insurance company B in an unrelated claim against a third party, in part because insurance company A is not the testifying expert's client); Phila. (Pa.) Bar Ass'n, Professional Guidance Comm. Opinion 88-34 (1988) (permissible [under the Pennsylvania Rules of Professional Conduct] for a lawyer to serve as a testifying expert for a party while at the same time serving as a testifying expert for the party's opponent in another unrelated suit).

and her legal advice and communications with the client and trial counsel are not expected to be disclosed, absent client consent after consultation. In sum, the lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct.

(b) The lawyer should assure his role as testifying expert is made clear and obtain client consent should his role change to consulting expert.

In order to avoid any misunderstanding that no client-lawyer relationship is created, the testifying expert should make his role clear at the outset of the engagement. A written engagement letter accepted by both the engaging law firm and its client is much to be preferred. The engagement letter should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences. It is the responsibility of the firm that has engaged the testifying expert to assure that its client is fully informed as to the nature of the testifying expert's role. *See* Model Rule 1.4.

The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.

When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm's client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity.[4] The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant. *See infra* nn. 10, 11 and 13.

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4. *See* Model Rule 1.2(c) stating: "A lawyer may limit the objectives of the representation if the client consents after consultation." Obtaining client consent after "consultation," see MODEL RULES OF PROFESSIONAL CONDUCT, Terminology (1995), is in this instance the joint responsibility of the law firm and the expert. *See also* Model Rules 1.4 and 1.5(e). Disclosure of all materials furnished to the expert by trial counsel, including opinion work product, may be ordered by courts following *Intermedics*, *supra* n. 2, when the testifying expert also serves as expert consultant. *See, e.g.,* Furniture World, Inc. v. D.A.V. Thrifty Stores, Inc., 168 F.R.D. 61 (D. N.M. 1996).

(c) The testifying expert does not provide a "law-related service."

A question remains under the Model Rules whether a lawyer who serves solely as a testifying expert provides "law-related services" as contemplated by Model Rule 5.7.[5] If so, the lawyer testifying expert would be subject to all the Model Rules unless the provision of the services satisfies the requirements of subparagraphs (a)(1) or (a)(2) of Rule 5.7, even though he has no client-lawyer relationship with the party on whose behalf he is to testify.

In answering the question, the Committee finds significant but not dispositive that Model Rule 5.7 is intended to address potential conflicts that arise when lawyers engage in businesses ancillary to their law practices, and that nowhere in the extensive literature surrounding adoption of Model Rule 5.7 is it suggested that a problem exists when lawyers serve as testifying experts.[6] Of greater significance is that the way in which tes-

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5. Model Rule 5.7 ("Responsibilities Regarding Law-related Services") states:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Model Rule 5.7 has been adopted in the Virgin Islands. Pennsylvania has adopted a similar rule that is based on the same rationale. At this date, no other jurisdiction has a rule dealing expressly with ancillary or law-related services.

6. Adoption of Rule 5.7 followed directly from the Stanley Commission's recommendation that "[t]he Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved." Report of ABA Commission on Professionalism, *". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 280-81 (1986). One of three areas of concern prompting this recommendation was that

> some firms now operate businesses which may provide services that those firms believe are ancillary to the practice of law—real estate development or investment banking, for example. Other firms or individual lawyers have become active in businesses which have little or nothing to do with their practice. *Id*. at 280.

The reports, published debates and articles surrounding the adoption of Model Rule 5.7

tifying experts provide their services eliminates as a practical matter the need for the protection that Model Rule 5.7 was designed to afford recipients of law-related services in order to avoid any misperception by the recipient of the services that the protections normally part of the client-lawyer relationship apply. See Rule 5.7 Comment [1]. As noted in Part I.(b), the testifying expert should appropriately define his role at the outset of the engagement so that the law firm's client will not be confused that the Rules of Professional Conduct apply in the relationship with the testifying expert.

While some members of the Committee believe that the plain language of Rule 5.7 encompasses testifying expert services rendered in "circumstances . . . not distinct from the lawyer's provision of legal service to client," Model Rule 5.7(a)(1), the clear majority believes that the words do not apply. In the view of the majority, lawyers serving as testifying experts do not offer their services "in conjunction with" the legal services they offer to their clients, Model Rule 5.7(b). Rarely does a testifying expert provide services directly to a client. The client invariably is represented by its own trial counsel, who manages the role to be played by the testifying expert in discovery, preparation and trial. Accordingly, the majority concludes that testifying expert services and trial counsel services always remain distinct with regard to a particular matter. Rule 5.7, adopted in only one jurisdiction, should not be construed to reach beyond the intent of its drafters.

For these reasons, the Committee concludes that testifying expert services are not "law-related services" under Model Rule 5.7. Thus, the testifying expert's role as a witness excludes not only a client-lawyer relationship with the party on whose behalf he is to be called, but also a law-related service provider relationship that would require all of the Model Rules

and its predecessor also make it clear that the perceived problems related solely to lawyers being involved in businesses ancillary to their law practices and not at all to lawyers testifying as experts. *See, e.g.,* ABA Section of Litigation, *Recommendation and Report on Law Firms' Ancillary Business Activities* (1990) (recommending that the ABA adopt a rule prohibiting ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 82); ABA Special Coordinating Committee on Professionalism, *Special Report to the House of Delegates on Ancillary Business Activities of Lawyers and Law Firms* (1990) (recommending that the ABA adopt a rule allowing, but regulating, ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 429); Dennis J. Block, Irwin H. Warren, & George F. Meierhofer, Jr., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739 (1992) (defending the ABA's first version of Model Rule 5.7, adopted in 1991 and rescinded in 1992, that made ancillary businesses unethical). Other authorities are gathered in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at 91:410-91:413 (1994). Predecessor Model Rule 5.7 was adopted by the ABA House of Delegates in 1991 and rescinded in 1992.

to apply to his relationship.[7]

II. The Lawyer Testifying Expert Has Responsibilities to Others That Under the Model Rules May Limit Representation of Clients by the Lawyer or His Firm.

In this Part II, the Committee answers the questions posed at the beginning of this Opinion by analyzing the limitations that the Model Rules impose upon the lawyer and his firm as a result of his serving as a testifying expert when the lawyer is called upon (a) to represent a client concurrently in a matter adverse to the party for whom the lawyer currently is serving as a testifying expert, or (b) to represent a client after the conclusion of the testifying expert service.[8]

(a) Rule 1.7(b) may bar concurrent representation of a client adverse to the party for whom the lawyer is serving as a testifying expert.

The Committee assumes for purposes of this Opinion that the testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify.[9] Accordingly, if the testifying

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7. The lawyer who serves as a testifying expert is, however, subject to the Model Rules that govern lawyers generally, particularly Rule 8.4 ("Misconduct"). *See, e.g.,* Attorney Grievance Commission of Maryland v. Breschi, 340 Md. 590, 667 A.2d 659 (1995) (willful failure to file income tax return on time justifies disbarment). Thus, for example, were the expert witness to testify falsely, discipline under Model Rule 8.4 would be warranted. *See also* ABA Formal Opinion 336 (1974).

8. A lawyer who is called upon to serve as a testifying expert in litigation in which information relating to the representation of a former client may be relevant is barred by Rule 1.9(c), *infra* n. 14, from using or revealing information relating to the earlier client representation in the earlier matter that is not generally known, except as permitted under Rules 1.6 or 3.3. *See also* Rule 1.8(b). If the former client is the opposing party, the testifying expert is subject, not only to a disciplinary charge, but also to disqualification as an expert witness in the case. *See, e.g.,* W.R. Grace & Co., et al. v. Gracecare, Inc., et al., 152 F.R.D. 61 (D. Md. 1993) (lawyer patent expert for defendant disqualified because of earlier consultation with plaintiff's counsel in the same case, intending to retain the lawyer to advise on patent law as well as a possible rebuttal expert). *Compare* cases cited *infra* n. 9 involving efforts to disqualify non-lawyer experts.

9. The Committee believes that most courts would find that the lawyer testifying expert is a subagent of the party on whose behalf he is engaged to testify. *See supra* n. 2. Courts, in cases seeking to disqualify expert witnesses from testifying for an opponent, have either held or assumed that a nonlawyer testifying expert (or a nonlawyer expert consultant) occupies a confidential relationship to the party on whose behalf the expert originally was engaged that is limited to the matters on which he was engaged as an expert. *See, e.g.,* Conforti & Eisele, Inc. v. Div. of Building Constr., 405 A.2d 487 (N.J. Super. Ct. Law Div. 1979) (nonlawyer expert disqualified as witness for plaintiff when defendant had used the expert to advise it earlier in the same litigation, reasoning that the expert may have been the agent of defendant's counsel and his testi-

expert's concurrent representation of a client in a matter adverse to the party for whom the expert is to testify might be materially limited by his responsibilities as a subagent to maintain the party's confidences or by other duties he owes the party, Model Rule 1.7(b)[10] applies to that concurrent representation. At least in circumstances where the party's material confidential information clearly would be useful in the representation of the client, the Committee is of the opinion that the testifying lawyer could not reasonably believe that the representation of a client would not be adversely affected and, therefore, client consent is no cure. Similarly, where the testifying expert might be called upon to testify for the party and could be subject to cross-examination by a lawyer from the expert's own law firm, on behalf of a client of the firm, the representation of a client would be barred both by Model Rule 1.7(b) and by Model Rule 3.7(b).[11] Under Model Rule 1.10(a),[12] the testifying lawyer's disqualifica-

mony therefore might violate the lawyer-client privilege, that defendant's counsel was upholding its obligations to preserve client confidences under DR 4-101 of the predecessor Code of Professional Responsibility, and that plaintiff's use of the expert "would be fundamentally unfair"); Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) (plaintiff's nonlawyer expert not disqualified from testifying that the cause of injuries was defective design of defendant's baseball helmet on which the expert previously had advised defendant, rejecting the presumption of disclosed confidences under the lawyer rules and finding that defendant failed to prove any discussion about plaintiff's injury occurred between the expert and the defendant); Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334 (N.D. Ill. 1990) (nonlawyer expert for defendant not disqualified where he worked closely with plaintiff's expert at the same research center, rejecting as in the *Paul* case use of an analogy to the predecessor Code of Professional Responsibility and refusing to apply vicarious disqualification as if the two experts were lawyers in the same law firm).

10. Model Rule 1.7(b) states:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

11. Rule 3.7(b) states:

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

See also State Bar of Mich., Comm. on Professional and Judicial Ethics Opinion RI-21 (1989) (firm barred from representing defendant when newly arrived "of counsel" to the firm previously had provided an expert opinion on plaintiff's behalf and would be called as a witness in the litigation).

12. Model Rule 1.10(a) states:

tion would be imputed to his law firm.

If the lawyer reasonably concludes that despite the possibility of a material limitation, the representation of a client will not be adversely affected by his duties as a testifying expert, the consent of the client after consultation is nonetheless required. This may be true, for example, if the matter in which the lawyer will testify and the matter in which a client seeks representation are entirely unrelated, and no material confidential information that the testifying lawyer has learned from the party has relevance to the second matter.

(b) Rule 1.7(b) also may bar subsequent representation if materially limited as a result of the earlier relationship.

If the party for whom a lawyer in the firm had acted as a testifying expert later sued a client of the expert's law firm on an *unrelated* matter, neither the testifying expert nor his law firm ordinarily would be barred from representing the defendant client. Model Rule 1.9(a)[13] would not apply, not only because the matters are unrelated, but also because a client-lawyer relationship did not exist when the lawyer acted as a testifying expert for the party in the earlier litigation, and Model Rule 5.7 did not apply to the testifying expert services. Even if the matter for the client is the same as or substantially related to the earlier litigation in which the lawyer had served as a testifying expert, neither Rule 1.9(a) nor Rule 1.9(c)[14] would apply because the testifying expert service did not involve a client-lawyer relationship or a law-related service.

Although neither Rule 1.9(a) nor Rule 1.9(c) applies, the expert and lawyers associated in his firm nevertheless may have duties of confidentiality under other law that might materially limit the representation of the current client, even in a matter which is unrelated to the earlier engage-

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(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

13. Model Rule 1.9(a) states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

14. Model Rule 1.9(c) states:

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

ment.[15] For example, if the representation of the current client were to require the use of confidential financial information learned in his testifying role, the lawyer and his firm would be barred from undertaking the current client representation by Rule 1.7(b) and Rule 1.10(a) unless they reasonably believe the representation will not be adversely affected by the lawyer's duty of confidentiality owed the party for whom the lawyer earlier had served as a testifying expert and the current client consents after consultation.

Summary

A lawyer who serves as a testifying expert on behalf of a party represented by another law firm does not thereby occupy a client-lawyer relationship or perform a law-related service within the purview of Model Rule 5.7. He nevertheless should make the nature and scope of the relationship clear at the outset. If the lawyer's role is or later becomes that of an expert consultant for the party as described in this Opinion, a client-lawyer relationship with the party is established, and the lawyer is subject to all of the Model Rules in connection with that engagement.

Even though service solely as a testifying expert is not as such governed by the Model Rules, concurrent representation of a client adverse to the party for whom the lawyer serves as a testifying expert ordinarily is barred by Model Rule 1.7(b) as a result of constraints imposed by other law. Subsequent representation may, for the same reason, also be barred where the party's confidential information is relevant to the subsequent representation or where other factors make it unreasonable to conclude that the representation will not be adversely affected.

15. The testifying expert's duties of confidentiality continue after the relationship with the party terminates. *See supra* nn. 2 and 12.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-

JOHN DOE

Plaintiffs,

vs.

BERNIE D. ATTORNEY, ESQ. and JOAN DOE, ESQ. jointly, severally or in the alternative

Defendants.

CIVIL ACTION

AFFIDAVIT OF MERIT
of
BENNETT J. WASSERMAN, ESQ.
Pursuant to N.J.S.A. 2A:53A-27

STATE OF NEW JERSEY)
S.S.
COUNTY OF BERGEN)

BENNETT J. WASSERMAN being of full age, duly sworn hereby states under oath:

(a) I am an attorney at law and am duly admitted to practice in the States of New Jersey, New York and Pennsylvania.

(b) I have reviewed each of the documents listed in "**Exhibit A".**

(c) I have been a Certified Civil Trial Attorney by the Board on Trial Attorney Certification of the Supreme Court of New Jersey since April 1985. I devote a substantial portion of my professional practice to the general practice of law and to the substantive area of law involved in this action, namely, commercial and real estate transactions, as well as to the areas of legal ethics and professional

malpractice. I have been so engaged for at least five years prior to the date of this affidavit. A copy of my current *curriculum vitae* is attached hereto as "**Exhibit B".**

(d) Based upon my review of the aforesaid documents, I hereby state, pursuant to N.J.S.A. 2A:53A-27, that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the practice or work of the attorneys at law about which plaintiff complains, i.e., **BERNIE D. ATTORNEY, ESQ. and JOAN DOE, ESQ.** fell outside acceptable professional standards of practice.

(e) I have no financial interest in the outcome of this case.

_____
Bennett J. Wasserman

DATED: February 2012

Sworn and subscribed to before me
this day of FEBRUARY, 2012

_____
Notary Public

Note: No Mention of PROXIMATE CAUSE OR DAMAGES

EXHIBIT "A"

DOCUMENTS REVIEWED

Underlying transactional matters

1. Affidavit of Plaintiff, JOHN DOE in Support of Order to Show Cause, dated 2/10/2011, Docket No. C-55-11 filed 2/17/11;
2. Lease Agreement documents re: 388 Rt. 46, South Hackensack, NJ
3. Div. of Alcoholic Beverage Control; Liquor License related documents re License No. 0259-33-003-005 (Sakura 46 Inc. to Inoue Corp);
4. LLP Agreement Mas Partners LLP
5. Payment Verification Records;
6. Agreement to Sell/Purchase Alcoholic Beverage License;
7. Contract for Sale of Business, Inoue Corp to Mas LLP
8. Bulk Sales documents related to Mas LLP
9. Jurecky to Speziale correspondence Dec. 4, 2008 with transactional documents re Inoue to Mas;
10. Bill of Sale IIII Corp to Mas Dec. 5, 2008;
11. Seller's Settlement Disclosure
12. Loan Closing Documents;
13. HUD-1 Dec. 5, 2008;
14. Business & Commercial Lease Agreement Dec. 5, 2008;
15. Diner Solutions LLC Construction contract documents Dec. 2008.
16. Underlying Transactional File of XXX Esq. including Mas Partners LLP and Dio Mas LLP with cover letter dated March 15, 2011 with itemized list of contents;
17. Speziale letter to Rathe dated April 28, 2011;
18. Correspondence form Twp. of So. Hackensack to Dios Mas Partnership LLP dated July 29, 2010, from Zoning Enforcement Officer.
19. Frank Migliorino Esq. Correspondence to Zoning Enforcement Officer Aug. 11, 2010;
20. Transcript of Hearing before Zoning Bd. Of Adjustment August 23, 2010 (Migliorino);
21. Lease Agreement between Mt. Laurel LLC and GM360 LLC , 370 Rt. 46 So. Hackensack, NJ.
22. Limited Liability Partnership Agreement of Dio Mas LLP, April 21, 2010 and related transactional, purchase option agreement and governmental registration filings;
23. Restaurant Management Agreement , April 27, 2010 (GF 46 LLC to Dio Mas LLP);
24. Contract for Sale of Business, GF 46 LLC to Dio Mas, LLP., April 28, 2010
25. Agreement to Sell/Purchase Alcoholic Beverage License GF 46 LLC to Dio Mas, LLP, dated May 6, 2010;
26. Div. of Alcoholic Beverage Control correspondence re License No. 0259-33-011-005; June 29, 2010 and forms re 0259-33-011-004;
27. Assignment and Assumption of Lease, GM 360 LLC to Dio Mas, LLP;
28. Order for Entry of Final Judgment, filed Nov. 18, 2010 (Topline Seating v. George Filippatos et ano).
29. AAA email dated Dec. 4, 2010 re Dio Mas LLP purchase option agreement;

30. “Exercise of Option” as to Mas & Option Agreement and related documents;

Legal Malpractice Action

1. Proposed Complaint

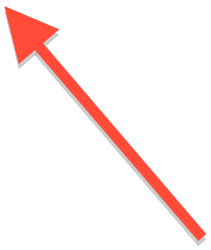

EXHIBIT "B"

BENNETT J. WASSERMAN

COUNSELOR AT LAW

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375 Cedar Lane
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ACADEMIC OFFICES:
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Bennett.Wasserman@hofstra.edu

WEB-BIO: http://law.hofstra.edu/Directory/Faculty/AdjunctFaculty/adjfac_wasserman.html

www.dsslaw.com/bennett-wasserman/

EXPERIENCE: Active participation in more than 1,000 legal malpractice cases as counsel for litigants or as consulting or testifying expert witness in transactional and litigation based matters; teaching of advanced law students a full semester course entitled "Lawyer Malpractice" at Hofstra University Law School, since 1990.

BAR ADMISSIONS: New York (1975), New Jersey (1976) and Pennsylvania (1983) State and Federal Courts; Supreme Court of the United States (1977), Certified Civil Trial Attorney (Supreme Court of New Jersey since 1985);

RATINGS/HONORS: AV™ - Martindale-Hubbell;

Bar Register of Preeminent Lawyers (Lexis/Nexis Martindale Hubbell);

Best Lawyers in America® 2010, 2011, 2012 (Legal Ethics and Professional Responsibility Law and Legal Malpractice Law);

The Best Lawyers in the United States (1985);

SuperLawyers® New Jersey 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 (Professional Liability)

"Lawyer of the Year, 2008"-- New Jersey Law Journal (Dec. 24, 2008) with co-

counsel on *In re Opinion 39 of the Committee on Attorney Advertising.*

www.Avvo.com (10 out of 10, legal malpractice)

OCCUPATION:

Davis Saperstein & Salomon, PC (Teaneck, NJ and NYC),
Chair, Legal Malpractice Law Section (January 2011 to date)

legal*mal*practice.com
General Counsel, Consultant to lawyers, law firms, and liability insurance companies on legal malpractice (plaintiff and defendant); qualified as expert witness by courts in the field of legal malpractice, legal ethics and law firm billing.

Hofstra University, Maurice A. Dean School of Law, Hempstead, New York, Special Professor of Law (in Lawyer Malpractice).

Editor-in-Chief, "*Legal Malpractice Law Review:* Research, Resources and Expertise in the Law Governing Lawyers" http://www.legalmalpracticelawreview.com

PRIOR EMPLOYMENT:

Of counsel to Stryker, Tams & Dill, L.L.P., (Newark, NJ and New York, NY) (2002-2010).

Bennett J. Wasserman, A Professional Corporation, Hackensack, New Jersey (1983-2002)

Moderator, National Legal Malpractice Forum; Co-Moderator, N.J. Professional Liability Law Forum, Counsel Connect (on-line computer discussion groups for lawyers on professional liability.)

Partner and New Jersey counsel to Harry H. Lipsig, Esq., (Lipsig, Sullivan & Liapakis, P.C. New York, New York.) (1978 - 1983.)

Associate to Arnold B. Elkind, Esq., (Elkind, Lampson & Sable, Esqs., New York, New York), former Chairman of the National Commission on Product Safety (1974 - 1978.)

Merck & Co. (Merck Sharp & Dohme Div.); Professional Representative (pharmaceutical marketing) (l969-l97l.)

Areas of Practice. Civil Litigation; Advocacy and Counseling in the law governing lawyers (legal malpractice, legal ethics; attorney advertising, attorney billing practices,) commercial transactions and litigation; real estate litigation; real estate transactions, construction and land use and development, mortgage foreclosures; securities litigation; due diligence; health care law, medical liability; professional malpractice; commercial torts; general negligence; toxic torts; construction site accidents and construction defect litigation; railroad and product liability in the federal and state courts of New Jersey, New York and Pennsylvania; employment law, Occupational Safety & Health (OSHA); collective bargaining under the Railway Labor Act, , intellectual property, wills, trusts and estates, environmental law; bank and securities fraud.

Responsibilities include case strategy development and implementation, investigation, discovery, motion practice, appeals, overall management of major litigation and appellate cases. Alternate Dispute Resolution.

Serving as lead counsel to public and close corporations, municipal entities and individuals in major legal malpractice actions arising from botched commercial litigation and transactions; securities, intellectual property; health care law and financing; real estate law and financing; land use and development; wills, trusts and estates, employment law, patent and trademark law; family law; tort litigation; ineffective assistance of counsel in criminal defense; breach of fiduciary duty, et al.

Serving as consulting and/or testifying expert on behalf of litigants, law firms, lawyers and professional liability insurers.

Serving as counsel in cases of catastrophic injuries involving multiple parties; negotiating and concluding structured and lump sum settlement awards for the seriously injured; representing clients in all phases of non-litigation matters including real estate, labor, wills, estates, commercial transactions. Alternate Dispute Resolution, general law practice; defense counsel for excess liability exposure in professional liability cases (medical and legal), professional liability claims evaluation, review, administration and resolution.

Serving as defense counsel designated by select professional liability carriers in major legal malpractice cases.

Served as defense counsel in product liability, personal injury cases on behalf of Tokio Marine Insurance Company, the largest Japanese liability carrier insuring companies such as Panasonic, Honda, Matsushita Electronics Corporation and other liability insurance carriers.

-Expert witness in the law governing lawyers, including legal malpractice, legal ethics, lawyer advertising and law firm billing practices, including consulting, case strategy, expert witness affidavits of merit, reports, testimony in depositions, trial and arbitration venues.

NOTEWORTHY MATTERS & FREQUENTLY CITED DECISIONS:

In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66, 961 A.2d 722 (2008) (**Attorney of Record-co-counsel for petitioners and intervenor/petitioners)** wherein the N.J. Supreme Court declared 2 of its own Rules of Professional Conduct unconstitutional as violative of commercial free speech.

Carbis Sales, Inc. et al v. Eisenberg, et al., 397 N.J. Super. 64, 935 A.2d 1236 (App. Div., 2007) (liability of designated defense counsel to his insurance carrier) (***Expert witness)***

Fiorentino v. Frank Rapoport, Saul Ewing, *et. al,* 693 A.2d 208 (Pa. Super.) app. denied. 1997 PA. 2323 (1997). (Negligence, contract and fiduciary duties of lawyer in commercial transaction) (***Expert witness)***.

Huber v. Watson, 568 N.W.2d 787 (Sup. Ct. of Iowa, 1997) (litigation malpractice, failure to name appropriate parties in underlying asbestos suit) (***Expert witness).***

Vahila et. al. v. Charles D. Hall, III, *et. al.* 77 Ohio St.3d 421, 647 NE2d 1164 (1997) (Sup. Ct. of Ohio). *(*proving the case within a case in underlying

criminal defense case with expert witness) ***(Expert witness)***.

Profit Sharing Trust v. Lampf, Lipkind*, et al.** 267 N.J. Super 174, 180, 630 A.2d 1191 (Law Div., 1993). (Fiduciary duty of law firm to refrain from prohibited transactions with client under RPC 1.8) ***(Expert witness).

Olds v. Donnelly*,** 291 N.J. Super. 222 (1996) *aff'd* 150 N.J. 424 (1997) ***(Expert witness) reverses *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla* (which held entire controversy doctrine inapplicable to legal malpractice claims)

.

Estate of Re v. Kornstein, Veisz & Wexler*,** 958 F. Supp. 907 (SDNY 1997) (fiduciary duty of lawyer in the absence of negligence) (Expert witness***).

Sklodowsky v. Lushis, 417 N.J. Super 648, 11 A.3d 420 (App. Div. 2011) (entire controversy doctrine does not bar subsequent legal malpractice action) (**Expert witness**)

Higgins v. Thurber, 413 N.J. Super. 1, 992 A.2d 50 (App. Div. 2010) **(Consulting Expert to Plaintiff);**

Dinter v. Sears, Roebuck & Co., 278 N.J. Super. 521 (1995). (***Attorney of record).***

Kostick v. Janke, et al., 221 N.J. Super 37 aff'd 223 N.J. Super 311 (App. Div. 1988) ***(Attorney of Record)***.

PUBLICATIONS:

"*The Ubiquitous Detailman*..." 1 Hofstra Law Review 183-213 (1973) -- reprinted in Paul D. Rheingold, DRUG LITIGATION, 3rd Edition (1981), and in PRECLINICAL AND CLINICAL TESTING BY THE PHARMACEUTICAL INDUSTRY, 1975, Joint Hearings before the Subcommittee on Health and Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, pages 1258-1280; cited in Dixon, TREATISE ON DRUG PRODUCT LIABILITY, s.6.10, et seq.

SYMPOSIUM ON PRODUCT LIABILITY AND SAFETY, Volume II, Hofstra Law Review (1974), (Articles Editor and Coordinator.)

LAWYERS LIABILITY REVIEW (Timeline Publishing Co., Inc.) (Member of Advisory Board.)

Author, Proposed Amendment to N.J.S.A. 2A:13-4, endorsed by the New Jersey State Bar Association and introduced into the NJ Senate and Assembly (S-1925 & A-3063, March, 1997).

Wasserman, *The Circle Chevrolet Fallout Continues: Problems the Supreme Court Did Not Solve.* 149 N.J.L.J. 320 (July 28, 1997).

Wasserman, *Expert Witnesses in the Legal Malpractice Case: The New Jersey Experience* (reprinted from Understanding Legal Malpractice - NJ Institute for Continuing Legal Education, Dec. 1997).

Wasserman, *Lawyer Malpractice: The Difference Between Life & Death,* (Opinion & Commentary, N.J. Law Journal, June 26, 2000).

Wasserman & Rosenblatt, *Legal Ethics: Getting Down to the Reason for the Rule* (New Jersey Law Journal. N.J. Supreme Court Year in Review 1999-2000 - 9/4/00).

Wasserman & Rosenblatt, *Legal Ethics: Making Things Clear* (New Jersey Law Journal. N.J. Supreme Court Year in Review 2000-2001 – 9/3/2001.

Wasserman & Rosenblatt, *Legal Ethics & Malpractice: Third Party Escrow Funds, Entitled to Same Protection as Client Trust Funds.* (New Jersey Law Journal. N.J. Supreme Court Year in Review, 2001-2002- 9/2/2002..

Wasserman & Rosenblatt, *Legal Ethics & Malpractice: Court Reaffirms American-Rule Exception to Enforce Fiduciary Duty* (New Jersey Law Journal, N.J. Supreme Court Year in Review, 2002-2003.

Wasserman, *Legal Ethics & Malpractice: 'Suit Within A Suit is Not Required',* (New Jersey Law Journal, The State Supreme Court Year in Review, 2003-2004.

Wasserman, *Legal Ethics & Malpractice: Advice on Asset Protection Could Land Lawyers in Hot Water* (New Jersey Law Journal, The State Supreme Court Year in Review, 2004-2005).

Wasserman, *Legal Ethics & Malpractice: Missing Evidence Prompts Negative Inference* (New Jersey Law Journal, The State Supreme Court Year in Review, 2005-2006).

Wasserman, *Professional Malpractice: Where Were the Lawyers?, Aiding and Abetting Breach of Fiduciary Duty, (*New Jersey Law Journal, January 22, 2007.)

Wasserman, *Own Up to Mistakes,* (New Jersey Law Journal, The State Supreme Court Year in Review, 2006-2007.)

Wasserman, *Professional Malpractice: Holding Lawyers Accountable for Bad Settlements. (*New Jersey Law Journal, January 21, 2008) p.1.

Wasserman, *Way to Cut Quality of Lawyering: Cut Deadline for Malpractice Suits,* New Jersey Law Journal, Commentary, April 28, 2008).

Wasserman et ano., *The Enormity of Our Fiduciary Duty,* New Jersey Law Journal, The Supreme Court Year in Review, Legal Ethics and Malpractice, 2007-2008).

Wasserman, *Decries State Bar's Support for Shortening Legal Malpractice Statute of Limitations,* New Jersey Law Journal, December 8, 2008, "Voice of the Bar" p.12-13.

Wasserman, et ano., *Professional Malpractice: Two Views of the Saffer Fee-Shifting Rule: There is a Professional Duty to Support the Rule,* New Jersey Law Journal, January 19, 2009) p. 1.

Wasserman, *The Professional Services Business Enhancement Act: Myths, Realities and Prospective Problems,* Report to Members of the New Jersey General Assembly and Senate, January 28, 2009.

Wasserman, *What if Bernie Madoff Were a New Jersey Lawyer?,* New Jersey Law Journal, Commentary, May 11, 2009, p. 23.

Wasserman, et ano. *At the Crossroad of Constitutionally Protected Free Speech and the Rules of Professional Conduct,* New Jersey Law Journal, Supreme Court Year in Review Sept. 7, 2009).

Wasserman, et ano., *Mandatory Legal Malpractice Insurance: The Time has Come.* New Jersey Law Journal, Professional Malpractice Supplement, January 14, 2010.

Wasserman, *What if Goldman Sachs Were a New Jersey Law Firm?*
New Jersey Law Journal, Commentary, May 17, 2010.

Wasserman, et ano. *Settle and Sue is Here to Stay,* New Jersey Law Journal, Supreme Court Year in Review, September 6, 2010).

Wasserman, et ano., *It is Reaffirmed: Entire Controversy Doctrine Does Not Bar a Subsequent Malpractice Action.* (New Jersey Law Journal, Supreme Court Year in Review, September 6, 2011).

WORK IN PROGRESS:

LAWYER MALPRACTICE: Curriculum, Cases & Materials http://www.legalmalpracticelawreview.com/articles/law-school-1/

Legal Malpractice Law Review: Research, Resources and Expertise in the Law Governing Lawyers http://www.legalmalpracticelawreview.com.

EDUCATION:

Hofstra University School of Law, Hempstead, N.Y.
-- J.D. *cum laude,* l974.
-- Hofstra Law Review, Articles Editor.
-- Dean's Citation for Excellence in Trial Advocacy.
-- Class Rank: 13th of 165.

Hunter College, New York City.
-- B.A., 1968.; M.A., 1971.

BAR ASSOCIATIONS:

Association of Professional Responsibility Lawyers (APRL); American Association of Justice (AAJ); New Jersey Association for Justice (NJAJ); American Bar Association; Center for Professional Responsibility; New Jersey State Bar Association (Member, Malpractice Insurance Committee, l992-to date; Member, Entire Controversy Committee 1996-97; NJSBA Delegate to the American Bar Association National Legal Malpractice Conference of the Standing Committee on Lawyers' Professional Liability 1994 -98); New York State Bar Association; Bergen County Bar Association; New York County Lawyer's Association (Lawyer's Professional Liability Committee); Professional Liability Underwriting Society.

MISCELLANEOUS:

--Designed "LAWYER MALPRACTICE" course curriculum for law school level now being taught at Hofstra University School of Law, Hempstead, New York and other law schools.

--Testified before the United States Senate, Subcommittee on Health (Edward M. Kennedy, Chairman), regarding the need for improvement in the law pertaining to the marketing of pharmaceutical products (1974).

--Interviewed by trade journals concerning developments in product liability law

(e.g., Chemical Business, February 8, l982.)

--Served on Bar Association Committees studying topics in law and medicine and multi-state practice of law.

--Lectured before Bar Association and community groups on trial advocacy and legal ethics.

--Guest lecturer on legal malpractice at:

- University of Liverpool (Cayman Island) Law School (1995, '96, '98, '99, 2002)

- Rutgers University School of Law (Newark, New Jersey, 1996)

-New York Law School (New York, N.Y., April, 2006).

--Lecturer & Panelist "Avoiding Malpractice", Continuing Legal Education Program, Bucks County (PA.) Bar Association (November 1995.)

--Co-Moderator & Panelist, "The Malpractice Explosion", Lexis Counsel Connect on-line seminary (November 1995.)

--Moderator, "Circle Chevrolet: Pitfalls of Legal Malpractice", Counsel Connect on-line seminary (April-May 1996). Reprinted in New Jersey Law Journal Supplement July 1, 1996.

--Faculty, "Ethical and Legal Malpractice Considerations in the Electronic Information Revolution, ATLA-NJ Education Foundation (January 1997).

--Faculty, "Understanding Legal Malpractice", N.J. Institute for Continuing Legal Education. Topic: "Expert Witnesses in the Legal Malpractice Case". (December, 1997).

--Lecture, "The Impact of the Entire Controversy Doctrine on Legal Malpractice" Bergen County Bar Association (9/12/96)

--Lecture, "The Entire Controversy Doctrine: How Wide and How Deep the Black Hole?" Bergen County Bar Association (10/24/96).

--Lecture, "Pitfalls of Legal Malpractice" Bergen County Bar Association (11/29/2001)

--Lecture & Panelist, "Practical Aspects of *Circle Chevrolet's* Impact Upon Legal Malpractice Claims", New Jersey State Bar Association, Annual Meeting, (5/16/97).

--Lecture & Panelist, "Ethics for Litigators and Trial Lawyers", Conflicts of Interest, New York State Bar Association, CLE (November 4 & 18, 2005).

--Lecture & Panelist, 8th Annual New Jersey Trust & Estate Law Forum, 2006, "A Word to the Wise: Keeping Current on Trust and Estate Legal Malpractice Trends and Issues". New Jersey Institute for Continuing Legal Education, Sept. 13, 2006.

--Lecture, "When Ethical Violations Become Malpractice" ATLA-NJ

Meadowlands Seminar, October 21, 2007;

--Lecture, "Ethics Here, Ethics There, Ethics, Ethics Everywhere (NJ State Bar Association Public Utility Law Committee/NJ Institue of Continuing Legal Education, April 9, 2010);

--Panel Member, "Teaching Tomorrow's Lawyers to Avoid Legal Malpractice: A Roundtable Discussion (American Bar Association, National Legal Malpractice Conference, Washington, DC April 15, 2010).

--Panel Member & Presenter, "Is It Ethical"? (New Jersey Association for Justice, Meadowlands Seminar 2011, November 11, 2011).

--Lecturer, "Legal Malpractice: The Good, the Bad, the Future" (New Jersey Association for Justice, Meadowlands Seminar 2011, November 11, 2011).

--Lecturer, "Legal Ethics Violations and Legal Malpractice" (New Jersey Association for Justice, Meadowlands 2011, November 11, 2011).

--Featured in Forbes Magazine, May 22, 2006 (On the Docket: "Getting Theirs")

--Appeared on radio talk shows with Barry Farber and television documentaries with Geraldo Rivera concerning cases of public interest relating to tort law.

--Received newspaper coverage on numerous matters being actively litigated in the courts.

--On-going participation in continuing legal and alternate dispute resolution education courses.

--Founded the Multi-State Bar Association, an organization seeking to foster the growth of the multi-state practice of law.

--Awarded "Distinguished Alumni Medal" Hofstra University Law School, June l985.

--Personal interest in environmental law, municipal finance, municipal bonds, securities and bank fraud and related legal and investment issues.

--Real Estate Broker, State of New York (Lic. # 691079).

REFERENCES: --Upon request.

Updated: February 2012

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW
TERM:
No.

MARTY FEIERSTEIN,
p/k/a MARTY FEIER,
a/k/a Slinky Records

Plaintiff(s)

vs.

OSCAR S. SCHERMER & ASSOCIATES, P.C.,
OSCAR S. SCHERMER, ESQUIRE,
STEVEN SCHATZ, ESQUIRE,
JONATHAN H. KAPLAN, ESQUIRE,
JONATHAN H. KAPLAN, P.C.
STEVEN R. GRAYSON, ESQ.,
L. KENNETH CHOTINER, ESQ.,
BERNARD M. RESNICK, ESQ. and
BERNARD M. RESNICK, ESQ., P.C.

Defendant(s).

CERTIFICATE OF MERIT
Pursuant to Rule 1042.3

BENNETT J. WASSERMAN, **ESQ**. hereby certifies:

1. I am an attorney at law, duly admitted to practice in Pennsylvania, New Jersey, and New York. I hold PA Attorney's License # 38275. I have been a Certified Civil Trial Attorney by the Board on Trial Attorney Certification of the Supreme Court of New Jersey since April 1985. I have been actively engaged in the practice of law since 1975. I devote a substantial portion of my professional practice to the general practice of law and to the substantive area of

law involved in this action and in the underlying action, as well as to the areas of legal ethics and professional malpractice. A copy of my current *curriculum vitae*, which attests that I am an appropriate licensed professional as required by Rule 1042.3(a)(1), is attached hereto as **Exhibit A.**

2. I have reviewed each of the documents listed in **Exhibit B** hereto.

3. Based upon my review of the aforesaid documents and upon my professional education, training, knowledge and experience, I hereby state, pursuant to Rule 1042.3(a), that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the practice or work of the attorney(s) at law that of which the Plaintiiff makes Complaint in this action, i.e., **OSCAR S. SCHERMER & ASSOCIATES, P.C., OSCAR S. SCHERMER, ESQUIRE, STEVEN SCHATZ, ESQUIRE, JONATHAN H. KAPLAN, ESQUIRE, JONATHAN H. KAPLAN, P.C., STEVEN R. GRAYSON, ESQ., L. KENNETH CHOTINER, ESQ., BERNARD M. RESNICK, ESQ. and BERNARD M. RESNICK, ESQ., P.C.** fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm complained of.

4. I have no financial interest in the outcome of this case.

_____

Bennett J. Wasserman, Esquire
PA ID#38275

DATED: DECEBMER 27, 2010

EXHIBIT A

BENNETT J. WASSERMAN
COUNSELOR AT LAW

OFFICES: Two Penn Plaza East
Newark, New Jersey 07105
Direct Tel. # (973) 491-3965
Cell Phone: (201) 803-6464
Direct Fax # (973) 556-1776

E-mail: benwasserman@legalmalpractice.com
benwasserman@strykertams.com
bennett.j.wasserman@hofstra.edu

WEB-BIO: http://law.hofstra.edu/Directory/Faculty/AdjunctFaculty/adjfac_wasserman.html

EXPERIENCE: Active participation in more than 1,000 legal malpractice and legal ethics cases as counsel for litigants or as consulting or testifying expert witness.

BAR ADMISSIONS: New York (1975), New Jersey (1975) and Pennsylvania (1983) State and Federal Courts; Supreme Court of the United States (1977), Certified Civil Trial Attorney (Supreme Court of New Jersey since 1985);

RATINGS/HONORS: AV™ - Martindale-Hubbell;

Bar Register of Preeminent Lawyers (Lexis/Nexis Martindale Hubbell);

The Best Lawyers in the United States (1985);

SuperLawyers® New Jersey 2005, 2006, 2007, 2008, 2009, 2010; (Professional Liability)

Best Lawyers in America® 2010 (Legal Ethics and Professional Responsibility Law and Legal Malpractice Law);

"Lawyer of the Year, 2008"-- New Jersey Law Journal (Dec. 24, 2008) with co-counsel on *In re Opinion 39 of the Committee on Attorney Advertising.*

www.Avvo.com

OCCUPATION: Of counsel to Stryker, Tams & Dill, L.L.P., (Newark, NJ and New York, NY).

Special Professor of Law (in Lawyer Malpractice) Hofstra University School of Law, Hempstead, New York.

Consultant to lawyers, law firms, and liability insurance companies on legal malpractice (plaintiff and defendant); qualified as expert witness by courts in the field of legal malpractice, legal ethics and law firm billing.

Editor, *Legal Malpractice Law Review:* Research, Resources and Expertise in the Law Governing Lawyers http://www.legalmalpracticelawreview.com

PRIOR EMPLOYMENT: Bennett J. Wasserman, A Professional Corporation, Hackensack, New Jersey (1983-2002)

Moderator, National Legal Malpractice Forum; Co-Moderator, N.J. Professional Liability Law Forum, Counsel Connect (on-line computer discussion groups for lawyers on professional liability.)

Partner and New Jersey counsel to Harry H. Lipsig, Esq., (Lipsig, Sullivan & Liapakis, P.C. New York, New York.) (1978 - 1983.)

Associate to Arnold B. Elkind, Esq., (Elkind, Lampson & Sable, Esqs., New York, New York), former Chairman of the National Commission on Product Safety (1974 - 1978.)

Merck & Co. (Merck Sharp & Dohme Div.); Professional Representative (pharmaceutical marketing) (l969-l97l.)

Areas of Practice. Civil Litigation; Advocacy and Counseling in the law governing lawyers (legal malpractice, legal ethics; attorney advertising, attorney billing practices,) personal injury and commercial litigation; health care law, medical liability; professional malpractice; commercial torts; general negligence; toxic torts; construction site accidents; railroad and product liability in the federal and state courts of New Jersey, New York and Pennsylvania; labor law, Occupational Safety & Health (OSHA); collective bargaining under the Railway Labor Act, commercial transactions, wills, trusts and estates, real estate litigation; real estate transactions, construction and development, mortgage foreclosures; environmental law; bank and securities fraud.

Responsibilities include case development, investigation, discovery, motion practice, appeals, overall management of major litigation and appellate cases. Alternate Dispute Resolution.

Serving as lead counsel to public and close corporations in major legal malpractice actions in commercial litigation and transactional matters.

Serving as counsel in cases of catastrophic injuries involving multiple parties; negotiating and concluding structured and lump sum settlement awards for the seriously injured; representing clients in all phases of non-litigation matters including real estate, labor, wills, estates, Alternate Dispute Resolution, general law practice; defense counsel for excess liability exposure in professional liability cases (medical and legal), professional liability claims evaluation, review, administration and resolution.

Serving as defense counsel designated by select professional liability carriers in major legal malpractice cases.

Serving as defense counsel in product liability, personal injury cases on behalf of Tokio Marine Insurance Company, the largest Japanese liability carrier insuring companies such as Panasonic, Honda, Matsushita Electronics Corporation and other liability insurance carriers.

-Expert witness in the law governing lawyers, including legal malpractice, legal ethics, law firm billing practices.

NOTEWORTHY MATTERS &
FREQUENTLY CITED DECISIONS:

In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66, 961 A.2d 722 (2008) (**Attorney of Record-co-counsel for petitioners and intervenor/petitioners)** wherein the N.J. Supreme Court declared 2 of its own Rules of Professional Conduct unconstitutional as violative of commercial free speech.

Carbis Sales, Inc. et al v. Eisenberg, et al., 397 N.J. Super. 64, 935 A.2d 1236 (App. Div., 2007) (liability of designated defense counsel to his insurance carrier) (***Expert witness)***

Fiorentino v. Frank Rapoport, Saul Ewing, *et. al,* 693 A.2d 208 (Pa. Super.) app. denied. 1997 PA. 2323 (1997). (Negligence, contract and fiduciary duties of lawyer in commercial transaction) (***Expert witness)***.

Huber v. Watson, 568 N.W.2d 787 (Sup. Ct. of Iowa, 1997) (litigation malpractice, failure to name appropriate parties in underlying asbestos suit) (***Expert witness).***

Vahila et. al. v. Charles D. Hall, III, *et. al.* 77 Ohio St.3d 421, 647 NE2d 1164 (1997) (Sup. Ct. of Ohio). *(*proving the case within a case in underlying criminal defense case with expert witness) ***(Expert witness)***.

Profit Sharing Trust v. Lampf, Lipkind*, et al.** 267 N.J. Super 174, 180, 630 A.2d 1191 (Law Div., 1993). (Fiduciary duty of law firm to refrain from prohibited transactions with client under RPC 1.8) ***(Expert witness).

Olds v. Donnelly*,** 291 N.J. Super. 222 (1996) *aff'd* 150 N.J. 424 (1997) ***(Expert witness) reverses *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla* (which held entire controversy doctrine inapplicable to legal malpractice claims)

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Estate of Re v. Kornstein, Veisz & Wexler*,** 958 F. Supp. 907 (SDNY 1997) (fiduciary duty of lawyer in the absence of negligence) (Expert witness***).

Dinter v. Sears, Roebuck & Co., 278 N.J. Super. 521 (1995). (***Attorney of record).***

Kostick v. Janke, et al., 221 N.J. Super 37 aff'd 223 N.J. Super 311 (App. Div. 1988) ***(Attorney of Record)***.

PUBLICATIONS:

"*The Ubiquitous Detailman...*" 1 Hofstra Law Review 183-213 (1973) -- reprinted in Paul D. Rheingold, DRUG LITIGATION, 3rd Edition (1981), and in PRECLINICAL AND CLINICAL TESTING BY THE PHARMACEUTICAL INDUSTRY, 1975, Joint Hearings before the Subcommittee on Health and Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, pages 1258-1280; cited in Dixon, TREATISE ON DRUG PRODUCT LIABILITY, s.6.10, et seq.

SYMPOSIUM ON PRODUCT LIABILITY AND SAFETY, Volume II, Hofstra Law Review (1974), (Articles Editor and Coordinator.)

LAWYERS LIABILITY REVIEW (Timeline Publishing Co., Inc.) (Member of Advisory Board.)

Author, Proposed Amendment to N.J.S.A. 2A:13-4, endorsed by the New Jersey State Bar Association and introduced into the NJ Senate and Assembly (S-1925 & A-3063, March, 1997).

Wasserman, *The Circle Chevrolet Fallout Continues: Problems the Supreme Court Did Not Solve.* 149 N.J.L.J. 320 (July 28, 1997).

Wasserman, *Expert Witnesses in the Legal Malpractice Case: The New Jersey Experience* (reprinted from Understanding Legal Malpractice - NJ Institute for Continuing Legal Education, Dec. 1997).

Wasserman, *Lawyer Malpractice: The Difference Between Life & Death,* (Opinion & Commentary, N.J. Law Journal, June 26, 2000).

Wasserman & Rosenblatt, *Legal Ethics: Getting Down to the Reason for the Rule* (New Jersey Law Journal. N.J. Supreme Court Year in Review 1999-2000 - 9/4/00).

Wasserman & Rosenblatt, *Legal Ethics: Making Things Clear* (New Jersey Law Journal. N.J. Supreme Court Year in Review 2000-2001 – 9/3/2001.

Wasserman & Rosenblatt, *Legal Ethics & Malpractice: Third Party Escrow Funds, Entitled to Same Protection as Client Trust Funds*. (New Jersey Law Journal. N.J. Supreme Court Year in Review, 2001-2002- 9/2/2002..

Wasserman & Rosenblatt, *Legal Ethics & Malpractice: Court Reaffirms American-Rule Exception to Enforce Fiduciary Duty* (New Jersey Law Journal, N.J. Supreme Court Year in Review, 2002-2003.

Wasserman, *Legal Ethics & Malpractice: 'Suit Within A Suit is Not Required',* (New Jersey Law Journal, The State Supreme Court Year in Review, 2003-2004.

Wasserman, *Legal Ethics & Malpractice: Advice on Asset Protection Could Land Lawyers in Hot Water* (New Jersey Law Journal, The State Supreme Court Year in Review, 2004-2005).

Wasserman, *Legal Ethics & Malpractice: Missing Evidence Prompts Negative Inference* (New Jersey Law Journal, The State Supreme Court Year in Review, 2005-2006).

Wasserman, *Professional Malpractice: Where Were the Lawyers?, Aiding and Abetting Breach of Fiduciary Duty, (*New Jersey Law Journal, January 22, 2007.)

Wasserman, *Own Up to Mistakes,* (New Jersey Law Journal, The State Supreme Court Year in Review, 2006-2007.)

Wasserman, *Professional Malpractice: Holding Lawyers Accountable for Bad Settlements. (*New Jersey Law Journal, January 21, 2008) p.1.

Wasserman, *Way to Cut Quality of Lawyering: Cut Deadline for Malpractice Suits,* New Jersey Law Journal, Commentary, April 28, 2008).

Wasserman & Rosenblatt, *The Enormity of Our Fiduciary Duty,* New Jersey Law Journal, The Supreme Court Year in Review, Legal Ethics and Malpractice, 2007-2008).

Wasserman, *Decries State Bar's Support for Shortening Legal Malpractice Statute of Limitations,* New Jersey Law Journal, December 8, 2008, "Voice of the Bar" p.12-13.

Wasserman, et ano., *Professional Malpractice: Two Views of the Saffer Fee-Shifting Rule: There is a Professional Duty to Support the Rule,* New Jersey Law Journal, January 19, 2009) p. 1.

Wasserman, *The Professional Services Business Enhancement Act: Myths, Realities and Prospective Problems,* Report to Members of the New Jersey General Assembly and Senate, January 28, 2009.

Wasserman, *What if Bernie Madoff Were a New Jersey Lawyer?,* New Jersey Law Journal, Commentary, May 11, 2009, p. 23.

Wasserman, et ano. *At the Crossroad of Constitutionally Protected Free Speech and the Rules of Professional Conduct,* New Jersey Law Journal, Supreme Court Year in Review Sept. 7, 2009).

Wasserman, et ano., *Mandatory Legal Malpractice Insurance: The Time has Come.* New Jersey Law Journal, Professional Malpractice Supplement, January 14, 2010.

Wasserman, *What if Goldman Sachs Were a New Jersey Law Firm?*
New Jersey Law Journal, Commentary, May 17, 2010.

Wasserman, et ano. *Settle and Sue is Here to Stay,* New Jersey Law Journal, Supreme Court Year in Review, September 6, 2010).

WORK IN PROGRESS:

LAWYER MALPRACTICE: Cases & Materials. (The West Educational Network)

Legal Malpractice Law Review: Research, Resources and Expertise in the Law Governing Lawyers http://www.legalmalpracticelawreview.com(Editor, 2009-2010).

EDUCATION:

Hofstra University School of Law, Hempstead, N.Y.
-- J.D. *cum laude,* l974.
-- Hofstra Law Review, Articles Editor.
-- Dean's Citation for Excellence in Trial Advocacy.
-- Class Rank: 13th of 165.

Hunter College, New York City.
-- B.A., 1968.; M.A., 1971.

BAR ASSOCIATIONS:

Association of Professional Responsibility Lawyers (APRL); Association of Trial Lawyers of America; ATLA (NJ), n/k/a American Association of Justice; Trial Attorneys of New Jersey; New York State Trial Lawyers Association; American Bar Association; New Jersey State Bar Association (Member,

Malpractice Insurance Committee, l992-to date; Member, Entire Controversy Committee 1996-97; NJSBA Delegate to the American Bar Association National Legal Malpractice Conference of the Standing Committee on Lawyers' Professional Liability 1994 -98); New York State Bar Association; Pennsylvania Bar Association (Professional Liability Committee, 1998-); Bergen County Bar Association (Co-Chairman Alternate Dispute Resolution Committee, Continuing Legal Education Committee); Association of the Bar of the City of New York; New York County Lawyer's Association (Lawyer's Professional Liability Committee); Professional Liability Underwriting Society; ABA Center for Professional Responsibility.

MISCELLANEOUS:

--Designed "LAWYER MALPRACTICE" course curriculum for law school level now being taught at Hofstra University School of Law, Hempstead, New York and other law schools.

--Testified before the United States Senate, Subcommittee on Health (Edward M. Kennedy, Chairman), regarding the need for improvement in the law pertaining to the marketing of pharmaceutical products (1974).

--Interviewed by trade journals concerning developments in product liability law (e.g., Chemical Business, February 8, l982.)

--Served on Bar Association Committees studying topics in law and medicine and multi-state practice of law.

--Lectured before Bar Association and community groups on trial advocacy and legal ethics.

--Guest lecturer on legal malpractice at:

- University of Liverpool (Cayman Island) Law School (1995, '96, '98, '99, 2002)

- Rutgers University School of Law (Newark, New Jersey, 1996)

-New York Law School (New York, N.Y., April, 2006).

--Lecturer & Panelist "Avoiding Malpractice", Continuing Legal Education Program, Bucks County (PA.) Bar Association (November 1995.)

--Co-Moderator & Panelist, "The Malpractice Explosion", Lexis Counsel Connect on-line seminary (November 1995.)

--Moderator, "Circle Chevrolet: Pitfalls of Legal Malpractice", Counsel Connect on-line seminary (April-May 1996). Reprinted in New Jersey Law Journal Supplement July 1, 1996.

--Faculty, "Ethical and Legal Malpractice Considerations in the Electronic Information Revolution, ATLA-NJ Education Foundation (January 1997).

--Faculty, "Understanding Legal Malpractice", N.J. Institute for Continuing Legal Education. Topic: "Expert Witnesses in the Legal Malpractice Case". (December, 1997).

--Lecture, "The Impact of the Entire Controversy Doctrine on Legal Malpractice" Bergen County Bar Association (9/12/96)

--Lecture, "The Entire Controversy Doctrine: How Wide and How Deep the Black Hole?" Bergen County Bar Association (10/24/96).

--Lecture, "Pitfalls of Legal Malpractice" Bergen County Bar Association (11/29/2001)

--Lecture & Panelist, "Practical Aspects of *Circle Chevrolet's* Impact Upon Legal Malpractice Claims", New Jersey State Bar Association, Annual Meeting, (5/16/97).

--Lecture & Panelist, "Ethics for Litigators and Trial Lawyers", Conflicts of Interest, New York State Bar Association, CLE (November 4 & 18, 2005).

--Lecture & Panelist, 8th Annual New Jersey Trust & Estate Law Forum, 2006, "A Word to the Wise: Keeping Current on Trust and Estate Legal Malpractice Trends and Issues". New Jersey Institute for Continuing Legal Education, Sept. 13, 2006.

--Lecture, "When Ethical Violations Become Malpractice" ATLA-NJ Meadowlands Seminar, October 21, 2007;

--Lecture, "Ethics Here, Ethics There, Ethics, Ethics Everywhere (NJ State Bar Association Public Utility Law Committee/NJ Institue of Continuing Legal Education, April 9, 2010);

--Panel Member, "Teaching Tomorrow's Lawyers to Avoid Legal Malpractice: A Roundtable Discussion (American Bar Association, National Legal Malpractice Conference, Washington, DC April 15, 2010).

--Featured in Forbes Magazine, May 22, 2006 (On the Docket: "Getting Theirs")

--Appeared on radio talk shows with Barry Farber and television documentaries with Geraldo Rivera concerning cases of public interest relating to tort law.

--Received newspaper coverage on numerous matters being actively litigated in the courts.

--On-going participation in continuing legal and alternate dispute resolution education courses.

--Founded the Multi-State Bar Association, an organization seeking to foster the growth of the multi-state practice of law.

--Awarded "Distinguished Alumni Medal" Hofstra University Law School, June l985.

--Personal interest in environmental law, municipal finance, municipal bonds, securities and bank fraud and related legal and investment issues.

--Real Estate Broker, State of New York (Lic. # 691079).

REFERENCES: Upon request.

PERSONAL: Born - January 2, l948

EXHIBIT B

DOCUMENTS REVIEWED

Underlying Matter (*Feierstein, et al v. Wray, et al.,* Court of Common Pleas, Phila. County, Term, 2005, No. 003690)

1. Civil Action Complaint;
2. Fee Agreement from Schermer to Feierstein dated May 6, 2005 signed by client on July 23, 2005, Two checks for $5,000 to Oscar Schermer & Associates, with supporting factual information from client to lawyer;
3. Additional factual information from client:
4. Link Wray Tour Dates 2005;
5. Wray Song File;
6. Royalty Payment check from Sony Music; 12/31/03; 8/12/2004;
7. Factual support for damages claim furnished by client to Steven Grayson, Esq. of Schermer & Associates; Schermer transmittal letter to Expert (Resnick).
8. Fax from Feier to Schermer July 7, 2005;
9. Curriculum Vitae of Marty Feier;
10. Transmittals of information to Expert;
11. Investigation/surveillance report May 17, 2005;
12. Expert Report of Bernard M. Resnick, Esq., P.C. dated February 20, 2007;
13. Handwritten notes entitled "Evidence";
14. Email exchange re: estate appointment, 8/15/2007;
15. EBay posting re Wray guitar;
16. Schermer letter to Judge Allen, February 22, 2007;
17. Schermer Retirement Letter, June 15, 2007;
18. Philadelphia Inquirer article;
19. Letter from Jonathan H. Kaplan, PC to Lauren H. Kane, Esq. dated January 31, 2008
20. Letter from Lauren Kane to Jonathan Kaplan dated March 2, 2009;
21. Reproduced Record (Appeal from the Order dated June 16, 2009 in the court of Common Pleas of Philadelphia County, May Term 2005 at No. 003690) (#1549 EDA 2009) (462 pages).
    a. Various motions, correspondence with Court
    b. Bench Trial transcript before Judge Jacqueline Allen, November 10, 2008;
    c. Plaintiff's Post Trial Motion, March 26, 2009;
    d. Judge Allen's Findings of Fact and Conclusions of Law, February 9, 2009;

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

JAY JONES,

Plaintiff,

-against-

JOHN KENNEDY, ESQ., MUNCHKIN KENNEDY, & KENNEDY, P.C., DANIEL J. STEINBERG, ESQ., and STEINBERG, WEISSMAN & FORSTBERG, LLP,

Defendants.

Index No.:

DEFENDANTS' EXPERT'S DISCLOSURE STATEMENT PURSUANT TO CPLR §3101(d)

---------- x

JOHN KENNEDY, ESQ. and MUNCHKIN KENNEDY & KENNEDY, P.C.,

Third-Party Plaintiff,

-against-

IRWIN CAREY, as Administrator of the Estate of SANDRA RUTH CAREY, Deceased,

Third-Party Defendant.

Third-Party Index No.:

----------x

DANIEL J. STEINBERG, ESQ. and STEINBERG, WEISSMAN & FORSTBERG, LLP.,

Second-Third-Party Plaintiffs,

-against-

IRWIN CAREY, as Administrator of the Estate of SANDRA RUTH CAREY, Deceased,

Second-Third-Party Defendant.

Index No.:

----------x

PLEASE TAKE NOTICE, that the defendants, DANIEL J. STEINBERG, ESQ. and STEINBERG WEISSMAN & FORSTBERG, LLP, by and through their attorneys, SLIMMEN, GERBER, FRIEDMAN & JOSEPHSON, P.C., submit the following as their Expert Disclosure Statement pursuant to CPLR §3101(d), and show as follows:

At the trial of this matter the defendants hereby place plaintiffs on notice of their intention to call Bennett J. Wasserman, Esq., as an expert witness. Mr. Wasserman is an attorney duly licensed to practice law in the States of New York, New Jersey and Pennsylvania, and is currently of counsel to the Law Firm of Stryker, Tams & Dill, LLP, with offices located at 2 Penn Plaza, New York, New York, and Newark, New Jersey. Mr. Wasserman also serves as a Special Professor of Law at Hofstra University School of Law in Hempstead, New York where he teaches a full semester advanced elective course entitled "Lawyer Malpractice." Mr. Wasserman's law practice has been concentrated in the areas of civil litigation as well as transactional matters. For the past 25 years or so, he has focused on the law governing lawyers, claims involving attorney malpractice and legal ethics. Mr. Wasserman has also lectured and written extensively in the area of attorney malpractice. His background, training, and practical experience in the field of attorney malpractice is set forth in his *curriculum vitae*, a copy of which is attached as Exhibit "A".

EXPERT QUALIFICATIONS

Mr. Wasserman will base his testimony upon his review of materials from the underlying litigation as well as the materials in this instant legal malpractice litigation. Mr. Wasserman will also base his testimony upon his background, training and experience in the field of attorney malpractice.

BASIS OF OPINIONS

Mr. Wasserman's opinion is that Mr. Steinberg, and the Steinberg Weissman & Forstberg firm, at all times acted in accordance with all accepted standards of practice

THE OPINIONS

relative to their very limited engagement in the underlying litigation. Mr. Wasserman will testify that Mr. Steinberg was contacted by the co-defendant KENNEDY, and there was a request that Mr. Steinberg and his firm conduct research and prepare a brief which would be submitted as part of the papers in opposition to a pending motion to dismiss JONES's Petition to Dissolve Texron Sales, Inc., which Motion to Dismiss was brought by Liffman, Mr. JONES's adversary in the underlying proceedings. Mr. Wasserman will testify that Mr. Steinberg and his firm fully complied with Mr. KENNEDY's request and performed this undertaking by completing the assignment he was engaged to perform and by timely submitting it to Mr. KENNEDY. Mr. Wasserman will testify that Mr. Steinberg and his firm completed the assignment in accordance with accepted standards of conduct, namely, by fulfilling the specific request made of him by the co-defendant KENNEDY. Mr. Wasserman will testify that the limited engagement of Mr. Steinberg and his law firm by Mr. KENNEDY and his law firm was in the nature of a sub-contract that outsourced a specific legal task which Mr. KENNEDY and his law firm sought on its own behalf and to assist it in its representation of its client in the underlying proceeding that Mr. KENNEDY had brought on behalf of its client, Mr. JONES.

WEAVE IN FACTS TO SUPPORT OPINION

Mr. Wasserman will offer testimony that no attorney-client relationship existed between Mr. JONES and Mr. Steinberg and his firm. Mr. Wasserman will testify that, at all times, Mr. KENNEDY and his firm were attorneys of record, and that there was no direct contact, at anytime, between Mr. JONES and Mr. Steinberg or other persons affiliated with Mr. Steinberg's firm. Further, Mr. Wasserman will testify that any and all decisions whether to pursue or not to pursue the courses of action taken by Mr. JONES and

NO ATTORNEY CLIENT RELATIONSHIP NO PRIVITY

Mr. KENNEDY, his counsel, in the underlying action, were beyond the scope of Mr. Steinberg's engagement, and were independent professional judgments made and to be made solely by Mr. KENNEDY and his law firm in consultation with its client, Mr. JONES. Further, on this issue, Mr. Wasserman will testify that Mr. Steinberg and his firm provided thorough and competent legal services in accordance with and within the scope of their limited engagement which enabled Mr. KENNEDY to assess and determine how he and his law firm could best represent its client, Mr. JONES.

Mr. Wasserman will offer testimony that the September 4, 2002 correspondence sent by Mr. Steinberg to Mr. JONES, c/o Mr. KENNEDY, in an effort to comply with 22 NYCRR 1215.1, did not create an attorney client relationship between the parties. Mr. Wasserman will testify that this correspondence was sent to Mr. JONES by Mr. Steinberg out of his concern for compliance with this court rule, which did not apply to him or this situation. The correspondence simply outlined the terms of Mr. Steinberg's engagement to perform certain limited services on behalf of Mr. KENNEDY and his firm, in connection with its representation of Mr. JONES's efforts to dissolve Texron Sales, Inc.

NO PRIVITY NO DUTY

Because there was never any attorney-client relationship between Mr. JONES and Mr. Steinberg and his firm, Mr. Wasserman is expected to offer testimony that Mr. Steinberg and his firm did not owe any duty to Mr. JONES. In addition, Mr. Wasserman will testify that nothing that Mr. Steinberg and his firm did in the course of their limited involvement in this action was the proximate cause of any damages allegedly sustained by Mr. JONES. On this issue, Mr. Wasserman will offer testimony that based upon his

review of the motion practice in the underlying dissolution action including, but not limited to Order of Judge Abdus-Salaam, dated December 10, 2002, the papers that were submitted in opposition to the Motion to Dismiss the Petition were successful in that the Petition was not dismissed. Further, Mr. Wasserman will testify that once Sandra Ruth Carey substituted Mr. KENNEDY as counsel for plaintiff, on or about March 27, 2003, all decisions with regard to how to proceed in the litigation were made by Ms. Carey, and that Ms. Carey had ample opportunity, in the event that there were departures from accepted standards of practice which preceded her involvement (which is vigorously denied), she had the opportunity to cure those problems. As a result, were there any departures from accepted standards of practice by Mr. Steinberg and his firm (again, vigorously denied), the involvement of Ms. Carey as successor counsel, interrupted the chain of causation. As a result, Mr. Wasserman is expected to offer testimony that plaintiff will be unable to demonstrate that anything that Mr. Steinberg and his law firm did or failed to do constituted a proximate cause of the damages alleged to have been sustained by Mr. JONES.

INTERVENING CAUSE

The defendants hereby reserve the right to amend this response up to and including the time of trial.

Dated: New York, New York
July 12, 2010

SLIMMEN, GERBER, FRIEDMAN
& JOSEPHSON, P.C.
Attorneys for Defendants
Daniel J. Steinberg, Esq. and
Steinberg, Weissman & Forstberg,
LLP.

By:_____
Barry Slimm

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File No.: 04-145

TO: LAW OFFICES OF REGINA L. HARDY
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FORSTENBERG KRONENBERG & BRENNAN, LLP
Attorneys for Defendants and Third-Party
Plaintiffs John KENNEDY, Esq. and
MUNCHKIN KENNEDY & KENNEDY, P.c.
570 Taxter Road, 5th Floor
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ON LAW FIRM, PLLC
Attorneys for Third-Party Defendant/
Second Third-Party Defendant
Irwin Carey, As Administrator of the
Estate of Sandra Ruth Carey
1123 Broadway
New York, New York 10010
(212) 252-1212

William F McMurry *Legal Liability and Ethical Dilemmas: The Case within the Case*

Current President of the ABPLA and holds dual certifications in medical and legal negligence. Mr. McMurry is recognized as "Preeminent" in the specialties of medical and legal malpractice by Martindale-Hubbell. Mr. McMurry is also Board Certified by the Florida Board of Legal Specialization and the National Board of Legal Specialty Certification (NBLSC) as a "Civil Trial Specialist." Mr. McMurry has lectured extensively to national and state trial lawyer organizations around the country on both legal and medical negligence.

Legal Liability and Ethical Dilemmas: The Case within the Case

Presented By:

William F. McMurry
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Louisville, Kentucky 40222
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email: bill@courtroomlaw.com
web: www.courtroomlaw.com

WILLIAM F.MCMURRY specializes in medical and legal malpractice matters, catastrophic personal injury, wrongful death and insurance bad faith litigation. He serves as President of the American Board of Professional Liability Attorneys (ABLPA), the only organization to be accredited by the ABA to certify specialists in medical and legal malpractice.

Recently, Mr. McMurry received a $2.5 million verdict against the Imperial Klans of America on behalf of a young Native American boy, severely beaten by members of the Klan's world headquarters, located in Kentucky. In this case Mr. McMurry, served as co-counsel with Morris Dees of the Southern Poverty Law Center. Mr. McMurry is the only lawyer to co-counsel with Morris Dees and be asked to conduct the direct exam of the plaintiff, present the damages proof and conduct the closing argument.

He has also recently obtained a $2.9 million verdict on behalf of a small town attorney who suffered a mild traumatic brain injury as a result of a motor vehicle accident; and a medical malpractice jury verdict of $2.1 million arising out of the failure to diagnose and treat a stroke patient. Mr. McMurry recently settled the only nationwide class action ever certified by a Circuit Court in Kentucky for an estimated value of $16 million. The class action involved 15,000 elderly class members who fell victim to lawyers involved in a living trust and life insurance scam.

Mr. McMurry has devoted much of the past ten years to victims of the Roman Catholic Church childhood sexual abuse scandal. He represented 213 victims who filed complaints against the Archdiocese of Louisville, Kentucky and was named lead counsel for the settlement class of 243 victims who settled their claims in June 2003, for $25.7 million. That settlement was then the largest payout to victims consisting exclusively of the assets of a diocese or archdiocese. In 2004, McMurry sued the Vatican in a nationwide class action, in an attempt to hold the Vatican accountable for the sexual abuse of children by Catholic clergy. From this case McMurry's appellate work led to the only ruling of its kind in the US; that the Vatican can be held accountable under the Foreign Sovereign Immunities Act for the failure of US Bishops to report known or suspected child sexual abuse to police authorities.

Mr. McMurry is recognized in Martindale-Hubbell's Bar Register of Preeminent Lawyers in the fields of legal and medical malpractice and has been awarded the "AV" rating by that organization. Mr. McMurry is also Board Certified as a Civil Trial Specialist by the National Board of Trial Advocacy (NBTA) and by the Florida Bar Board of Legal Specialization.

The practice of law, as with most professions, has become increasingly specialized—in tandem with the growing complexity of society and commerce.[1]

I. INTRODUCTION

The American Bar Association has been compiling statistics on lawyer's professional liability claims since 1985. In 2012, the ABA's claims survey conducted from 2008-20011 demonstrates a "changing landscape." For the first time since1985, personal injury attorneys no longer hold the title for the practice area with the highest risk of malpractice claims against lawyers. Real estate matters are now the area of practice generating the greatest number of legal malpractice claims against lawyers. This trend may reflect merely a decline in the number of attorneys practicing personal injury law, but the data is limited, frustrating the reader's ability to understand the basis for such trends. The Study points out that real estate claims did not increase dramatically, but personal injury malpractice claims declined significantly (5.9%).

However, badly handled personal injury cases, particularly medical malpractice cases, continue to rank high among the legal malpractice claims made each year. These claims are the focus of this discussion.

Once again, one of the most frequent errors leading to a legal malpractice claim is the **failure to know or properly apply the law**. The ABA estimates that 13.5% of malpractice claims arise from these types of mistakes. How can a lawyer fail to know the law?

We all learn in law school that the necessary elements for an actionable legal malpractice claim are: (1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage.[2] In the legal malpractice case, often the most challenging element is proving damages. That challenge is never greater than when the underlying case involves allegations of medical malpractice.

We will start by examining common mistakes that result in mishandling a medical malpractice case, and the cases that have arisen from these mistakes. We will next examine just what is the case within a case method of proving damages and how courts apply the rule. This work will also look at what consequential and other damages are available in a legal malpractice case. Next, this work will look at common ethical pitfalls that arise in the legal malpractice setting, particularly when the underlying case is specialized in nature such as medical malpractice. Finally, this work will address a common defense procedural maneuver, a motion to bifurcate, and how it affects your legal malpractice case.

II. MISHANDLING THE MEDICAL MALPRACTICE CASE

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1 *Duffey Law Office, S.C. v. Tank Transport, Inc*., 194 Wis.2d 674, 682 (Wis. App. 1995).

2 *Schultz v. Harney*, 33 Cal.Rptr.2d 276, 281 (Cal. App. 2nd Dist. 1994).

Due to the complex nature of the medical malpractice claim, it is not surprising that the medical malpractice case often becomes the case within in a case in the legal malpractice arena. Some common missteps in the handling of medical malpractice case include:

- Representing a client in the face of conflicting interests;
- Poor investigation of the merits of the claim;
- Thinking you are not responsible after simply you refer the client to an apparent medical malpractice specialist;
- Failure to properly supervise an associate attorney;
- Communicating or failing to communicate altogether or accurately with the medical malpractice claimant, the defendant, or other counsel involved in the dispute;
- Failing to give notice of the claim to governmental authorities;
- Instituting proceedings with a medical review panel;
- Failing to file suit on the claim or in a timely manner;
- Poorly alleging facts or causes of action, prosecuting the suit;
- Settling the claim or stipulating to its dismissal;
- Failing to seek a continuance; and
- Obtaining, calling, and questioning expert witnesses;

From a risk management perspective, it is beneficial to incorporate safeguards in your practice so as to avoid these common pitfalls. The following section will examine one of the worst pitfalls for attorneys who are inexperienced in handling complex medical malpractice cases, the referral of the medical malpractice case.

A. The Referral Game: Your Continued Liability In Spite of Your Referral of the Matter to Competent Counsel

The evaluation of the underlying medical malpractice case raises particular concerns. Often well-trained and well-intentioned personal injury attorneys will investigate a personal injury claim for which they are highly qualified. It may be in the worker's compensation, products liability or automobile accident setting that the client seeks the attorney's legal advice. Often the client has no reason to believe that an x-ray report has gone unread by her doctors or that she has been the victim of medical negligence. It is for this reason that courts impose a duty on ALL attorneys to "investigate the client's rights and liability" even though the precise legal problem for which the client seeks advice is not within the agreed scope of the attorney's representation.

Dubbed the "peripheral duty" by Mallen and Smith, this duty was never so well explained as it was in the Kentucky case of *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. Ct. App.

1978). In *Daugherty*, while representing the deceased for injuries sustained in an automobile accident, the attorney failed to pursue a medical malpractice claim until her claim was barred by the statute of limitations. The medical malpractice occurred during the client's treatment following the auto accident.

In *Daugherty*, the attorney, Runner, argued that he was retained to handle the automobile accident claim and that he did not handle medical malpractice matters. In fact, Runner referred the medical malpractice aspects of the case to another attorney skilled in such matters, yet the malpractice attorney allowed the statute of limitations to expire. The court held:

> We are not ready to hold that Mr. Runner had absolutely no duties to his client with regard to a medical malpractice action simply because the written contract did not specifically mention a malpractice suit. To do so would require the client, presumably a layman who is unskilled in the law, to recognize for himself all potential legal remedies. An attorney cannot completely disregard matters coming to his attention, which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.[3]

Even though the jury found that Runner was not negligent in his handling of the "malpractice" matter, the Kentucky Court of Appeals ruled that a jury must be allowed to decide whether the attorney breached his duty when failing to protect and preserve a client's medical malpractice case.

In *Miller v. Metzinger*, 91 Cal App 3d 31 (Cal App, 2nd Dist. 1979), the California Court upheld the sufficiency of the evidence of counsel's legal malpractice in connection with referring clients to a medical malpractice specialist. The clients, survivors of the decedent, charged four law firms with negligently failing to bring a wrongful death action for medical malpractice within the statute of limitations. The clients' decedent died on January 4, 1973. Allegedly, in early 1973, the clients contacted the first law firm, which declined to handle their case after obtaining copies of the decedent's medical records; the records were sent to the second firm, who retained the records in late December 1974; the third firm became involved in early July when the clients consulted one of its lawyers; in early November, that lawyer advised the clients that he did not have sufficient expertise to handle a medical malpractice action and referred them to the fourth firm; in early December, the fourth firm agreed to handle the matter; in late December, a written retainer was entered into; and the fourth firm filed the complaint on January 30, 1974—after the statute of limitations had run. The clients did not allege which attorney or firm was in possession of the file on January 4, 1974, and the court cited "great uncertainty" concerning some dates plus uncertainty on whether the third lawyer contacted the fourth firm in connection with the reference or merely sent one of the survivors there.

The court, holding that issues of fact remained as to whether an attorney-client relationship was established between the third lawyer and the client and the duration of any such relationship, commented that the third **lawyer's statements that his function was purely investigatory and that he did not agree to represent her**, charge a fee for his services, or

[3] *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. Ct. App. 1978)

secure a retainer agreement, **did not eliminate the existence of an attorney-client relationship**. The court held that there was a serious issue of fact as to whether the third lawyer advised the survivors to seek other representation at any time before a date when the statute of limitations had run or was about to run within a matter of days, and that a breach of duty might be found in his failure to advise them of the necessity to act promptly in contacting the fourth firm. According to one survivor's declaration, the third lawyer made the appointment for her with the fourth firm, noted the court, and if that is true—and if the appointment was not until late January—there was a breach of duty. Moreover, in view of the third lawyer's apparent knowledge of the statute of limitations problem, a breach of duty might exist even though he left it up to that survivor to make the appointment without advising her as to the statute of limitations.

Even in the referral situation it is imperative to remain aware of the statute of limitations in the related medical malpractice case, even though you make it clear to the client that you do not handle medical malpractice cases, and advise the client accordingly.

B. Avoiding Risk in Withdrawing from the "Case Gone Wrong"

In the California case of *Kirsch v. Duryea*, 578 P.2d 935 (Cal. 1978), defendant was confronted with a choice between his duty to advance his client's cause by continuing to prosecute the action and his duty to fair administration of justice to refuse to maintain actions believed to lack merit. He delayed seeking judicial withdrawal to allow the client time to find other counsel. The Court reasoned that an attorney's duty includes the duty to maintain only such actions as appear to him legal or just. (Bus. & Prof.Code, s 6068, subd. (c).) "When an attorney loses faith in his cause he should either retire from the case or dismiss the action." (*Larimer v. Smith* (1933) 130 Cal.App. 98, 101, 19 P.2d 825, 827.)

The *Kirsch* Court held:

> A valid purpose is served by the requirement that the withdrawing attorney delay seeking court approval to permit his client to secure other representation. When the attorney seeks to withdraw without consent of client, there is an obvious inference his withdrawal is not for the client's purpose but for the attorney's purpose, usually **a lack of confidence in the merits of the case**. The inference is obvious to the parties in the case and will ordinarily gravely jeopardize any chance of settlement. On the other hand, consensual withdrawal or substitution of another attorney as opposing counsel are well-aware may be due to numerous reasons even personal, casting no reflection on the client's case. **Accordingly, an attorney should not seek a nonconsensual withdrawal immediately upon determination that the case lacks merit, but should delay to give his client an opportunity to obtain other counsel or to file a consensual withdrawal**.[4]

This rule may seem forgiving to some, but **problems arise when the attorney delays in informing himself of the validity of the claim**. Should the client find legal malpractice counsel after her medical malpractice case is dismissed for delay, new counsel may be successful in

[4] *Kirsch v. Duryea*, 578 P.2d 935 (Cal. 1978)

finding physicians to support her claim. Under these circumstances it may be far easier to convince a jury of the value of her underlying medical malpractice case in the legal malpractice forum. There are well-reasoned rules in many states which allow a legal malpractice plaintiff to prove her underlying case by proving that, "more likely than not" she would have prevailed in the medical malpractice action.[5] In reality it is impossible to truly recreate the "case within the case." In many of the underlying cases the attorney failed to preserve crucial evidence or through delay allowed witnesses memories to fade. Why should the client be required to prove the underlying case by the same burden as though she were in a medical malpractice trial, given such negligence?[6] Requiring the legal malpractice plaintiff to prove that she would have prevailed, more likely than not, in the underlying case is far more just. But keep in mind, when the underlying case is a medical malpractice case the legal malpractice case is considerably easier to prove than the case against a physician in a medical malpractice courtroom.

Rules of Professional Conduct 2-110(2), further supports this position and provides that a member of the State Bar shall not accept employment to present "a claim or defense (in litigation) that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law." Rule 2-111(C) provides for permissive withdrawal when the client insists upon presenting a claim that is not warranted under existing law and cannot be supported by good faith argument for extension, modification, or reversal of the law.

III. PROVING DAMAGES AND THE CASE WITHIN THE CASE

A. Proving Your Direct Damages in the Case Within the Case

In a legal malpractice action, compensatory damages can be classified as either direct or consequential.[7]

> Direct damages are compensation for the loss of the expected benefits from the attorney's services and any expenses incurred due to the attorney's failure to achieve those benefits. The direct damage usually is the value of the lost benefit or of the detriment. The value of that benefit is based on the circumstances existing at the time of the wrongful act or omission.
>
> If the injury occurred because of negligence in handling litigation, the measure of direct damages is the difference between the amount actually recovered or paid and the amount that should have been recovered or paid. The legal interest that was, or that should have been, awarded on the judgment also may be part of the direct damages. The measure of direct damages can be exemplary damages that

[5] *Keeney v. Osborne* at http://opinions.kycourts.net/coa/2007-CA-002112.pdf.
[6] See *Section V*, below regarding Motions to Bifurcate
[7] Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, vol. 3, § 20:1, 3, (2007 ed., West).

> were not recovered or awarded. The direct damages may be the value of a lost settlement opportunity or the cost of a disadvantageous settlement. Additional elements of direct damages can be the legal fees paid to the defendant attorney and expenses incurred to mitigate the loss of the intended benefit.[8]

As a New Jersey Court summarized, "damages are generally shown by introducing evidence establishing the viability and worth of the claim that was irredeemably lost. This procedure has been termed a 'suit within a suit.'"[9] Proving damages in the case within a case arena is often challenging, and logically, any proof or other difficulties in the underlying case are not to be escaped in the legal malpractice case. Depending on the nature of the attorney's negligent act, proving the underlying case can become next to impossible.

Courts apply the case within a case rule with varying degrees of rigidity. For example, as the New Jersey Court points out, some courts require the plaintiff to prove by a preponderance of the evidence that "(1) he would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectability of that judgment."[10] However, this approach fails to take into consideration the possibility of settlement. Also, it can be difficult to present an accurate evidential picture of the original action and the passage of time works against the case within a case approach.[11] New Jersey has adopted a more flexible rule than the rigid case within a case rule finding that "it should be within the discretion of the trial judge as to the manner in which the plaintiff may proceed to prove his claim for damages...."[12]

A recent decision out of the Court of Appeals in Ohio has also rejected the case within a case approach. The Court stated that Ohio precedent rejected a "blanket requirement that plaintiffs in a legal malpractice case always had to prove their 'case within a case,' the court favored a case-by-case analysis of the causation and damages element of the claim."[13] The Court analyzed the shortcomings of the case within a case method approach of proving damages in a legal malpractice case:

> [W]e reject any finding that the element of causation in the context of a legal malpractice action can be replaced or supplemented with a rule of thumb requiring that a plaintiff, in order to establish damage or loss, prove in every instance that he or she would have been successful in the underlying matter(s) giving rise to the complaint. This should be true regardless of the type of representation involved.
>
> A standard of proof that requires a plaintiff to prove to a virtual certainty that, but for the defendant's negligence, the plaintiff would have prevailed in the underlying action, in effect immunizes most negligent attorneys from liability. No

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8 *Id.* at 4.

9 *Gautam v. DeLuca*, 521 A.2d 1343, 1348 (N.J. Super. App. Div. 1987)

10 *Id.* at 1348. See also, *Wilkins v. Safran*, 649 S.E.2d 658, 673 (N.C. App. 2007)

11 *Id*. at 1348.

12 *Id*. at 1348 (quoting *Lieberman v. Employers Ins. of Wasau*, 419 A.2d 417 (N.J. 1980).

13 *Young-Hatten v. Taylor*, 2009 WL 690165 at *5 (Ohio App. 10 Dist.).

matter how outrageous and morally reprehensible the attorney's behavior may have been, if minimal doubt exists as to the outcome in the original action, the plaintiff may not recover in the malpractice action. Except in those rare instances where the initial action was a 'sure thing,' the certainty requirement protects attorneys from liability for their negligence.

A strict 'but for' test also ignores settlement opportunities lost due to the attorney's negligence. The test focuses on whether the client would have won in the original action. A high standard of proof of causation encourages courts' tendencies to exclude evidence about settlement as too remote and speculative. The standard therefore excludes consideration of the most common form of client recovery.

In addition, stringent standards of proving 'but for' require the plaintiff to conduct a 'trial within a trial' to show the validity of his underlying claim. A full, theoretically complete reconstruction of the original trial would require evidence about such matters as the size of jury verdicts in the original jurisdiction. For example, an experienced attorney could testify that juries in that jurisdiction typically award verdicts of x dollars in similar cases. But such evidence is too remote and speculative; the new fact finder must try the merits of both the malpractice suit and the underlying claim to make an independent determination of the damage award. The cost and complexity of such a proceeding may well discourage the few plaintiffs otherwise willing to pursue the slim chance of success.

Other problems await those who do proceed with the 'trial within a trial.' For example, the attorney in the original action may have negligently failed to pursue the discovery that would have insured success. If the results of that same discovery are now necessary to prove the merit of the underlying claim-and the passage of time has precluded obtaining that information-the attorney by his own negligence will have protected himself from liability. In such a case, the more negligent the attorney, the more difficult is the plaintiff's task of proving causation.[14]

B. Consequential Damages in Legal Malpractice Cases

The other component of damages in legal malpractice cases is consequential damages. "Consequential damages are compensation for those additional injuries that are a proximate result of the attorney's negligence, which do not flow directly from or concern the objective of the intended benefit of the attorney's services but damages that occurred because the benefit was lost. Such injuries may include damages for mental distress and related personal injuries, injuries to reputation, economic losses, and expenses incurred in suing the attorney for legal malpractice."[15]

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[14] *Id*. at 4, quoting *Vahila v. Hall*, 77 Ohio St.3d 421 (Ohio 1997)(quoting Note, *The Standard of Proof of Causation in Legal Malpractice Case*, 63 Cornell L.Rev. 666, 670-71 (1978)).

[15] Mallen, *supra* n. 3, at 4.

Looking at the issue of emotional damages, courts across the country have fallen on both sides of the fence on whether or not emotional damages are recoverable, with an increasing number of courts allowing plaintiffs to recover for emotional damages in a legal malpractice case, separately from the underlying claim.[16]

Within your state, there may be statutory remedies that would allow recovery for emotional damages. In Kentucky, the legislature has defined the damages allowable for legal malpractice in K.R.S § 411.165(1) as follows: "If any attorney employed to attend to professional business neglects to attend to the business, after being paid anything for his services, or attends to the business negligently, he shall be liable to the client for all damages and costs sustained by reason thereof."[17] (emphasis supplied). The defense bar has argued that in a legal malpractice case since plaintiff's claims of emotional distress do not derive from any "affirmative or intentional wrongdoing" on the part of the defendant that such damages should not be recoverable. If the words "all damages" are to be given any meaning at all, the statute must mean that a negligent or grossly negligent attorney is liable for the derivative damages stemming from the underlying case and all resultant damages that have a direct causal link to the misconduct, such as those recoverable for emotional distress. Both types of damages are inarguably "sustained by reason" of the attorney's wrongful conduct. However, such an argument was recently rejected by the Kentucky Court of Appeals in *Keeney v. Osborne*, ___S.W.3d ___ (2010 WL 743671 (Ky. App. 2010), holding that a Plaintiff could not recover damages for emotional distress due to her attorney's negligence unless there was a physical impact or physical injury due to the negligent infliction of emotional distress.

As mentioned above, in pursuing claims for damages, be mindful of specific state statutory remedies for additional damages such as trebled awards, specific penalties, punitive damages, etc. Finally, the defendant attorney can make a variety of arguments for a reduction in the ultimate award. For example, in a minority of states the attorney can set off the fees that would have been received for the services necessary to secure the intended benefit for the client. An attorney also can reduce damages by sums recovered by the client from a tortfeasor in an underlying action. If the client was a defendant in the underlying action, the attorney may claim the benefit of payments made by a joint tortfeasor or the client's liability insurer. Finally, an attorney can diminish the award by those damages that are attributable to the plaintiff or which the plaintiff should have mitigated or avoided. The amount of a lien that would have attached to the client's recovery also may be subtracted."[18]

IV. ETHICAL PITFALLS

A. COMPETENCE, DILIGENCE AND THE STANDARD OF CARE

"With few exceptions, the courts agree that the violation of an ethics rule alone does not create a cause of action, constitute legal malpractice *per se* or necessarily create a duty."[19] In the

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[16] See *Gautam v. DeLuca*, 521 A.2d 1343, 1348 (N.J. Super. App. Div. 1987).

[17] K.R.S § 411.165 (2008).

[18] Mallen, *supra* n. 3, at 4-5.

[19] Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, vol. 2, § 19:7, 1208, (2007 ed., West).

2002 Amendments to the Model Rules, the ABA clarified their position on the scope of the ethic rules and how they related to civil liability:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached…Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.[20]

Furthermore, ethics rules do not necessarily set legal standards, but they do have relevance.[21] "The issue, however, is not whether the lawyer was "unethical," but whether the lawyer deviated from the governing standard."[22] Two ethical rules that are clearly intertwined with the standard of care in a legal malpractice case are the rules regarding competence and diligence.

The very first Model Rule of Professional Conduct by the American Bar Association is Rule 1.1 regarding Competence. Rule 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[23]

As the Comments to the rule above suggest, "a lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."[24] Where lawyers run into problems, is attempting to handle a mater in a novel field without the association of a lawyer who has established competence in the field or by failing to thoroughly commit the time to becoming competent themselves in the novel field.

Another familiar rule of professional conduct, Rule 1.3 (Diligence) states: "A lawyer shall act with reasonable diligence and promptness in representing a client."[25] As the comments state, diligence requires an attorney to "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[26]

Courts and commentators long have recognized that lawyers' dilatory tactics impede the administration of justice and that such delay is a burden upon opposing parties and a waste of

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[20] *Id.* at 1213-1214, (quoting ABA Model Rules of Professional Conduct, *Scope* (2002)).
[21] Mallen, *supra* n. 15, at 1218.
[22] *Id.* at 1218-1219.
[23] A.B.A. Model R. Prof. Conduct 1.1.
[24] *Id*. See Comment 2.
[25] A.B.A. Model R. Prof. Conduct 1.3.
[26] *Id.* See Comment 1.

public resources.[27] Rule 3.2 (Expediting Litigation), as well as Rule 1.3 (Diligence), attempts to address this issue. While Rule 1.3 sets forth the general requirement that lawyers "act with reasonable diligence and promptness in representing a client," Rule 3.2 specifically requires lawyers to attempt to "expedite litigation." Lawyers who fail to make "reasonable efforts" to do so are subject to discipline. The comments to the rule point out that "dilatory practices bring the administration of justice into disrepute."[28]

The landmark legal malpractice case in Kentucky, *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. App. 1978), is a prime example of how an attorney's violation of the above ethics rules can lead to a malpractice suit. As the Court stated, "the standard of care is generally composed of two elements care and skill. The first has to do with care and diligence that the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display."[29] While affirming the lower court's jury instructions, the Court refused to hold that simply because Mr. Runner did not have competence, as he alleged, in handling medical malpractice suits, this did not remove his duty to his client. The Court reasoned: "An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney."[30]

A lack of diligence can hurt any case, as well as a lack of competence. "Concern about the competence of attorneys has resulted in certification of legal specialists."[31] According to Mallen and Smith in their treatise, *Legal Malpractice*, "[s]pecialization raises the question whether the standard of care devised for the "ordinary" attorney suffices for the practice of law today. The answer, with increasing frequency, is that an attorney undertaking a task in a specialized area of the law must exercise the degree of skill and knowledge possessed by those attorneys who practice in that specialty."[32]

B. CLIENT COMMUNICATIONS

In legal malpractice cases, common ethical pitfalls often involve the malpracticing attorney's failure to communicate properly with their client. Below are some of the ethical rules concerning a lawyer's communications with their clients:

Rule 1.4 (Communication):

(a) A lawyer shall:

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[27] *See Roadway Express v. Piper*, 447 U.S. 752, 757 n. 4 (1980) ("The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law.")
[28] A.B.A. Model R. Prof. Conduct 3.2. See Comment 1.
[29] *Daugherty*, 581 S.W.2d at 14 (quoting Wade, The Attorney's Liability for Negligence, 12 Vand.L.Rev. 755, 762 (1959)).
[30] *Id*. at 17.
[31] Mallen, *supra* n. 15, at 1185.
[32] *Id.*

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[33]

Rule 1.16 (Declining or Terminating Representation):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.[34]

Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer):

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.[35]

Rule 7.1 (Communications Concerning a Lawyer's Service):

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.[36]

Rule 1.4 is the general rule regarding communications, while the remaining rules deal with specific problem areas that arise in communicating with clients. For example, Rule 1.16 would include advising a client of any applicable statute of limitations and also would include as

[33] A.B.A. Model R. Prof. Conduct 1.4.
[34] A.B.A. Model R. Prof. Conduct 1.16.
[35] A.B.A. Model R. Prof. Conduct 1.2.
[36] A.B.A Model R. Prof. Conduct 7.15.

in the above *Daugherty* case, advising of any other potential claims a client may have regardless of what the attorney has agreed to litigate. The *Daugherty* dilemma also involves Rule 1.2, which allows a lawyer to limit the objectives of representation, but such limitation must be done properly. Finally, of course, a lawyer should not make a false, deceptive or misleading communication to a client. For example, an attorney who has never handled a medical malpractice case should not represent that he has any special knowledge in such matters.

V. CASE WITHIN A CASE: MOTIONS TO BIFURCATE

It is common in legal malpractice cases for the defense to move to bifurcate the underlying action from the legal malpractice claims. Under Federal Rule of Civil Procedure Rule 42, courts have the discretion to order separate trials. FRCP Rule 42 states:

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

However, bifurcation is the exception, not the rule.[37] Imagine using the defendant's logic in every case. Using the common defense approach, every negligence case should be bifurcated and tried piecemeal. Such practice would create havoc in the judicial system and cases would become extremely difficult to manage in the best of circumstance. Potentially, every negligence case would result in multiple trials and possibly multiple appeals. Discovery would become disjointed, and prosecution of any negligence case would become nearly impossible. The court's docket would become extremely backlogged and the need for additional jurors would increase substantially. It is the party making the motion for bifurcation's burden to establish that bifurcation of the issues will promote judicial economy and expedition and avoid prejudice to any party. In exercising its discretion, federal courts look at such relevant factors as "(1) whether separation of the issues for trial will expedite disposition of the actions; (2) whether such separation will conserve trial time and other judicial resources; (3) whether such separation will avoid prejudice; (4) and whether the issues are essentially independent of each other so that there will be no need to duplicate the presentation of significant areas of the evidence in the separated proceedings."[38] The controlling factor in determining whether an action should be bifurcated is "the interest of efficient judicial administration."[39] As such, the party requesting bifurcation must

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[37] See *J2 Global Communications, Inc. v. Protus IP Solutions*, 2009 WL 910701 (C.D.Cal. March 31, 2009) at p. 3 ("all claims in a case-even if founded on different causes of action-are tried together, as such an approach is generally considered to be the most efficient for the court and parties); *Hamm v. American Home Products Corp*., 888 F.Supp. 1037, 1039 (E.D. Cal. 1995) ("absent some experience demonstrating the worth of bifurcation, 'separation' of issues for trial is not to be routinely ordered."); *Hangarter v. Paul Revere Life Ins. Co.*, 236 F.Supp.2d 1069, 1094 (N.D. Cal. 2002) ("piecemeal trial of separate issues in a single suit is not to be the usual course [and] should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule").

[38] *Tuey v. Mammoth Mountain Ski Area*, 2009 WL 928328 at *4 (E.D. Cal.).

[39] *J2 Global Communications, Inc.,* 2009 WL 910701 at *3 (C.D. Cal.) (citing Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ. 3d* §2388).

specifically show that "bifurcation will promote judicial economy, and avoid inconvenience or prejudice to the parties."[40]

"Because bifurcation works an infringement on such an important aspect of the judicial process, courts are 'cautioned that [it] is not the usual course that should be followed.'"[41] Furthermore, "A trial may be bifurcated only when the issues are clearly distinct and the bifurcation will not work a hardship against either party. Although bifurcation may result in judicial economy in some cases, it often works an injustice and does not achieve judicial economy when trials must be conducted again.... A fair trial is often thwarted when interwoven issues are tried separately."[42] Furthermore, "when issues are 'so interwoven' that their independent trial would cause 'confusion and uncertainty, which would amount to a denial of a fair trial,' they must be tried together."[43]

In Mallen and Smith's treatise, *Legal Malpractice* (2007), the authors take the position that such bifurcation can "provide a cogent and clear evidentiary process, reducing the risk of confusing a jury."[44] However from the plaintiff's point of view this is not always the best approach. If bifurcation is ordered, procedurally it is favored to try the issue of the attorney's negligence before the issue of causation and damage in the underlying action.[45] Obviously, every defendant would love to have bifurcation of every single issue. By presenting issues separately, it becomes more difficult for the jury to understand the entire picture. In theory, a defendant could ask for bifurcation of duty, causation, damages, and so on.

There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of injury. **Moreover, can a legal malpractice plaintiff ever prove the underlying case even by a preponderance of the evidence when the majority of legal malpractice involves delay, resulting in lost evidence, which cannot be recreated?** The better approach is to require the legal malpractice plaintiff only prove, "more likely than not," she "would have prevailed in the underlying case." If bifurcation is ever to be a solution to expediting these matters it should be limited to first trying the issue of the attorney's negligence.

Other courts have rejected the bifurcation method finding that the issues of liability were too closely intertwined with the other issues.[46] Courts have also rejected bifurcation where the attorney's negligent actions have impaired the plaintiff's evidence of damages in the underlying case.[47] In *National Union Fire Insurance Co. v. Dowd & Dowd, P.C.,* 191 F.R.D. 566 (N.D.Ill.1999), the Court refused to bifurcate the underlying case from the legal malpractice

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[40] *Spectra-Physics Lasers, Inc. v. Uniphase, Corp*., 144 F.R.D. 99, 101 (N.D. Cal. 1992).
[41] *Kimberly-Clark Corp. v. James River Corp. of Virginia*, 131 F.R.D. 607 (N.D. Ga., 1989).
[42] *Beavis ex rel. Beavis v. Campbell County Memorial Hosp*., 20 P.3d 508 (Wyo. 2001).
[43] *Id*.
[44] Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, vol. 4, § 33:26, 1198-1199, (2007 ed., West).
[45] *Id*. at 1199.
[46] *Id.* at 1200 (citing *National Union Fire Insurance Co. v. Dowd & Dowd, P.C.,* 191 F.R.D. 566 (N.D.Ill.1999)).
[47] *Keeney v. Osborne*, ___S.W.3d ___ (2010 WL 743671 (Ky. App. 2010)

claims because the attorney's actions were "alleged to have directly affected the strength and strategy of the personal outcome of the personal injury trial."[48]

Bifurcation should not create a vehicle by which the defendant attorney can disguise their true identity. Consider claims against the UIM carrier in an automobile accident case. In Kentucky, the case law is clear that the UIM carrier is the real party in interest and must be named.[49] In the UIM setting, Kentucky has found:

> There is no more reason to create a legal fiction by substituting the name of the tortfeasor for the UIM carrier, when the carrier alone is the real party in interest in UIM cases, than there is a reason to do so when dealing with UM coverage. The issue of permitting a "legal fiction" to be employed has been laid to rest in an uninsured motorist claim which involves a direct action against the UM carrier.[50]

There is little difference between the role of an underinsured or uninsured motorist carrier who is represented by counsel in the bifurcated automobile accident case and the role of the former lawyer in a legal malpractice suit. The defendant attorney likewise should not be allowed to use bifurcation to create a fiction in an attempt to prove to the jury that their prior client is undeserving of damages in the underlying case. The jury should be told that it is the plaintiff's former attorney, who now, as a result of allegations of malpractice, is attempting to prove to the jury that his or her own client was not worthy of representation from the outset.

IV. CONCLUSION

In statistics released by the American Bar Association in 2012, plaintiff personal injury work is listed as the area of practice with one of the highest claims rates.[51] While personal injury cases appear to the uninitiated as lucrative with a short learning curve, the landscape is littered with clients who are forced to take woefully inadequate recoveries, whether through settlement or trial. Every personal injury case has the potential to go to a jury, yet many who offer their services to distraught and suffering consumers do not have the experience to do so. While thoughtful study and associating with mentors in this field of practice would go a long way to reduce the number of malpractice claims, far too many lawyers skip this important step in their career. When they do it is important for those of us who are consulted to right these wrongs to do so without compunction.

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[48] *National Union*, 191 F.R.D. at 567.

[49] Kentucky Rule of Civil Procedure 17.01 provides in part: "Every action shall be prosecuted in the name of the real party in interest...nothing herein, however shall abrogate or take away an individuals right to sue."

[50] *Earl v. Cobb*, 156 S.W. 3d 257, 261 (Ky. 2005).

[51] See The American Bar Association's Standing Committee on Lawyers Professional Liability*, The Profile of Legal Malpractice Claims: 2008-2011* (2012).

Gary L Brooks - *How to Defeat Affirmative Defenses in a Legal Malpractice case from the Plaintiffs Perspective*

Mr. Brooks has practiced law in Oklahoma City since 1975. Mr. Brooks has concentrated his practice in the field of medical negligence with an emphasis on birth trauma cases. He also handles products liability and other personal injury cases involving death, brain injury, or catastrophic injuries. He has obtained numerous million dollar or greater verdicts and settlements for his clients. Mr. Brooks has written numerous articles and is a frequent speaker at legal and medical programs. His office frequently has medical residents rotate through in order to become more familiar with the practical workings of the legal system.

ABPLA 2013 PRESENTATION

ELECTRONIC MEDICAL RECORDS – A DISASTROUS CASE STUDY

By: Gary L. Brooks

INTRODUCTION

Point of this presentation

What you should get out of it

SYNOPSIS

SUMMARY OF THE CASE

THE STAGE

Main Hospital

Heart Hospital

Hospital Health Network

Cardiology Group

Outside Providers

THE PLAYERS

Plaintiff, Mrs. V

Non-party Dr. SH (cardiologist)

Defendant, Dr. HV (cardiologist/electrophysiologist)

Defendant, Dr. SM (family practice)

Defendant, Dr. HS (rheumatologist)

Non-party, Dr. LNUK (orthopedist)

Defendant, Dr. T (orthopedist)

TIMELINE

3/1/10	Mrs. V appointment with Dr. SM – well woman exam. Labs done: CBC with differential; Lipid Panel; TSH; Comprehensive Metabolic Panel; Vitamin D 25 Hydroxy. Needs referral for Reclast.
3/3/10	Dr. SM referred to Dr. HS – appointment 4/5/10
4/5/10	Appointment with Dr. HS. Removed bloody fluid from knee. Ordered MRI, wear immobilizer brace on knee; stop warfarin – per Dr. HV (according to Dr. HS - said he talked to Dr. HV who agreed with him) – follow up in a week.
4/6/10	Stopped Warfarin
4/8/10	MRI at M Hospital
4/11/10	Dr. SM in office over weekend and sees MRI in her inbox – MRI shows unusual appearance (suggests sprain) – recommends she be evaluated by orthopedist. Refer if patient is in agreement.
4/14/10	M North May – Patient notified – referral submitted.
4/19/10	Referral confirmation letter sent to Mrs. V from Dr. SM re Dr. T referral
4/20/10	TH at Dr. SM.'s office – spoke with Mrs. V at home and gave her the appointment information – she will pick up her MRI before the appointment
4/22/10	Appt. with Dr. T – "Plan: Schedule [unable to read]. Follow up after approval." "Nurse Note at T's: We have called [insurance company], and Orthovisc injections are a covered benefit with medical necessity. We will order the medication and schedule her appointments." [Dr. T did not send Dr. SM a letter re his appointment and Dr. SM did not follow up with Dr. T after referring her] Routine mammogram that was scheduled at Dr. SM's office for this date – rescheduled to 5/6/10
5/3/10	Late in evening Mrs. V's son finds her and she is taken to M Hospital ER by ambulance.

There are multiple records in EMR: Legal, Administrative, Patient records.
So when you order medical records, you might only get Legal records, not records that are reserved for inhouse use.
The records you get are merely "reports"of records.
iPads cannot communicate with EMR. Devices that are lost??

WHAT WENT WRONG – A Case Analysis

SUMMARY OF SYSTEM FAILURES

1. Non-compatible medical records systems
2. Failure to provide for exchange of data
3. Failure of physicians to utilize existing system
4. Reliance on Electronic Medical Records Systems without old-fashioned common safeguards
5. Inability to get reliable, complete and consistent data printout

Audit trail
Run time module (get CD operating platform in order tobe able to read
records.
Default entries charting
task lists
staffing modules
backward dating entries--retroactive propogation of data throughout
record creating appearance that it was entered earlier when it was
entered later. (PCN allergy entered on Thursday but it appeared on
records entered on Monday)
--no time to make contemporaneous entries so they make them at
home. Passage of time=inaccurate entries.
EMR for storage of medical information
EHR you have to have the ability to read the EMR
practice modules for different specialties. Can the software integrate
with one another? Does the PCP see the consult notes?
Dictation of notes vs. keyboard entry of notes.
"Coumadin Syndrome" diagnosis. Different dx is limited to multiple choice
alternatives put in by IT personnel, not necessarily medical personnel

"The ones with the highest degree of inefficiency are now vested with the power to perpetuate those inadequacies"
"The system is driving medical care rather than medical care driving the system"
Imposing the system on medical care

David Drexler *A Case of Medical Molestation*

David Drexler is an unusually gifted Attorney with a unique background that has contributed to him being recognized as one of the most preeminent Personal Injury Attorneys in Los Angeles and the entire State of California. David has been practicing Personal Injury Law for over 36 years and has recovered over $150 million dollars on behalf of his clients. LA Direct Magazine has proclaimed David Drexler "A Big City Attorney with Small Town Values." LA Magazine has has nominated Drexler as "Trial Attorney of the Year".

THE DIALECTICS OF MEDICAL MOLESTATION CASES

Does sex sell in lawsuits against doctors who have sexually molested their patients?

DAVID DREXLER

THE LAW OFFICES OF DAVID DREXLER
www.daviddrexlerlaw.com

I. INTRODUCTION

In her bestseller, "*The Dialectic of Sex*", Shulamith Firestone, one of six children of Orthodox Jewish parents, born in Ottawa, Canada in 1945, captured on paper the new mores and attitudes which arose from the sexual revolution. Her book ignited the fire that spread through the 1960's Womens' Movement, establishing sexual equality in American society and profoundly changing prevailing perceptions towards unconsensual sex between adult female patients and doctors[1], resulting in more forgiving attitudes toward doctors' sexual transgressions.

This presentation offers anecdotal references from actual *Medical Molestation* cases.

II. LEGAL PLEADINGS AND PROCEEDINGS

Pleading alternatives include negligence and intentional torts, assault and battery, intentional infliction of emotional distress and applicable Statutory violations.

- The advantage of pleading intentional torts is the availability of punitive damages, avoidance of damage caps (M.I.C.R.A. in California) and non-dischargeability in bankruptcy.

- Disadvantages include the likely denial of insurance coverage for the intentional acts of the doctor or the reservation of rights by the doctor's malpractice carrier. Insurance carriers usually pay for the defense, but will not indemnify a verdict against the doctor for intentional torts. Expect a Declarative Relief action by the insurance company.

Collateral Proceedings

Police, Attorney General, Medical Boards and other Licensing Agencies.

California's Medical Board, for example, is extremely aggressive in prosecuting doctors accused of having any sexual contact with patients. In California, over the past six years, 78 doctors lost or surrendered their licenses for sexual misconduct, with the Board likely to terminate a doctor's licence for any sexual conduct forced upon a patient. The other 45 doctors disciplined kept their right to practice, most of them being placed on probation. Seven were given reprimands.
Please see Dr. Stuart Fischbein's California Medical Board *Firing Squad* at pg. 13.

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[1] "*Doctor*" in this outline, includes all medical health care professionals, physiatrists, chiropractors, rehabilitation specialists, osteopaths and physical therapists.

Dr. Arnold Serkin, a Podiatrist at the West Torrence Foot and Ankle Group, faces three criminal charges and license revocation because he allegedly told one patient *"to strip to her waist and then he stared at her breasts."* Another patient alleged Dr. Serkin *"pulled down her shorts without permission, exposing her genitals."* A third patient said *"Dr. Serkin rubbed the top of her thigh, asked if she wanted to be his wife and asked if he could look at her breasts."*

III. Discovery and Trial

1. Written Discovery, (*largely worthless.*)

2. 5th Amendment objections are raised by defense counsel to block testimony of the doctor in deposition; Not such a good strategy at trial.

3. The preparation of Plaintiff for deposition presents challenges where there are *seemingly* exaggerated descriptions of the details, as recalled by the victim/plaintiff, about exactly what actually happened between her and her doctor, the estimated amount of time which elapsed and explicit narratives with descriptions of unbelievably depraved conduct which can stretch the normal limits of credulity.

IV. CENTRAL CREDIBILITY CONSIDERATIONS FOR PLAINTIFFS

Psychological manifestations of the ***victim mentality*** include passive submission where female victims feel robbed of personal power, disabling them from taking any action to stop the offensive sexual conduct.

Extreme care must be taken to explain this to those men who lack understanding as to why the victim does not react quickly to stop the offensive conduct by doing *something* like screaming or putting up physical resistance to stop the unwelcomed sexual conduct by the doctor.
(Please refer to the Daily Journal article about an Orange County Judge's censure at p. 12.)

The ***trust*** we place in doctors is constantly reinforced in our society where doctors are glorified in movies and TV. The sudden, shocking sexual event confronting the victim creates confusion and presents an unforeseen circumstance outside of the normal range of experiences. It is, of course, natural to have trust and faith in doctors. So, when a female patient is exposed to unexpected and inappropriate sexual behavior by her trusted physician, it can result in an incapacity to act.

Such ***paralyzing*** emotions experienced by female patient victims translate into an inability to quickly formulate a strategy to do something to stop a sexual assault. These are well documented manifestations associated with Negative Personality Disorder and *Passive Aggressive Disorder.*

In Psychiatry, ***passivism*** is defined as the sexual submission to the will of another. ***Denial*** dictates inaction when a woman is subjected to an unexpected, unprovoked and unwanted sexual advance without any clue what she is supposed to say or do or how to respond to this horrifying hell brought on through no fault of her own. (D.S.M. IV.)

Shame and embarrassment result from the victim's fear of the consequences of disclosure and the resulting prosecution of the offending doctor. The thought of reporting a sexual attack would cause anyone to think twice about the far-reaching implications. A woman reporting a sex crime takes the risk of being blamed for what happened and having her credibility attacked in legal proceedings. There is no escaping the inevitable fallout on a marriage or other intimate relationship. The crippling fear of having to *tell all* to a husband, boyfriend or partner sends victims into *freeze mode.*

Dark thoughts and fear would have a paralyzing effect on anyone, especially someone who is ordinarily non-verbal and passive by nature. Even a usually forceful personality can be rendered speechless and completely immobilized when caught off guard by a perverted predator masquerading as a respectable physician.

In litigation, defense counsel routinely use aggressive tactics which include the character assassination of victim plaintiffs, portraying them as delusional psychotics or scheming seductresses. They will argue that the victim's inaction is evidence of consensual doctor-patient sex.

V. EXPERTS

A. Damage experts
B. Standard of care experts
C. Psychiatrists and psychologists
D. Human factors experts
E. Other Forensic Experts

VI. CASE EXEMPLAR

Jane Doe vs. Richard Heiss, M.D., Case # SPC 246959
Doctor-Patient Roofie-Sex case exemplar.
Pgs. 14-55.

Rohypnol

VII. CONCLUSION

Believability trumps beauty; it's not a beauty contest.

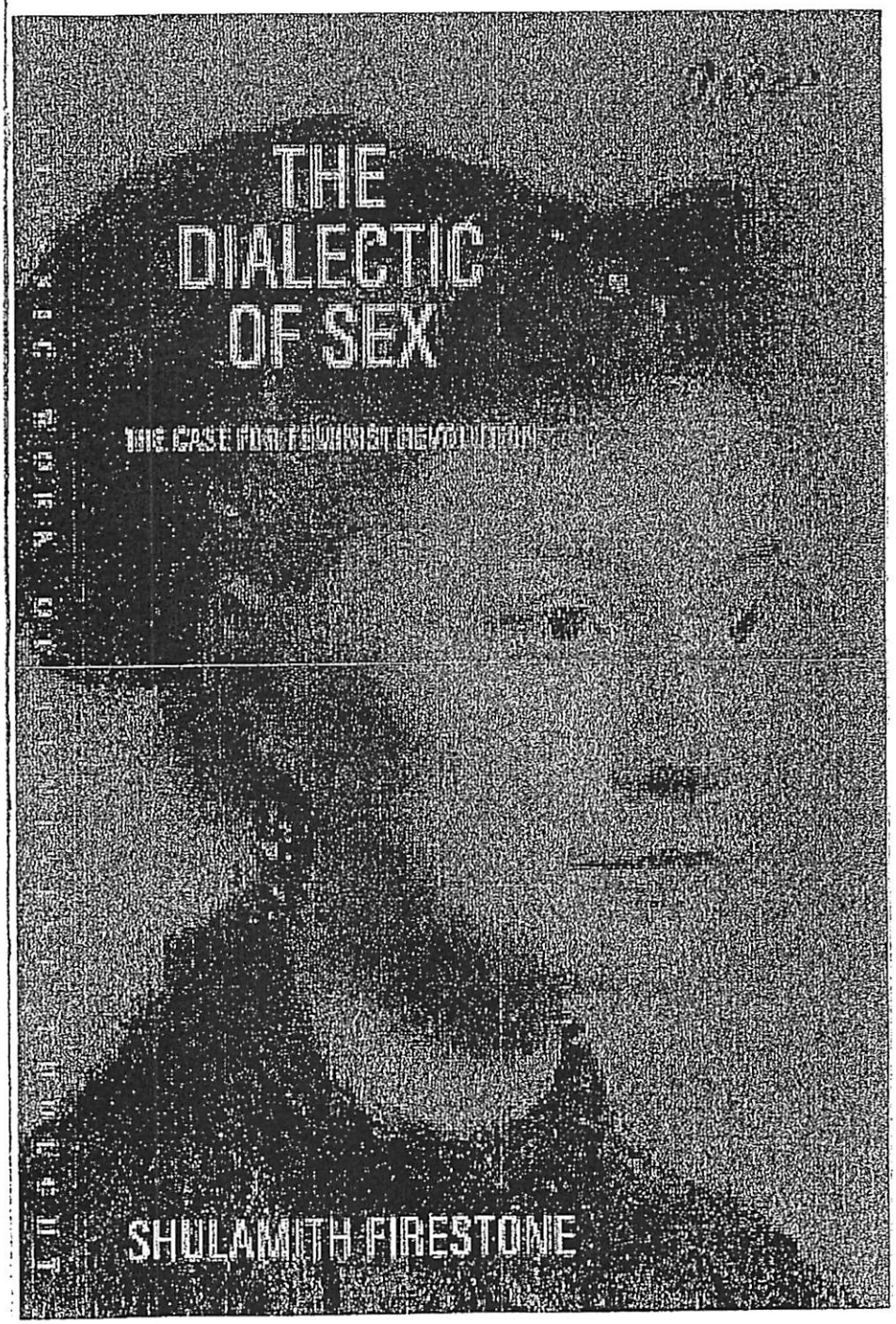
Ask your clients lots and lots of questions.

Social media postings can crush all credibility.

All that glitters is not gold.

LESSONS FROM THE LIFE OF PI

- **Belief in the Story.**
- **Faith in the Fight.**
- **Hope for Justice.**


THE DIALECTIC OF SEX
THE CASE FOR FEMINIST REVOLUTION
SHULAMITH FIRESTONE

Shulamith Firestone dies at 67: wrote feminist classic 'The Dialectic of Sex'

The reclusive author's 1970 book 'The Dialectic of Sex' became a feminist classic with its calls for a drastic rethinking of women's roles in the bearing and raising of children.

September 02, 2012 | By Elaine Woo, Los Angeles Times

Shulamith Firestone, whose 1970 book "The Dialectic of Sex" became a feminist classic with its calls for a drastic rethinking of women's roles in the bearing and raising of children, was found dead Tuesday in her New York City apartment. She was 67.

A recluse who struggled with mental illness in later years, the author apparently died of natural causes, said her sister, Miriam Tirzah Firestone.

Only 25 when "The Dialectic of Sex" was published, Firestone vaulted to prominence as a leading theorist of the second wave of feminism that crested in the 1960s and '70s. But unlike leaders such as Betty Friedan and Gloria Steinem, who made legal equality for women a priority, Firestone preached freedom from "the tyranny of the biological family," envisioning a brave new world in which fetuses were developed in artificial wombs and children were raised in communal households.

"A revolutionary in every bedroom cannot fail to shake up the status quo," Firestone wrote. "And if it is your wife that is revolting, you can't just split to the suburbs. Feminism, when it truly achieves its goals, will crack through the most basic structures of our society."

Subtitled "The Case for Feminist Revolution," Firestone's book was considered essential reading for feminists and in college courses on women's studies.

"No one can understand how feminism has evolved without reading this radical ... second-wave landmark," feminist writer Naomi Wolf wrote when the book was reissued in 2003.

Firestone emerged as a radical voice during a fertile era for feminist theory. Her "Dialectic" became a bestseller the same year as Kate Millett's "Sexual Politics," a feminist critique of works by D.H. Lawrence, Henry Miller and Norman Mailer; and Germaine Greer's "The Female Eunuch," which examined history, literature, biology and popular culture.

Some feminists believed that Firestone "had found the solution" to sexual inequality, according to Ruth Rosen in "The World Split Open" (2000), a history of the modern women's movement. But other feminists were incensed by her ideas, particularly because, Rosen wrote, Firestone seemed to accept men as the normative human being, rather than demanding that society accommodate — and honor —

The Oath of Hippocrates

I SWEAR by Apollo the physician, and Aesculapius, and Health, and All-heal, and all the gods and goddesses, that, according to my ability and judgment, I will keep this Oath and this stipulation — to reckon him who taught me this Art equally dear to me as my parents, to share my substance with him, and relieve his necessities if required; to look upon his offspring in the same footing as my own brothers, and to teach them this art if they shall wish to learn it, without fee or stipulation; and that by precept, lecture, and every other mode of instruction, I will impart a knowledge of the Art to my own sons, and those of my teachers, and to disciples bound by a stipulation and oath according to the law of medicine, but to none others. ¶ I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practise my Art. ¶ I will not cut persons labouring under the stone, but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption; and, further, from the seduction of females or males, of freemen and slaves. ¶ Whatever, in connexion with my professional practice, or not in connexion with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret. While I continue to keep this Oath unviolated, may it be granted to me to enjoy life and the practise of the art, respected by all men, in all times! But should I trespass and violate this Oath, may the reverse be my lot!

From The Genuine Works of Hippocrates, *translated from the Greek by Francis Adams, Surgeon, volume 2, London, 1849.*

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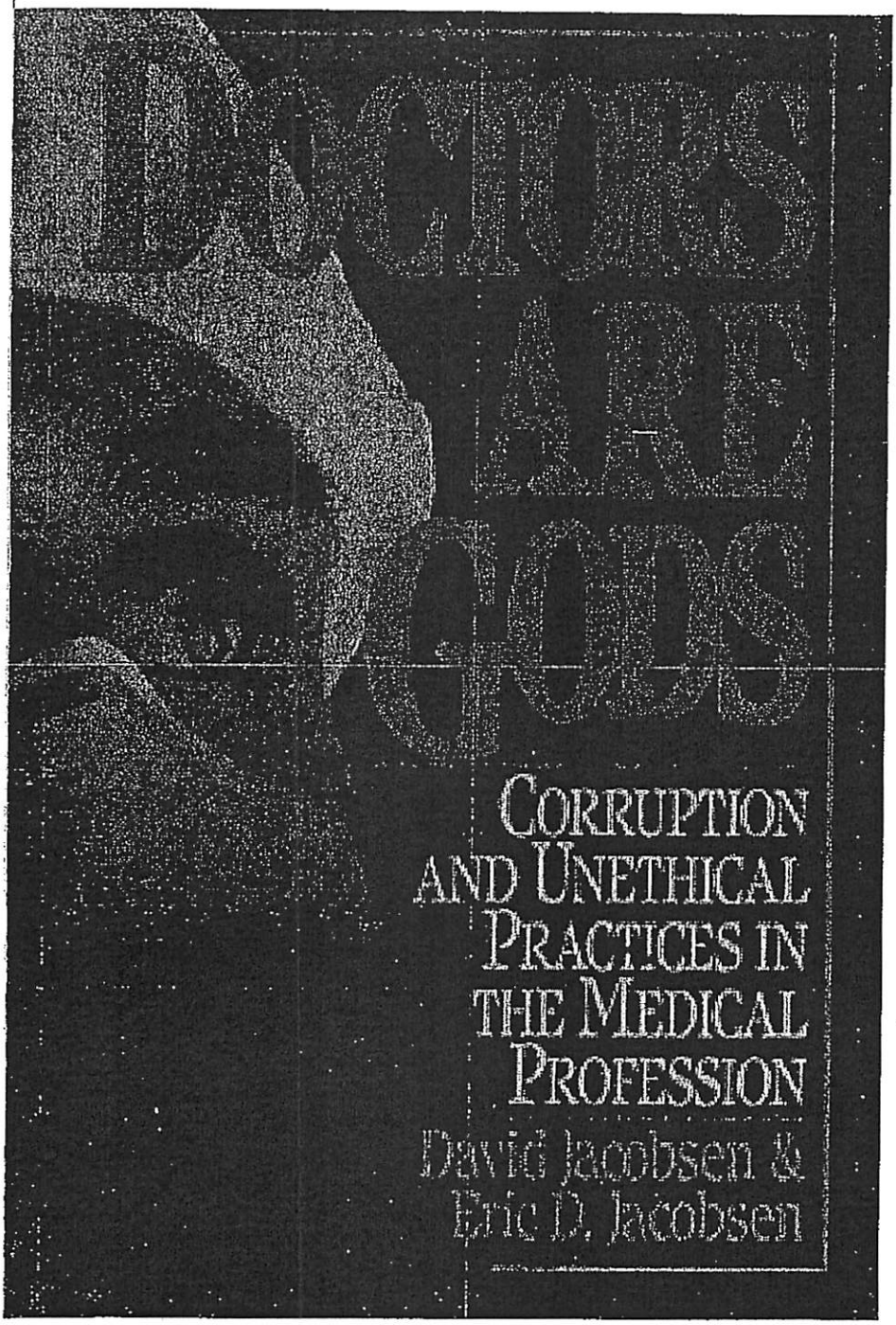
DOCTORS ARE GODS
CORRUPTION AND UNETHICAL PRACTICES IN THE MEDICAL PROFESSION
David Jacobsen & Eric D. Jacobsen


TRUST
ME
I'M
THE
DOCTOR

Psychiatrist loses lawsuit in fondling case

By FRANK KLIMKO
Daily News Staff Writer

VAN NUYS — A jury awarded $225,000 Tuesday to a woman who sued her psychiatrist claiming that he fondled her during weekend therapy sessions.

Karen Bomyea, 32, a radiology technician from Canoga Park, sued Dr. Irving Berent, 59, for sexual battery and psychiatric malpractice after a series of incidents she said occurred from July 1982 to June 1983 while she was in his care.

Bomyea sought $500,000 in damages, but the eight-woman, four-man jury that heard the case in the court of Judge Robert M. Letteau agreed on about half that amount.

Bomyea sought psychiatric help in 1981 after she realized she was suffering from anorexia, a nervous condition characterized by a chronic lack of eating, said David Drexler, her attorney.

Bomyea seemed to improve while under treatment at the Woodview-Calabasas Hospital and was discharged in 1982 to the care of Berent, who was on the hospital's staff, court records show.

Bomyea claimed that Berent failed to help her and instead fondled her at his Encino office during marathon sessions, Drexler said.

Berent denied all the allegations and claimed that Bomyea had a history of mental problems that caused her to imagine the incidents, said Mark Palmer, Berent's attorney. Berent has since moved to San [illegible].

CALIFORNIA

O.C. judge admonished for rape case comments

Judge Derek Johnson had said that the victim didn't put up a fight and that the sexual attack was "technical" only.

BY CHRISTOPHER GOFFARD

A longtime Orange County judge who said that a rape victim "didn't put up a fight" and that her sexual assault was only "technical" has been publicly admonished by a state agency that said his remarks seemed outdated, insensitive and possibly biased.

The Commission on Judicial Performance said Superior Court Judge Derek G. Johnson's comments breached judicial ethics.

At a sentencing in 2008, Johnson denied a prosecutor's call to impose a 16-year prison term on Metin Gurel, who had been convicted of rape, forcible oral copulation, domestic battery, stalking and making threats against his former live-in girlfriend.

On the day he raped her, prosecutors said, Gurel had threatened to mutilate the woman with a heated screwdriver.

Johnson imposed a six-year sentence.

"I'm not a gynecologist, but I can tell you something," the judge said, according to documents released Thursday. "If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted, and we heard nothing about that in this case.

"That tells me that the victim in this case, although she wasn't necessarily willing, she didn't put up a fight," the judge said.

The judge, who has been on the Orange County Superior Court since 2000, also declared the rape "technical" and not "a real, live criminal case."

"To treat this case like the rape cases that we all hear about is an insult to victims of rape," the judge said. "I think it's an insult. I think it trivializes a rape."

The San Francisco-based Commission on Judicial Performance said Johnson's remarks flew in the face of California law, which does not require proof that a rape victim tried to resist an attack.

In the commission's view, the judge's remarks reflected outdated, biased and insensitive views about sexual assault victims who do not put up a fight, the agency said in a news release Thursday.

"Such comments cannot help but diminish public confidence and trust in the impartiality of the judiciary." In his response to the commission and at his appearance, Judge Johnson conceded his comments were inappropriate and apologized.

Johnson remains on the bench.

"Neither Judge Johnson nor I will be making comment," said Johnson's attorney, Paul S. Meyer, when he was reached by phone Thursday.

The commission, which is composed of judges, lawyers and members of the public, voted 10 to 0 that Johnson deserved a public admonishment.

The commission said it did not learn of the judge's remarks until May 2012. The OC Weekly published a story on the judge's remarks in 2008.

christopher.goffard@latimes.com

000012

DR. FISCHBEIN FACES FIRING SQUAD FOR HAVING A CONSENSUAL DATING RELATIONSHIP AND SEX WITH AN UNMARRIED FEMALE PSYCHOLOGIST WHO INITIATED THINGS BY VOLUNTEERING HER ADVISE, COUNSEL AND SUPPORT FOR DR. FISCHBEIN'S POST DIVORCE DEPRESSION.

Stuart Fischbein, M.D., 51, a well respected Los Angeles OB/GYN, was convicted of having consensual sex with a patient. He pled no contest to the criminal misdemeanor charge of sexual exploitation and was sentenced to three years probation.

Dr. Fischbein, who practices in Century City and at The Woman's Place for Health and Midwifery Care in Camarillo, was accused by the Medical Board of California of having sex with his patient, a female psychologist.

Dr. Fischbein started dating his former patient, an attractive single psychologist, who started the relationship by offering support and conversation for what she herself noticed, during an office visit, was Dr. Fischbein's depression in the aftermath of an unwanted divorce. He took her to dinner and the opera, and, over a period of time, engaged in consensual sex, twice. Coincidentally, while they were dating, she scheduled an office appointment and Dr. Fischbein removed a benign cyst. Their relationship continued until the woman returned to her old boyfriend and married him. After she disclosed to her husband about her now-ended relationship with Dr. Fischbein, the boyfriend reported the doctor's conduct to the Medical Board.

In February, 2012, Los Angeles Administrative Law Judge, Samuel D. Reyes, recommended that the California Medical Board revoke Dr. Fischbein's license based on the accusations filed. California Business and Professions Code, Section 726, makes it a crime for a physician to have sex with a patient. Consent is not a defense.

The California Medical Board has asked Dr. Fischbein and prosecutors to submit arguments for hearing on whether the proposed penalty should be imposed.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

Plaintiff(s),	
vs.	No. CV 0000246959-SPC
RICHARD J. HEISS, II, M.D.; and DOES One through Fifty, inclusive, and, every DOE in between,	
Defendant(s).	

DEPOSITION OF

Tuesday, October 8, 2002

Bakersfield, California

Reported by: Erika Banuelos, CSR No. 11621

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ORIGINAL

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516 West Shaw Avenue, Suite 200 • Fresno, CA 93704 • (559) 224-2223

12:07:38 A. I sit down towards the end of the office in
12:07:44 just a regular chair, and he kind of sits down in a
12:07:49 chair, kind of in front of me and -- where his desk
12:07:53 is right by his -- his side. And he had -- he had
12:08:02 asked me, you know, about -- about the chest pain.
12:08:05 And he rolls his chair closer to me, and he starts,
12:08:10 you know, pressing on my chest and then on my back,
12:08:17 just -- basically just asking, you know, "Does this
12:08:20 hurt? Or "Does this hurt? Breathe in, breathe out."
12:08:25 He -- he had noticed -- he said, "You're
12:08:28 really stressed and everything." So after he had
12:08:31 checked and everything, by this time I had -- I had
12:08:35 my shirt off; so he was checking everything. He
12:08:42 stood up, and he had reached around -- around the
12:08:58 side of me where there was a -- like a metal cabinet
12:08:58 or something behind me, and he got a -- a glass,
12:08:58 little bottle out or something. I didn't really --
12:09:00 I just kind of glanced behind. I only saw that. And
12:09:05 he -- he poured some into a styrofoam cup. And I
12:09:10 don't know what it was. I know it was -- it was
12:09:12 yellow.
12:09:13 Q. The liquid itself or the cup?
12:09:15 A. The -- the liquid.
12:09:20 Q. And did he give -- he -- did he give that to
12:09:22 you to -- to drink?

12:31:10 1 little groggy. I -- I don't know.
12:31:12 2 For some reason, at the time it wasn't even
12:31:14 3 really processing as fast as everything was going on.
12:31:25 4 Meaning, I -- I -- you know, I knew -- I knew what
12:31:27 5 was going on, but for some reason I wasn't thinking
12:31:31 6 clearly as is this really happening? And he -- he
12:31:39 7 had taken my -- my skirt and panties off, and then
12:31:42 8 he -- he kind of put his hand behind my back and
12:31:48 9 lowered me down to the carpet.
12:31:51 10 Q. Did you -- when he did -- just to jump back
12 31:53 11 for a second, just very briefly.
12:31:56 12 Before that, when he did the exam on your
12:31:58 13 chest and everything else in the room for the chest
12:32:00 14 pain, had you already had your bra off and your shirt
12:32:04 15 off?
12:32:05 16 A. I had already my bra and my shirt off, yes.
12:32:10 17 Q. Okay. So when he came in and he -- he turns
12:32:13 18 you around and takes off your skirt and your panties,
12:32:15 19 and he lowers you to the ground. Am I correct?
12:32:15 20 A. Yes.
12:32:19 21 Q. And your recollection of things is that
12:32:20 22 while you could perceive that this was going on, it
12:32:23 23 just wasn't processing very well in your own mind
12:32:28 24 exactly what -- what was going on or why?
12:32:30 25 A. More as of what I was going to do about it.

12:32:35 1 or -- I mean, I knew what was -- I knew what was
12:32:41 2 going on but I -- I guess I was shocked. I guess you
12:32:44 3 could say I was in a real complete state of shock.
12:32:47 4 Not -- it was kind of hard to believe what was going
12:32:51 5 on, if that's what you mean.
12:32:55 6 Q. Now, did you say anything to him while this
12:32:57 7 was going on, that you can remember?
12:33:01 8 A. Just up to this point?
12:33:04 9 Q. Correct.
12:33:04 10 A. I had asked him what was going on, to which
12:33:08 11 he just said -- he said, "You look real, real
12:33:12 12 depressed and -- real depressed," and he said, "This
12:33:23 13 is something that would help you with -- with --"
12:33:28 14 I can't really remember how he said it. He had said
12:33:34 15 something to the effect that this is good for you and
12:33:37 16 this is going to help you.
12:33:40 17 Q. Now, up to the point where he puts his hand
12:33:45 18 behind your back and helped you lay down to the
12:33:48 19 ground, had you said anything like, "No, let me go,"
12:33:51 20 or anything along those lines? "I want to go home."
12:33:57 21 Do you remember saying anything?
12:33:59 22 A. I had told him when -- at the time that he
12:34:00 23 had come in and I was facing -- grabbing my stuff,
12:34:03 24 I told him I was leaving. And he said, "No. You
12:34:05 25 don't need to go yet. You're not in a state to --

12:34:09 you're not in a state of mind that you should be
12:34:10 driving yourself home." He says, "You need to stay
12:34:13 here for a little while longer."
12:34:15 Q. Okay. When he -- when he took off your --
12:34:19 your -- your skirt and your panties and laid you
12:34:21 down, did you say anything to him?
12:34:23 A. I asked him what was -- what he was doing.
12:34:27 Q. Okay.
12:34:29 A. And then I said that "This doesn't --
12:34:32 doesn't seem right." And he said not to worry about
12:34:35 it.
12:34:37 Q. What happened after that?
12:34:40 A. After that he reached down, and I told him,
12:34:47 "What are you doing? I'm -- I'm on -- I'm on my
12:34:50 period. I don't -- you know, I don't want to be
12:34:51 checked down there."
12:34:52 And he again said, "Don't worry about it."
12:34:54 And he took -- he took my tampon out and -- and then
12:35:00 he said he was going to just look down there. And
12:35:05 he -- he stuck his fingers there and said he was just
12:35:14 looking.
12:35:16 Q. You know, you -- were you able to see how he
12:35:19 took your tampon out?
12:35:21 A. I was on my back; so I can't exactly see
12:35:24 down there. But I'm assuming he just pulled it out.

12:35:29 Q. Okay. You were on your -- you were during
12:35:34 your cycle of your period at that point?
12:35:36 A. Yes.
12:35:41 Q. After he took out your tampon, what
12:35:44 happened? You said he used his fingers or
12:35:47 something --
12:35:47 A. He used --
12:35:47 Q. -- to do something?
12:35:48 A. He used two of his fingers, from what I
12:35:53 could -- what I could tell, and he said he was just
12:35:56 going to check down there.
12:35:59 Q. Okay. Did you -- did you then feel him do
12:36:01 something do you know there?
12:36:02 A. Yes.
12:36:02 Q. Okay.
12:36:02 A. He stuck his fingers in.
12:36:05 Q. Okay. So he told you he was going to
12:36:07 examine you down there, and he then he used his
12:36:11 fingers down there --
12:36:11 A. He --
12:36:11 Q. -- or just looked down there or something
12:36:13 like that?
12:36:13 A. He said he just wanted to check down there
12:36:16 and see how much room I had. I don't know what he
12:36:18 meant by that but --

12:36:20 Q. Okay. And after -- and did you then feel
12:36:22 him insert something like his fingers into your
12:36:27 vagina?
12:36:27 A. Yes.
12:36:27 Q. And what happened after that?
12:36:33 A. He pulled them back out, and he said, "You
12:36:39 have a lot of room down there." And then he -- he
12:36:51 stuck his head down there.
12:37:01 Q. How long did he have his head down there?
12:37:04 A. A long time. I don't know how long.
12:37:14 Q. Do you remember feeling as though you were
12:37:17 being manipulated in some way down there, physically
12:37:22 touched down there --
12:37:22 A. Yes.
12:37:22 Q. -- in some way?
12:37:24 As far as could -- as -- could you see what
12:37:27 was -- I -- I'm assuming you couldn't see because of
12:37:40 the way you're describing the way you were laying
12:37:40 down, but I need you to confirm.
12:37:40 Could you see or not see what he was doing?
12:37:40 A. I could see his head right there, and
12:37:42 obviously I could feel his head between my thighs.
12:37:49 Q. Okay. And then after that, did he do
12:37:53 anything else?
12:37:57 A. That lasted, like I said, for a long time.

12:37:59 1 And then he -- when he was done doing that, he pulled
12:38:07 2 his head back up, and that's when I -- I started to
12:38:14 3 try to get up. And there were words spoken in
12:38:18 4 between all this. I'm just talking about what
12:38:21 5 physically was happening.
12:38:22 6 Q. Okay. So physically, after he takes his
12:38:24 7 head -- moves his head out of the way again, what
12:38:28 8 physically happens next?
12:38:30 9 A. I -- I tried getting up, and I -- basically
12:38:33 10 I sat up and then put my hands on the ground so I
12:38:36 11 could stand up. And he just -- he just kind of said
12:38:49 12 that I owed him oral -- oral sex on him because he
12:39:06 13 had did it on me.
12:39:10 14 Q. Okay. And did you -- did that follow up
12:39:14 15 with you doing something to him?
12:39:17 16 A. I said -- I said no. And I started get up,
12:39:22 17 and he -- he stood up on his knees, and he kind of
12:39:29 18 put his hand, like -- like, behind my neck area. And
12:39:32 19 he said, "Oh, come on. There's nothing wrong with
12:39:36 20 it." And -- and he stuck his penis in my mouth.
12:39:49 21 Q. And did you have -- so did he and you then
12:39:59 22 engage in oral sex for awhile at that -- from -- with
12:40:04 23 his penis staying in your mouth?
12:40:11 24 A. Um, it was in my mouth, if that's what you
12:40:13 25 mean.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

, Plaintiff(s), vs. RICHARD J. HEISS, II, M.D.; and DOES One through Fifty, inclusive, and, every DOE in between, Defendant(s).	No. CV 0000246959-SPC

DEPOSITION OF RICHARD J. HEISS, M.D.

Wednesday, October 9, 2002

Bakersfield, California

Reported by: Erika Banuelos, CSR No. 11621

12:04:12 A. No.

12:04:14 Q. Is there any reason why you did not think
12:04:16 that this patient should be referred out to another
12:04:19 doctor because of whatever perceptions you had that
12:04:24 she had some romantic inclination toward you?

12:04:29 A. I felt it was a symptom of her illness, and
12:04:31 I felt that we were making improvement.

12:04:35 Q. How was she improving?

12:04:37 A. Um, in several visits, even in some of her
12:04:41 father's letters, he would state that she was up and
12:04:44 down and -- but overall better. And, um, the --
12:04:48 adding the neuroleptic Zyprexa seemed to make her
12:04:54 actively delusional to the extent that she -- I
12:05:00 believe she had fantasized this thing with me and had
12:05:05 been telling her friends, apparently, or her family
12:05:10 and filed a complaint with the policeman --
12:05:13 department apparently --

12:05:18 Q. Let's go to the next --

12:05:19 A. -- in retrospect.

12:05:21 Q. Let's go to the next documented office visit
12:05:24 so we can finish the chart.

12:05:30 MR. CONNELY: So now we're on date
12:05:32 December 21st, 1999. I think that's the next one.

12:05:53 THE WITNESS: December 21 or 9?

12:05:57 MR. CONNELY: After November 3rd I have

12:06:01 December 21 that the -- let's see. Or maybe I'm out
12:06:02 of order. Oh, yeah. December 9.
12:06:02 MR. DREXLER: Okay.
12:06:24 Q. (By Mr. Drexler) What was the reason for
12:06:26 the visit on --
12:06:29 MR. CONNELY: Do you have it? It's
12:06:29 December 9th.
12:06:31 MR. DREXLER: I'm looking for it.
12:06:38 I have December 21st.
12:06:40 December 9th. It's out of order.
12:06:43 Q. (By Mr. Drexler) Okay. Is there anything
12:06:47 in the -- okay. Strike that.
12:06:51 You have impression Number 1, depression,
12:06:53 panic, social phobia; and Number 2, seizure disorder.
12:06:59 What notes do you have in your chart
12:07:01 concerning the first impression?
12:07:06 A. Awakens a lot at night with sore jaw; so we
12:07:11 think she was having seizures at night. Um --
12:07:18 Q. My question is what notes do you have on
12:07:20 that date regarding the first impression, starting
12:07:27 with the word depression, panic, social phobia?
12:07:34 A. That was a carryover from the previous
12:07:39 visit.
12:07:40 Q. Okay. So the answer is there are no
12:07:41 notes --

12:32:01 A. Depression, panic disorder, seizure
12:32:04 disorder.
12:32:07 Q. And tell me what notes exist regarding the
12:32:11 depression and panic disorder.
12:32:13 A. I changed her Zoloft medication.
12:32:20 Q. No other notes about anything related to the
12:32:25 depression or panic disorder? It was just a
12:32:29 carryover, then, from other --
12:32:31 A. Correct.
12:32:32 Q. -- visits?
12:32:33 As of this point in time, since January of
12:32:41 '98, approximately two years -- a little over two
12:32:45 years, we do not see in your records a diagnosis of
12:32:51 schizophrenia. Correct?
12:32:54 A. Correct.
12:32:54 Q. We do not see a diagnosis of delusional
12:32:58 behavior. Correct?
12:33:00 A. Correct.
12:33:01 Q. You are familiar with the DSM-IV. Correct?
12:33:04 A. Correct.
12:33:05 Q. And did you ever consult the DSM-IV in
12:33:10 making any diagnosis?
12:33:12 A. I do not recall.
12:33:13 Q. Did you do so regarding Miss ?
12:33:16 A. I do not recall. I have used it with other

12:33:18 patients.

12:33:22 Q. What are the criteria under the DSM-IV for
12:33:28 schizophrenia?

12:33:31 A. Um, there are many different types of
12:33:33 schizophrenia.

12:33:35 Q. What type of schizophrenia would be
12:33:37 applicable to Miss ?

12:33:43 A. Um, I was tossing around in my head in
12:33:45 retrospect, after she got worse, and then reviewing
12:33:51 her chart backwards. It seemed to click and make
12:33:56 sense that in retrospect she had some type of bipolar
12:34:03 depression with delusional thinking, along with some
12:34:08 things that weren't real, this deja vu stuff, escape
12:34:14 from reality.

12:34:15 Q. Okay.

12:34:15 A. So I -- I wasn't 100 percent sure where to
12:34:18 go with it.

12:34:19 Q. Okay. I understand.

12:34:19 But what would be the criteria for that type
12:34:22 of schizophrenia, if it existed?

12:34:27 A. I wasn't sure it existed.

12:34:31 Q. I understand.

12:34:31 A. The delusional thinking, escape from
12:34:33 reality.

12:34:36 Q. According to the DSM-IV, those are two

13:17:33 17th of October or any other date, it is your
13:17:38 testimony that you did not have any inappropriate
13:17:52 sexual conduct or contact with Miss .
13:17:52 Correct?
13:17:52 A. Correct.
13:17:52 Q. You did not have oral sex with her.
13:17:52 Correct?
13:17:52 A. Correct.
13:17:52 Q. Did not have intercourse with her?
13:17:56 A. Correct.
13:18:04 Q. And you know, I -- I don't want to get into
13:18:06 some situation where I'm using words and you're
13:18:10 understanding them differently.
13:18:13 I'm talking about any type of what a normal
13:18:15 person would consider to be sexual conduct or
13:18:19 contact. You did not have that at any time with
13:18:23 Miss .
13:18:23 A. Correct.
13:18:24 Q. Is that correct?
13:18:25 A. That's correct.
13:18:27 Q. And did you ever provide her with any liquid
13:18:30 to drink during any of your visits that would cause
13:18:33 her to become physically incapacitated?
13:18:37 A. No, I did not.
13:18:38 Q. Do you have any such liquid in your office

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF KERN

CERTIFIED COPY

- - - - - - - - - - - - - - - - - - - -

Plaintiff,)

V.) NO. CV 0000

RICHARD J. HEISS II, M.D.; and) 246959-SPC

DOES ONE through FIFTY, inclusive,)

and, every Doe in between,)

Defendants.)

- - - - - - - - - - - - - - - - - - - -

DEPOSITION OF MARK S. LIPIAN, M.D., Ph.D.

FRIDAY, APRIL 11, 2003,

BEHMKE REPORTING & VIDEO SERVICES

BY: JUDY A. MANFRED, CSR #4748

1320 ADOBE DRIVE

PACIFICA, CALIFORNIA 94044

(650) 359-3201

strange, bizarre, extreme and to tend to carry certain family characteristics in a given patient -- family characteristics, meaning characteristics of delusional experience, not of the family, but of the delusional experience that are similar.

So, again, if I am to accept that what Dr. Heiss is saying currently is true, that nothing happened between himself and Ms. : on the night in question and that he was suddenly confronted with what sounds like extreme, bizarre allegations, and then we go on to read elaborations on those allegations that are even more extreme and seemingly bizarre in their character, that is entirely consistent with these prior recalled experiences of Ms. being of delusional nature as well, because they are violent, extreme, bizarre.

Q. How are you aware of the standard of care of family practitioners in treatment, in what the acceptable treatment is with delusional conduct? Let me give you an example.

My expert, a family practice doctor, testified that as a Board Certified family practice doctor, that it is unacceptable in a standard of care to treat a delusional patient, assuming you take that hypothesis that the patient is delusional by playing into the

basically two things. One, a tendency to contradict herself and/or contradict others in an opportunistic way and strictly an opportunistic way that simply does not have support in psychiatric reality, such things as saying that she did not wish to -- on some accounts, saying that she did not wish to disclose to the police officer, Ryan Floyd, in the emergency room what had happened -- she alleges happened with Dr. Heiss because she recognized him as a member of her church, he might spread the story around and she was embarrassed about that possibly happening.

Q. You have this on your notes, right?

A. Yes.

Q. Okay. Tell me your second -- you said inconsistency of behaviors and number two?

A. Well, the internal inconsistency of behaviors. And number two is the contradictions of Ms. with herself in different accounts of the alleged events regarding events or aspects of the alleged incidents that are far too psychologically meaningful and important to allow for the contradiction being simply the problem of memory.

Q. Give me an example. I know you have it in your notes. Just give me an example.

A. Well, an obvious example, for instance, would

be the allegation to the police that oral copulation, though requested by Dr. Heiss, on the part of Ms. . was refused and not pursued by Dr. Heiss. His penis never entered her mouth. The account by Ms. - at her deposition was that not only did the penis enter her mouth, but that she thinks that Dr. Heiss climaxed.

It is impossible, in my opinion, to a reasonable medical probability from a psychiatric point of view, to account for such a discrepancy in memory of an event of such magnitude and importance to Ms. herself to account for such an event, simply in terms of memory defect.

Q. Okay. So if I understand this broad brush opinion, that if you're assuming that the admission by Dr. Heiss in the taped telephone conversation had nothing to do with playing into the delusions, but was a true admission of conduct, is your opinion based on inconsistencies and contradictions that the sex that occurred was consensual?

A. Yes, that there was consensual flirting, leading to consensual sexual behavior, more likely than not, just as is described in that conversation, oral only, not involving coitus.

Q. And is there ever an occasion between patient

MARK B. CONNELY, Bar No.: 125693
ALISA R. KNIGHT, Bar No. 153269
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(805) 541-8350

Attorneys for Defendant,
RICHARD J. HEISS, M.D.

APR 17 2003

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

Plaintiff,

vs.

RICHARD J. HEISS, II, M.D.; and DOES One through Fifty, inclusive, and, every DOE in between,

Defendants.

CASE NO. CV-0000246959-SPC

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE ANY TESTIMONY REGARDING A SUSPICION DEFENDANT USED A "DATE RAPE DRUG", OR THE LIKE, ON PLAINTIFF [No. 8 of 14]

DATE: 4/28/03
TIME: 9:00 a.m.
DEPT: Fourteen (14)
BEFORE: Hon. Sidney P. Chapin

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant RICHARD J. HEISS, M.D. will move this Court for an order precluding Plaintiff and/or witnesses called by her from offering testimony regarding any suspicion that Plaintiff was improperly drugged or given a date rape drug by Defendant on the date of the alleged sexual contact. The probative value of this testimony, if any, is substantially outweighed by the probability it will create undue prejudice to Defendant and substantially confuse the issues at trial. This being true, it is appropriate to exclude this testimony pursuant to Evidence Code, section 352.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This is, in part, akin to a psychiatric malpractice action for injuries allegedly sustained by Plaintiff as a result of the care and treatment rendered to her by Defendant and as a result of his alleged sexual contact with her.

During Plaintiff's deposition, she testified she had a suspicion that Defendant had given her an unidentified liquid which incapacitated her (much like the "date rape drug" GHB or rufinol). However, Plaintiff and her attorney have produced no evidence whatever to support this statement and it amounts to a mere speculation or suspicion. Plaintiff further testified that she was unable to physically resist Defendant's unwanted sexual contact as a result of the drug, but following the alleged incident dressed herself and drove home. Defendant anticipates that Plaintiff, her attorney(s), and/or her witness(es) will attempt to offer the above speculative testimony at trial.

II. THE TESTIMONY AT ISSUE IS PROPERLY EXCLUDED UNDER EVIDENCE CODE, SECTION 352.

Evidence Code, section 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that it will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In the case at bar, Plaintiff, in essence, concedes her belief that she was drugged immediately precedent to the alleged incident is based only on suspicion. Thus, there is no probative value to this statement and it presents the actual danger of unfair prejudice to Defendant and confusion of the issues at trial. Any probative value of this testimony is substantially outweighed by the risk of the undue prejudice to Defendants and confusion of the issues. Accordingly, it is appropriate to grant Defendant's motion and exclude these statements at trial.

III. CONCLUSION

For the reasons set forth above, Defendant respectfully requests any testimony

regarding Plaintiff's (or any other person's) suspicion she was given a "date rape" drug, GHB, Rufinol, or other incapacitating substance immediately precedent to the alleged sexual contact, be excluded pursuant to Evidence Code, section 352.

DATED: April 15, 2003

BONNE, BRIDGES, MUELLER, O'KEEFE & NICHOLS

By _____
MARK B. CONNELY
Attorneys for Defendant,
RICHARD J. HEISS, M.D.

000034

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 and not a party to the within action; my business address is 1035 Peach Street, Suite 201, San Luis Obispo, California 93401-2700.

On April 16, 2003, I served the foregoing document described as:

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE ANY TESTIMONY REGARDING A SUSPICION DEFENDANT USED A "DATE RAPE DRUG", OR THE LIKE, ON PLAINTIFF

on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED MAILING LIST

[ ] (BY MAIL)
[ ] I deposited such envelope in the mail at San Luis Obispo, California. The envelope was mailed with postage thereon fully prepaid.
[ ] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Luis Obispo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on April ___, 2003, at San Luis Obispo, California.

[X] (BY OVERNIGHT MAIL)
[X] I deposited such envelope in the overnight mail service at San Luis Obispo, California. The envelope was delivered overnight
[] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Luis Obispo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on April 16, 2003, at San Luis Obispo, California.

[ ] (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
Executed on April ___, 2003, at San Luis Obispo, California.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Cynthia A. Parmater

Cynthia A. Parmater

000035

SERVICE LIST

Re: n v. Heiss
Case No. 246959 SPC

Attorney for Plaintiff
David Drexler, Esq.
Law Offices of David Drexler
13808 Ventura Boulevard
Sherman Oaks, CA 91423-3604

000036

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ALISA R. KNIGHT, Bar No. 153269
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APR 17 2003

Attorneys for Defendant,
RICHARD J. HEISS, M.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

Plaintiff,

vs.

RICHARD J. HEISS, II, M.D.; and DOES One through Fifty, inclusive, and, every DOE in between,

Defendants.

CASE NO. CV-0000246959-SPC

MOTION IN LIMINE TO PRECLUDE PLAINTIFF'S USE OF THE TERM "RAPE", OR "FORCIBLE INTERCOURSE" OR THE LIKE, OR OTHER CHARACTERIZATION OF ALLEGED SEXUAL CONTACT AS NONCONSENSUAL [No. 10 of 14]

TRIAL DATE: 4/28/03
TIME: 9:00 a.m.
DEPT.: Fourteen (14)
BEFORE: Hon. Sidney P. Chapin

INTRODUCTION

Defendant RICHARD J. HEISS, M.D. anticipates that, if Plaintiff and her attorneys are not admonished otherwise, they will attempt to inform the jury that she was the victim of alleged "rape" and/or "forcible intercourse" at the time of the alleged sexual contact. Defendant respectfully submits that this would be highly improper and extremely prejudicial for Plaintiff and/or her attorneys to do and, therefore, requests that each be admonished and instructed never to make such a reference, comment, or characterization in the presence of the jury or prospective jurors herein.

ARGUMENT

I.

THE JURY SHOULD NOT BE TOLD THAT THE DEFENDANT COMMITTED "RAPE", "FORCIBLE INTERCOURSE", OR ANYTHING OF THE LIKE; NOR SHOULD ANY SUCH CHARACTERIZATION BE MADE OR COMMUNICATED

Pursuant to Evidence Code, Section 352, any statement to the jury, or in its presence, to the effect that Plaintiff was the victim of "rape", "forcible intercourse", or the like, is substantially more prejudicial than it is probative to any issue properly submitted in this case. Summers v. A.L. Gilbert Co. (1999) 69 Cal. App. 4th 1155, 1187.

While Defendant does not object to characterization of the alleged sexual contact as "sexual contact" as defined in the Business & Professions Code or as "negligence", he does object to any assertion that it was "rape" or "forcible intercourse" (or any other term implying criminality and/or violence). First, Plaintiff, when deposed, never included this assertion as part of her testimony or the basis for her complaint. Second, there is no foundation for such an assertion insofar as no evidence or authority for such a statement has been produced by Plaintiff. Third, there has been no showing that any purported "force" or "violence" was committed by Defendant herein. Finally, and perhaps most importantly, the jury could be unduly confused by the use of these terms or characterizations.

II.

THE JURY SHOULD NOT BE TOLD THAT THE ALLEGED SEXUAL CONTACT WAS RAPE, FORCIBLE INTERCOURSE, CRIMINAL, VIOLENT OR THE LIKE

In a similar manner, any characterization of Defendant's conduct during the alleged sexual contact would clearly be more prejudicial than probative of the issues herein. Defendant does not object to Plaintiff's characterization of the alleged sexual contact as "sexual contact" as defined in the Business & Professions Code or "negligent"

or "below the standard of care". But any statement in the jury's presence, which tends to label the alleged sexual contact as "rape", "forcible intercourse", "criminal", "violent", or the like, could unduly confuse the jury, waste time, and would certainly be unfair to Defendant. Plaintiff has not produced any support for the assertion that the alleged sexual contact was "forcible" or "violent". No physical or forensic proof has been proffered by Plaintiff in this regard, as none exists. She simply has not demonstrated that the alleged sexual contact was violent or forceful.

CONCLUSION

It is therefore respectfully requested that this Court preclude Plaintiff, Plaintiff's witness(es), and each of her attorneys of record, and so instruct and admonish each said person that he or she is precluded, from making any reference whatsoever to sexual contact by Defendant which was "rape", "forcible", "violent" or "criminal", or the like, while in the presence of jurors and/or prospective jurors.

DATED: April 15, 2003

BONNE, BRIDGES, MUELLER, O'KEEFE & NICHOLS

By _____
MARK B. CONNELY
ALISA R. KNIGHT
Attorneys for Defendant,
RICHARD J. HEISS, M.D.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 and not a party to the within action; my business address is 1035 Peach Street, Suite 201, San Luis Obispo, California 93401-2700.

On April 16, 2003, I served the foregoing document described as:

MOTION IN LIMINE TO PRECLUDE PLAINTIFF'S USE OF THE TERM "RAPE", OR "FORCIBLE INTERCOURSE" OR THE LIKE, OR OTHER CHARACTERIZATION OF ALLEGED SEXUAL CONTACT AS NONCONSENSUAL

on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED MAILING LIST

[ ] (BY MAIL)
[ ] I deposited such envelope in the mail at San Luis Obispo, California. The envelope was mailed with postage thereon fully prepaid.
[ ] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Luis Obispo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on April ___, 2003, at San Luis Obispo, California.

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[ ] (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
Executed on April ___, 2003, at San Luis Obispo, California.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Cynthia A Parmater

6/01

BAKERSFIELD POLICE DEPARTMENT
SPECIAL REPORT

4/3

CASE 01-46644

DATE 11/19/01

CRIME OR INCIDENT RAPE INVESTIGATION

CRIME OR INCIDENT DATE 11/19/01

LOCATION OF INCIDENT:

STAMP HERE IF REQUIRED

REPORTING PARTY:

SUBJECT: RICHARD HEISS WMA 40's
500 Old River Road, Suite 110 - 664-0212

INVESTIGATING OFFICER(S): D. Opheim, #888

DETAILS:

On 11/19/01, at approximately 1730 hours, I was dispatched to regarding a late-reported rape report.

Upon arrival, I contacted who told me she was seeing her doctor, Heiss, for approximately four years with various health problems. said her major health problem that she saw Heiss was for her seizures. said on 10/17/01 she had an appointment to see Heiss at 500 Old River Road, Suite 110. She said Heiss removed two moles, one from her chest and one from her back. Heiss also gave her a piece of paper with his pager number on it and told her to call him if she had any other problems or if she wanted to talk. stated Heiss also acted as a counselor for her because she said she had a history of depression and other mental issues.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

dictated: 11/19/01 1945
dgw 11/23/01 1222 FP
TYPIST/DATE/TIME

BY OFFICER D. OPHEIM #888
NUMBER

APPROVED

PD643631 Rev. 7/82 HLS

000041

KERSFIELD POLICE DEPARTMENT
SPECIAL REPORT

ASE 01-46644 DATE 11/19/01

CRIME OR INCIDENT RAPE INVESTIGATION

CRIME OR INCIDENT DATE 11/19/01

said on 10/18/01, at approximately 1730 hours, she was feeling "stressed out" from school and other things. She said she was having chest pains because of the stress. At approximately 1730 hours, Heiss called her at her residence and asked her if she was okay. told Heiss that she was having chest pains and he advised her to come into his office. said she questioned him about the late hour and he said he was working late. said she arrived at Heiss' office at approximately 1800 hours. She said she was extremely tired and depressed and stated at the time she was having a problem with low self-esteem. said once in the office, Heiss gave her an unknown-type beverage in a Styrofoam cup. said she has never drank alcoholic beverages before and did not know what was in the cup. said Heiss did make reference that there was alcohol in the cup and it would relax her and the alcohol was what she needed. stated the liquid and noted it had a strong chemical taste and burned when she drank it. said she drank approximately three ounces of the liquid. said Heiss encouraged her to drink more but she refused.

said Heiss left the room momentarily to answer the phone in another room. When he returned, he was wearing only his pants. said she was feeling extremely groggy and did not think it was unusual that Heiss removed his shirt and was now sitting in front of her, asking her questions about her chest pains. Heiss asked her to remove her shirt and when she did, Heiss examined her chest and back areas, telling her she may have kidney stones. Heiss left the room again momentarily and when he returned he was completely naked. said she stood up and turned away from Heiss and began gathering her items to leave the doctor's office. Heiss approached her from behind and turned her around. At that point, Heiss directed her toward the floor and laid her on her back on the floor. said she was extremely groggy and was feeling unconscious of her surroundings. said she did not know if she was feeling this way because of the beverage she drank or the medication she took for her seizures. Heiss unbuttoned her skirt and removed her skirt and panties. said she was on her menstrual cycle and Heiss removed her tampon from her vagina. Heiss then stuck an unknown number of fingers in her vagina and said, "I'm just going to check down here." Heiss lowered his head toward her pelvic area and began licking her vagina. said she could move but she was finding it to be very difficult to do simple movements such as moving her arm. said she felt extremely exhausted while laying on the floor and at one point while Heiss was licking her vagina she began losing consciousness as if she was falling asleep. said Heiss asked her if he was "boring" her but she could not reply. said she could remember Heiss telling her that she was pretty and it was a good thing for them to be together and she could remember telling him that she did not think it was proper for them to be together.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

dictated: 11/19/01 1945
dgw 11/23/01 1222 FP
TYPIST/DATE/TIME

BY OFFICER D. OPHEIM #888
NUMBER

APPROVED

PD643631 Rev. 7/82 HLS

000042

ASE 01-46644 DATE 11/19/01

CRIME OR INCIDENT RAPE INVESTIGATION

CRIME OR INCIDENT DATE 11/19/01

Heiss used his hands by directing his penis into her vagina. . said Heiss was having trouble sticking his penis into her vagina and was having a hard time getting his penis erect. Brandom stated Heiss eventually put his penis in her vagina and she had pain in her vagina at the moment of penetration. i said Heiss had sex with her and when he finished he stood up and put his clothes on. said she was still feeling extremely groggy and she stood up and put her clothes on. said she walked to her vehicle and while she was walking out, Heiss said, "Are you okay with this?" said she did not reply. When she got to her vehicle, Heiss said, "The next time I want to see you is in a hotel room."

.aid for the next few days, Heiss called her several times and asked her if she was okay with what happened but she would not reply. , said she did see Heiss approximately two and a half weeks after the incident where she went to him for a medical reason. She said nothing unusual occurred.

said the day after the incident, there was bruising on her lower back from the floor and the inside of her thighs. said she did not call police immediately because she was confused and did not know what to do. i said she called police approximately three weeks ago but stated she knew the officer who arrived on scene to take the report and felt embarrassed and did not make the report. said she called the Bakersfield Police Department and talked to Detective Wooldridge who advised her to make the police report and she requested that Detective Wooldridge handle the case.

No further.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

dictated: 11/19/01 1945
dgw 11/23/01 1222 FP
TYPIST/DATE/TIME

BY OFFICER D. OPHEIM #888
NUMBER

APPROVED

PD643611 Rev 7/87 HLS

000043

EDWARD R JAGELS
DISTRICT ATTORNEY
KERN COUNTY
BY: JUDITH KRECH DULCICH
DEPUTY DISTRICT ATTORNEY
1215 TRUXTUN AV
BAKERSFIELD, CA 93301

TELEPHONE: (661) 868-2340

ATTORNEYS FOR PLAINTIFF

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN

BAKERSFIELD JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, V. RICHARD JAMES HEISS DEFENDANT(S).	NO BK01-46644 BP CASE DA CASE: COM 0440677 MISDEMEANOR COMPLAINT 616874

I, THE UNDERSIGNED, SAY, ON INFORMATION AND BELIEF, THAT IN THE COUNTY OF KERN, STATE OF CALIFORNIA:

COUNT: 001, ON OR ABOUT OCTOBER 18, 2001, RICHARD JAMES HEISS, A PHYSICIAN, SURGEON, PSYCHOTHERAPIST, COUNSELOR, DID WILLFULLY AND UNLAWFULLY ENGAGE IN AN ACT OF SEXUAL INTERCOUSE, SODOMY, ORAL COPULATION OR SEXUAL CONTACT WITH A PATIENT OR CLIENT, IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 729(A), A MISDEMEANOR.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT EXCEPT FOR THOSE THINGS STATED ON INFORMATION AND BELIEF AND THOSE I BELIEVE TO BE TRUE.

EXECUTED ON 02/15/02, AT BAKERSFIELD, CALIFORNIA.

D_187.

FIRST CAUSE FOR DISCIPLINE
(Conviction of a Crime)
[Bus. & Prof. Code section 2236 (a)]

11. Respondent is subject to disciplinary action for unprofessional conduct under 2236(a) of the Code in that Respondent was convicted of a crime substantially related to the qualifications, functions or duties of a physician and surgeon as follows.

12. In a case entitled People vs. Richard James Heiss, Case No. BM616874A, in the Superior Court of the State of California, In and For Kern County, on or about July 15, 2002, Respondent pled nolo contendere to one count of Business and Professions Code section 729(a), (Sexual Exploitation of a Patient), a criminal misdemeanor. The circumstances of the criminal conviction are as follows.

13. On or about On October 17, 2001, patient K.B. a 20-year-old female, had an appointment with Respondent, who had been treating K.B. for her epilepsy. K.B. saw him at his office at 500 Old River Road, in Bakersfield, California. Respondent removed two moles, one from her chest and one from her back.

14. On October 18, 2001, K.B. was feeling stressed over school and other matters and experienced chest pain. She believed the chest pain was caused by the stress. At approximately 5:30 p.m., Respondent called her and asked if she was okay. She informed Respondent of her chest pain and he asked her to come to his office. K.B. questioned him about the late hour and he said he was working late.

15. K.B. arrived at Respondent's office at approximately 6 p.m. She felt extremely tired and weak. No one was in the office that K.B. could see, besides Respondent and herself. Respondent took K.B. to his personal office and gave K.B. an unknown beverage to drink in a styrofoam cup and mentioned that it contained alcohol and it would relax her. She drank from the cup, but did not finish the drink. Respondent encouraged her to drink more, but she refused.

16. Respondent left the room on two occasions, when he returned the second time, he was completely naked. K.B. stood up and began gathering her items to leave. Respondent approached her from behind and turned her around to face him and then he removed K.B.'s skirt and panties. He directed her toward the floor and laid K.B. on her back, on the floor of his personal

office. K.B. informed him that she was on her menstrual cycle. He removed her tampon. Respondent placed an unknown number of fingers in her vagina and said, "I am just going to check down there" and he lowered his head toward her pelvic area and began licking her vagina. At one point, while he was licking K.B.'s vagina, he asked her if he was boring her.

17. Respondent guided his penis into K.B.'s mouth.

18. Respondent used his hands to direct his penis into K.B's vagina and she felt some pain. K.B was shocked by what was happening.

19. After the above sexual incidents, K.B contacted the Bakersfield Police Department. On December 13, 2001, Detective Frank Wooldridge asked K.B to telephone Respondent, so that the Detective could make an audio taped recording of her telephone conversation with Respondent about the sexual encounter on October 18, 2001. K.B complied with the request and paged Respondent. He returned the page and telephoned her. K.B. spoke with Respondent about the above sexual encounter while Detective Wooldridge tape recorded the conversation. On the above date, K.B. had two telephone conversations with Respondent that Detective Wooldridge tape recorded.

20. Respondent's above criminal conviction for sexual exploitation of a patient constitutes unprofessional conduct within the meaning of section 2236 of the Code.

SECOND CAUSE FOR DISCIPLINE
(Sexual Abuse, Misconduct, Relations With a Patient)
[Bus. & Prof. Code section 726]

21. Respondent is subject to disciplinary action under section 726 of the Code for sexual abuse, misconduct, or relations with a patient during an office appointment. The circumstances are as follows.

22. Complainant realleges paragraphs 13 through 19 above, as if fully set forth at this point.

23. Respondent's above sexual abuse, misconduct or relations with his patient K.B. constitutes unprofessional conduct within the meaning of section 726 of the Code.

RJH: Lots of stuff.

KB: Like what? I mean,

RJH: I guess it's where the chemistry part comes in. I don't know.

KB: Hum. Alright.

RJH: Some kind of weird attraction, something, I'll let my nurse in the room with us tomorrow.

KB: Okay, um, by the way, what was that drink, I, it was, that I was drinking? What was it? It was gross!

RJH: Yeah. You only took a sip of it by the way.

KB: Yeah. I know, but it tasted really gross, I thought, I guess its probably cuz, I don't ever, I don't ever drink anything at all but,

RJH: I don't remember it at all

KB: You don't remember what it was?

RJH: I don't know what it was.

KB: Hum. Alright, well, well you know I'm under 21, why did you give it to me.

RJH: I didn't do it to you.

KB: No, why did you give me the drink. I shouldn't, you know, I shouldn't have taken it, I know, but,

RJH: Can we talk about it tomorrow?

KB: Well, we'll see. I'll

RJH: So, you're mad at me?

KB: No.

RJH: You hate me?

KB: No. I just, I just feel a lot of depression and stuff and I have been trying to see what I can do to make it better, because I am not doing that, I'm not, I have finals and I'm not doing all that great, cuz I have a lot on my mind.

RJH: I'll find a way to make it up to you.

KB: How? Like

RJH: Why don't you think about it.

KB: Well, I'm trying, I guess I'm trying to talk tonight, cuz I know I have, I have school tomorrow and I have to give a big speech and I guess I have been trying to clear my mind for tomorrow. It's a fifteen minute speech and I'm really nervous and

RJH: Well, you'll be happy.

KB: Well, I guess, I guess I have been feeling really bad just because I didn't really say you can, you know, you can do that to me that night and

RJH: Ohhh, what are you accusing me of?

KB: Well, I'm not accusing you, I just mean, I guess when you were touching me down there, I got real scared and

RJH: Scared?

KB: Well, I told you, you I was a virgin. I had never even been naked with another guy. Remember? I told you.

RJH: You and I both know that's not true.

KB: How? I told you I was a virgin.

RJH: Yeah, I know, one time and then you admitted later that you weren't. So, it's, it's, you know, we shouldn't be talking about this. Um.

KB: Well, can I ask you why, when you just called last time, why you, why you told me you, you didn't take my tampon out?

RJH: You did that.

KB: It's no big deal, but, I just feel like, now, I just feel kind of, cuz I trust you and when, just on the phone call, you you lied to me.

RJH: No I didn't.

KB: I know you took my tampon out, because I have to stand up when I do it, and I was laying down.

RJH: I won't argue with you.

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KB: I just don't, I just don't want you to lie to me.

RJH: I'm not gonna to lie to you.

KB: I mean I can trust you a lot more if you don't lie when it's just me and you that's kind of

RJH: (inaudible, talking simultaneously) okay

KB: Like when you said you didn't, you didn't stick you penis in me.

RJH: I did not.

KB: And just feel kind of, I just feel like, you've been my doctor so long and I trust you and now, now, I feel even, I just feel, I just feel really really hurt because I did think, you know, now you said you did like me and you tell me that what happened didn't happen, making me feel like, making me feel like don't, I'm not all here or something.

RJH: Well, I didn't mean to imply that.

KB: But.

RJH: I really didn't.

KB: Then why, why did you say, why did you say it didn't happen.

RJH: What didn't happen?

KB: Like, I know it's something petty and it doesn't even mean anything, but just something little, a little lie, a little lie like that it kind of hurts me because I'm

RJH: It's not a little lie. I mean that's how I remember it. But, you remember it differently and that's okay.

KB: What, what did happen then? I mean, I, I, was it sex?

RJH: No, it was (inaudible, both talking simultaneously)

KB: Did me, did I have sex with you or,

RJH: (inaudible, both talking simultaneously)

KB: Cuz I don't, I don't know

RJH: That's not something I would do. Absolutely not.

Are you going to be able to come in tomorrow?

KB: I'll see. I'll try if I can, if, if you don't

RJH: That would be nice, we could really clear a lot of stuff up.

KB: If you don't believe me, then I don't even think I should come in.

RJH: Believe you about what?

KB: I mean, I'm trying to clear my my own mind, I'm trying to clear my own mind of what happened. I, I know what, I know what I felt, I know what I believe happen and now that I am trying to talk to you about it to try to make me feel better, you're saying I really don't know what I'm talking about.

RJH: I am not saying that.

KB: Well, you said it's okay that I, I have a different view of what happened, but I just feel like

RJH: Whatever, whatever

KB: I knew, I know, I know what little things happen and I am just trying maybe see if you can explain to me, you know, what, why I did it, or why you did it or why why were you or or even what really happened. I just, I just, I mean, I haven't been going to church now and I have just, and I, cuz when I go I just feel like crap.

RJH: Well, don't you believe God forgives us?

KB: Yeah, he forgives us. I guess I just feel, I don't know. Can you just do me one last favor. Just tell me the truth about how you feel about me and about what exactly was going on.

RJH: Well, I'd like to do that in person. It would mean a lot more to me.

KB: I know, but, I would sleep a lot better tonight. Cuz I have been having those seizures in my sleep, which

RJH: Well, I like you a lot and I care for you a lot. I've known you for a long time. A very long time.

KB: Um hum.

RJH: I think very highly of you, you're a very special woman.

KB: Thanks.

RJH: That's how I feel about you. I would never violate you, I'd never rape you, I'd never do anything like that.

KB: I didn't say you raped me. But, I'm not saying that, I'm just saying, I mean, I'm just trying to say you know, I just feel that I clear all this up with you, I can easilier [sic] pray about and repent about it. I mean, because I have been pray about us about what happened that night, but I just feel like I need to talk to you and get it all out and get exactly what happen, that way I can clear everything, that way, when I repent and pray and (inaudible) tell God how I feel, I won't feel like I'm lying to him.

RJH: No, no, no, no.

KB: So,

RJH: God knows what you know those things.

KB: So, was it me? I mean, did we have sex? Is that

RJH: No, absolutely not.

KB: Well, what did happen?

RJH: I would never do that.

KB: Well, what do you call it?

RJH: I'll talk to you about that tomorrow if you come in.

KB: I don't understand why we can't talk about it now. Cuz I am going to have a hard time trying to come in tomorrow.

RJH: Well, you don't have to come in, but, that, that needs to be done in person. It really does.

KB: I know, it, it's just I know, I think it would be hard in person because I, I'll be a lot more emotional and I just feel it's easier when I don't have to see you and look at you. I think it would be easier cuz

RJH: You don't like me?

KB: I didn't say that.

RJH: And I'm not attractive to you, huh? I guess I'm too old,

KB: Do you think I'm too young?

RJH: No.

I'm probably too old for you.

KB: What do you mean?

RJH: Well, I just don't think you like me, I'm too old. Maybe you should, maybe you should get somebody else.

KB: Well, I don't, I guess I don't think, I don't think you should, you know, I don't think we should have been naked together when, you know, you're married and

RJH: No, we shouldn't have been, that's my fault.

KB: I mean, especially in your office.

RJH: Well, I blame myself.

KB: Okay. That makes me feel a little better. Uh. I really appreciate you talking to me.

RJH: Well, it's not your fault. It's my fault, I shouldn't have let myself get carried away.

KB: Okay, thank you.

RJH: You're a very attractive woman. That's how I get carried away, but we did not have sex.

KB: Well, you were naked, I was naked, I, I never had sex, so I don't know, I obviously don't know, that's why I'm asking you, because you're my doctor, cuz I'm trying to, cuz I can't talk to may family about this kind of, you would know

RJH: You would know it, believe me.

KB: I would?

RJH: Oh yeah!

KB: I guess I'm naive, huh?

RJH: Well, not naive.

KB: Or ignorant is it.

RJH: No, inexperienced.

KB: I guess cuz I went to a Christian school.

RJH: That's good, glad you did, but, don't be burden with guilt, God can forgive anything. In fact, the only sin God can't forgive is the one we never confess.

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KB: Yeah.

Well, I, I, felt your penis in me though,

RJH: No, no.

KB: so that's

RJH: No, it wasn't.

KB: That's not sex?

RJH: Nope.

KB: So, even though your penis was in me, that's not.

RJH: It wasn't.

KB: Well, that's only cuz it wasn't hard.

RJH: No.

KB: What was in me, cuz I did feel something in me.

RJH: I'll tell you about it tomorrow.

KB: Oh, it's probably just your finger, huh?

RJH: No, it wasn't.

KB: Well, what was it?

RJH: My mouth.

KB: Oh. I guess that I was just laying there and didn't, I must be tired, I guess, I didn't even

RJH: You were probably exhausted.

KB: How did you know to do that?

RJH: Well, I knew I couldn't do the other and I wanted to make you happy.

KB: Uh. Okay. I guess I was just really really nervous and

RJH: That's obvious

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Local news

Doctor takes plea bargain

By STEVE E. SWANSON, Californian staff writer
e-mail: sswanson@bakersfield.com

Monday, July 15, 2002, 11:00:28 PM

Suspended Bakersfield physician Richard J. Hoige II pleaded no contest Monday through his attorney to a misdemeanor count of sexual exploitation of a patient.

Kern County Superior Court Commissioner Louis P. Bilokovsky, pursuant to the plea bargain, sentenced Hoige to three years' probation and 80 hours of community service.

Hoige, 44, was not present during the hearing — he was across the county caring for a relative, said his attorney, James E. "Ed" Hoige of Bakersfield.

The plea, which ends the criminal case, stems from an allegation of a 30-year-old woman who said Hoige committed sexual acts — but not intercourse — with her after he gave her something to drink.

In a telephone call recorded by police, Hoige reportedly admitted engaging in a sex act with her, agreeing he shouldn't have been alone with her because he is married, and blaming himself for getting "sucked away."

The plea bargain was arranged between Deputy District Attorney John Chung and Hoige. Chung said the woman was satisfied with the outcome of the case. The charge carries a maximum jail term of six months.

But Hoige has two other civil matters to contend with — a lawsuit in Kern County Superior Court seeking monetary damages by the same woman, and an accusation filed before the California Medical Board alleging inappropriate sexual conduct toward five patients, including the first woman.

An administrative law judge in March temporarily

Dominique Pollara *Ethical Considerations in Medical Malpractice Litigation*

Dominique was born in Minneapolis, Minnesota, and she was raised in Upstate New York. She has practiced law since 1984, and she is a member of ABOTA; she has tried more than 30 cases to verdict in California, Nevada and New York. Dominique's practice focuses on medical malpractice defense and medical professional advocacy. When she is not working on improving her surfing, you can find her practicing yoga, skiing at Squaw Valley, cycling in the foothills around Sacramento, fly fishing, playing with her dogs or donating her time to Homeward Bound (a golden retriever rescue organization).

THE TIME IS NOW
Ethics and Civility in Medical Malpractice

Dominique Pollara, Esq.
Schuering Zimmerman & Doyle, LLP
400 University Avenue, Sacramento, CA 95825
New Orleans April 27, 2013

Not every unexpected outcome = negligence . . .

But that doesn't mean it hurts any less

The Impact Zone:

Patients, family members and . . .

health care providers

Scorched Earth Policy:

Zealous Advocacy or Tunnel Vision?

Acknowledging the impact unexpected outcomes have on the involved parties

Does it make us ineffective advocates or does it make us better advocates?

Can Ethical Practices and Civility further our role as Advocates for our Clients?

- Filing suit without obtaining the records
- Filing suit without obtaining expert input
- Pursuing a claim in the face of evidence the medical provider exercised judgment recognized as reasonable in the medical community

- Defending a claim in the absence of legitimate expert support
- Pursuing unsupported theories of liability against co-defendants or non-parties

Do we have an ethical responsibility to educate our clients about the legal process?

Proposal: Client education can improve communication, decrease distrust about the medical and legal systems, and further the appropriate resolution of disputes

Do we have an ethical responsibility to educate ourselves about the medical issues and advise our clients accordingly?

Proposal: Educating ourselves about the medicine allows for a more realistic evaluation of the potential viability/defensibility of a suit and increases our effectiveness as advocates

Does ethical conduct require candor with our clients regarding the potential viability/defensibility of a claim?

Proposal: Communicating candidly with our clients is the right thing to do – It decreases misunderstanding and anger, and makes sense economically

Experts

What is our ethical obligation as advocates in the retention and use of medical experts?

Proposal: As advocates we have an ethical responsibility to assure we use experts who base their opinions on evidence based medicine

Proposal: The ethical workup and management of malpractice litigation makes sense economically for all parties

Discussion