A MIDWESTERN LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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Greetings from Edwardsville

As I write this, Dave Sinn is starting a jury trial in Peoria County. As a Vice-Chair of the Professional Liability Practice, I have the honor of introducing this edition of the Medicolegal Monitor while Dave is otherwise occupied.

Coincidentally, our first article involves an analysis of behaviors to help a physician survive a jury trial. As attorneys, we have suffered with our beleaguered physician clients through the emotional roller coaster of a jury trial. Witnessing the adversarial clash of evidence to be evaluated by a jury without any formal medical training can be a very sobering experience. In recent years, we have seen the advent of the "Reptile Strategy" where plaintiff's lawyers advance the fanciful narrative that a treating physician has completely ignored a patient's "safety" and, as a result, should be punished. During a particularly contentious trial, one of my clients whispered into my ear: "I would rather have open heart surgery than listen to this so-called expert misrepresent my concern for the patient." She was not exaggerating. As you will read, staying true to those behaviors which are strongly valued by patients can be very effective in the courtroom. Emphasizing your best physician qualities is an approach which will help make the trial experience one where the jury ultimately concludes that you did care for your patient in a reasonable and professional manner.

Our second article reports on a very recent Illinois Supreme Court decision that addressed a significant state constitutional question while leaving other important issues to be further addressed by the trial court in Champaign County. In the *Carle Foundation* case, our state's high court reversed a Fourth District Appellate Court ruling that a 2012 charitable-use property tax exemption is unconstitutional. Though the Supreme Court could still rule on this issue in the future, it appears the charitable use tax exemption for hospitals may not be on death's doorstep—as some commentators had predicted. The issue is a complicated one and may evolve into an analysis of what constitutes "charitable use" and whether hospitals qualify as charities when they advertise their services in what some argue are "for profit" ventures. Heyl Royster will continue to monitor this issue as it will undoubtedly impact our hospital and physician clients, particularly those who practice in smaller community based hospitals.

In closing, I want to mention our May 18th Professional Liability Seminar at the Westin Chicago Northwest in Itasca. It is being held in conjunction with Heyl Royster's Property & Casualty, Governmental and Workers' Compensation Practice seminars. Our seminar is targeted for professional liability claim representatives, hospital risk managers and practice group administrators. We have included an announcement in this newsletter which provides further detail on times, topics and registration. We will be evaluating a number of cutting-edge issues such as burgeoning legal challenges in electronic medical record-keeping, credentialing issues, tactics for neutralizing the just referenced "reptile" theory and recent trends in state licensing (IDFPR) actions and investigations. If you or one of your risk manager colleagues are interested in attending, please join us for what we promise will be a very insightful seminar followed by a reception where we will have some time to visit and introduce you to our team of dedicated lawyers.

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A Lawyer's Consideration of Qualities Patients Expect from Their Physicians

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One common theme defense lawyers hear from their physician clients is that the concept of a civil jury trial is fundamentally flawed because a jury will never be composed of the physician's peers who are equipped by education and training to evaluate standard of care issues. While true, the charge misses the point of why lay juries have been delegated the task of resolving civil legal disputes for more than two centuries. The counterpoint to the "learned peer" criticism sometimes leveled against our present civil jury system is that it is better to have independent lay jurors resolve civil disputes than judges or specially empaneled juries of "experts" who may not be truly independent decision makers.

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After acknowledging how lay juries are selected and instructed, a good starting point in determining how to reduce the risk of litigation and, at the same time, how to prevail when sued, is to recognize that each person who serves on a jury shares the common experience of having been a patient and also having made an assessment of what qualities to look for in selecting a physician. Most seasoned trial lawyers appreciate that when juries deliberate, they often use their past experiences with doctors to judge the outcome of a case where medical negligence has been alleged. So while lawyers and judges approach their cases by evaluating the law applicable to medical negligence claims, there is much more than legal principles and jury instructions at play when the jury is sent to deliberate on a verdict following the close of the evidence.

In the March 2006 edition of Mayo Clinic Proceedings, a study focusing on patients' perspectives of ideal physician behavior was reported.[1] The study, which involved 192 patients who were seen in 14 different medical specialties at two separate Mayo facilities, measured patient experiences, both good and bad, to distill those qualities which resonate with patients as being either strongly positive or strongly negative. Interestingly, these qualities track what defense lawyers have heard from individual jurors who explain why they rejected the claim of an injured patient bringing a medical negligence case. Often, one hears anecdotal comments from jurors such as: "He seems to be a good doctor"; "He seems to care about his patient"; "She struck me as careful"; or "She seemed very knowledgeable." While such critical assessments obviously drive jurors to decide how to vote in a medical negligence case, it is worth noting that such considerations of character and motive do not spring from the pattern instructions which jurors are directed to follow in reaching a verdict. Perhaps the best anecdotal evidence illustrating the reality of jury deliberations was the experience of the lawyer who, after being given permission to interview a jury which had just returned a verdict in favor of a physician, heard the following comment from the jury's foreperson: "We did not believe the doctor was guilty of malpractice. We think he messed up. He should have ordered the colonoscopy following the history of rectal bleeding. But, we like him and we think he is a good doctor who obviously was doing his best for the patient." The plaintiff's attorney was beside himself after hearing these comments. His case was premised on the simple principle that when a patient in her 50s experienced rectal bleeding, the standard of care required that the doctor recommend a colonoscopy. It is worth noting that the jury comments were obviously influenced by the fact that the doctor was extremely calm, likable, honest and knowledgeable when on the witness stand. Moreover, he was able to confidently explain why he did not document that he recommended a colonoscopy. These qualities obviously carried the day for the physician in a case where the evidence could easily have warranted a verdict in favor of the patient.

Armed with the knowledge that jurors evaluate cases of medical negligence through the shared eyes of patient experience, the Mayo article illustrates what physicians should do when interacting with patients to create the best possible impression. Equally important, the study is very instructive in helping physicians understand why those essential behaviors displayed in their practices must also be obvious after taking the witness stand.

Following detailed analysis of patient surveys, the Mayo research team concluded that its study identified seven ideal behaviors which patients expect of physicians. They are set out as follows:

Ideal Physician Behaviors, Definitions, and Supporting Quotes

Ideal physician behaviors	Definitions	Representative quotations*
Confident	The doctor's assured manner engenders trust. The doctor's confidence gives me confidence.	"You could tell from his attitude that he was very strong, very positive, very confident that he could help me. His confidence made me feel relaxed."
Empathetic	The doctor tries to understand what I am feeling and experiencing, physically and emotionally, and communicates that understanding to me.	"One doctor was so thoughtful and kind to my husband during his final days. He also waited to tell me personally when he found a polyp in me, because my husband died from small bowel cancer and he knew I would be scared."
Humane	The doctor is caring, compassionate, and kind.	"My rheumatologist will sit and explain everything, medication, procedures. I never feel rushed. He is very caring. If I call, he always makes sure they schedule me. He told me he knows when I call, it is important. I appreciate his trust."
Personal	The doctor is interested in me more than just as a patient, interacts with me, and remembers me as an individual.	"He tries to find out not only about patients' health but about their activities and home life as well."
Forthright	The doctor tells me what I need to know in plain language and in a forthright manner.	"They tell it like it is in plain English. They don't give you any Mickey Mouse answers and they don't beat around the bush."
Respectful	The doctor takes my input seriously and works with me.	"She checks on me. She also lets me participate in my care. She asks me when I want tests, what works best for my schedule. She listens to me. She is a wonderful doctor."
Thorough	The doctor is conscientious and persistent.	"My cardiac surgeon explained everything well. The explanation was very thorough. He was very concerned about my recovery after the surgery. I thought it was special how well he looked after me following the surgery. Not all surgeons do that. They are not interested in you after you are done with surgery."

*The quotations in this table are excerpts of longer quotations in the transcripts. Respondents commonly mentioned multiple attributes in describing their best physician experience. For example, the quotation used to illustrate "humane" also incorporates "respectful" and "thorough" and was coded accordingly.

The enumerated qualities: Confident, Empathetic, Humane, Personal, Forthright, Respectful and Thorough are neither surprising nor mutually exclusive. Put in slightly different terms, some lawyers express the important traits as the "Big C's": Confident, Credible, Competent, Compassionate, Caring and Comprehensive. However worded, it seems clear that patients want their doctors to exhibit those qualities associated with strong, capable, smart, and empathetic problem solvers.

The findings reported in the Mayo study are just as useful for attorneys attempting to prove medical negligence as they are for lawyers engaged to defend medical professionals in cases where medical negligence is alleged. A burgeoning strategy seen in many medical malpractice cases is a series of questions which revolve around patient safety. From the plaintiff's (patient's) perspective, trial lawyers have developed a battery of techniques to convince juries that otherwise experienced and trained physicians either don't care about or ignore recognized safety practices. This approach, termed the Reptile strategy, can be used to counteract evidence illustrating that the physician is confident, empathetic, humane, personal, forthright, respectful or thorough.[2] The tactic most often employed by plaintiff's lawyers is to review with the physician policies, procedures, literature and basic principles of patient safety and then show that these safety practices were not considered or applied in the care at issue before the jury. Strategies premised upon the failure to adhere to policies grounded in patient safety are employed to both neutralize evidence of ideal physician behavior and to generate fear and anger in the minds of jurors. The thinking of those that adhere to this approach is that once a jury is fearful or angry because practices designed to keep the patient safe were not followed, it is much easier to convince the jury to punish the offending parties by returning a large jury verdict in the patient's favor.

Ultimately, a trial often revolves around a clash of narratives: good doctor, who displayed those traits associated with patient expectations vs. reckless doctor, who purposefully ignored institutional policies and procedures designed to enhance patient safety.

Conclusion

As noted, the Mayo study did not involve the evaluation of cases which resulted in medical negligence claims. Nevertheless, the study is essential in understanding how patients evaluate and judge physicians. Remember, jurors are instructed to use "common sense gained from your experiences in life, in evaluating what you see and hear during trial."[3] Seasoned trial lawyers can attest to how those physicians who illustrate ideal behaviors are much more likely to convince a jury to reject a claim of medical negligence. Just as important, it is essential for physicians to display these behaviors while interacting with a patient or family member. This is not easy – particularly when attempting to manage a complication or bad outcome in a short period of time where prompt decision making is essential. And it must be recognized that even if the physician displays all of the ideal behaviors in face to face interactions with the patient or family member, it is also important that the record created by the physician or care giver reflect the time, depth of thought, willingness to listen, and the physician's concern for the patient's well-being. Documenting conduct consistent with ideal behaviors, even in the heat of managing a difficult case, will serve you and your patient well. And, in those unfortunate scenarios where your care is the subject of a medical negligence case, they are essential in showing a jury that just because the plaintiff's lawyer aggressively characterizes the doctor otherwise, the medical record and the demeanor of the physician while in court reflect those ideal behaviors which resonate with patients and jurors alike.

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[1] Neeli M. Bendapudi et al., *Patients' Perspectives on Ideal Physician Behaviors*, 81 Mayo Clin. Proc. 338, 340 (2006).

[2] *Reptile – The 2009 Manual of The Plaintiff's Revolution*, by David Ball and Don C. Keenan.

[3] Illinois Pattern Jury Instruction 1.01[4].

Illinois Supreme Court Decision Regarding Not-for-Profit Hospitals: *Carle v. Cunningham Township*

By: Richard Hunsaker, rhunsaker@heylroyster.com

Fourth District Appellate Court's decision that the charitable-use exemption for hospitals enacted in 2012 is unconstitutional has been reversed by the Illinois Supreme Court – with the high court electing not to decide the issue, but to have the matter further clarified at the trial court level.

The Illinois Supreme Court addressed an important question in the case of *Carle Foundation v. Cunningham Township*. In that case, the court was asked to determine

whether a hospital is exempt from paying property taxes based upon its use of the property for charitable purposes. Beginning in 2004, a township assessor terminated the charitable use exemption of four parcels of property used in connection with the operation of Carle Foundation Hospital. In 2007, Carle Foundation filed an action in circuit court asking the court to find that its property qualified for a charitable-use tax exemption. After extensive briefing on the issue, the trial court granted summary judgment relief in favor of the Foundation, finding that 35 ILCS 200/15-86 was to be applied, as plaintiff requested, for tax assessment years 2004 – 2011. The trial court then certified its ruling for an interlocutory appeal pursuant to Illinois Supreme Court Rule 304(a). On appeal, the Illinois Appellate Court, Fourth District, found that a recently enacted statutory exemption, 35 ILCS 200/15-86, facially violates Article IX, Section 6 of the Illinois Constitution, which in relevant part, states that "the General Assembly by law may exempt from taxation ***property used exclusively for ***charitable purposes." 35 ILCS 200/15-86, which took effect on June 14, 2012, sets forth a new charitable-use exemption specifically for hospitals.

In first addressing whether the issue before the court was properly raised under Illinois Supreme Court Rule 304(a), the Supreme Court found that the issue certified for appeal is dispositive of only an issue relating to a claim – and not the full claim itself – meaning that the Fourth District Appellate Court did not have proper jurisdiction to review the trial court's rulings. In support of this finding, the Supreme Court noted that interlocutory appeals of "issues" as opposed to "claims" promotes costly and inefficient piecemeal litigation.

The Supreme Court further noted, in discussing its "supervisory authority" to resolve the constitutionality of 35 ILCS 200/15-86, that it was compelled to decline the request to exercise such authority. In doing so, the court noted that ruling on the "issue" would be tantamount to encouraging piecemeal litigation of legal issues – which is not the purpose of Illinois Supreme Rule 304(a) interlocutory appeals – and that "cases should be decided on non-constitutional grounds, wherever possible, reaching constitutional issues only as a last resort." Accordingly, the Supreme Court remanded the case to the trial court for further proceedings.

The practical effect of the Supreme Court's ruling is that the Fourth District Appellate Court's declaration that the 15-86's charitable-use tax exemption is unconstitutional has now been reversed – meaning that the constitutionality of the charitable use exemption for hospitals is again an open question.

Heyl Royster will continue to monitor this case and report on any future significant appellate court rulings which touch upon this issue.

For More Information

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The materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

Topics & Speakers

- Overtime? What is Changing with the Discovery Rule and the Statute of Limitations in Medical Malpractice Actions? – Nick Bertschy, Peoria
- Recent Trends in Illinois Department of Financial and Professional Regulation Actions – Roger Clayton, Peoria
- Negligent Acts of Non-Employees - The Doctrine of Apparent Agency & Potential Hospital Liability – Renee Monfort, Champaign
- Understanding Recoverable Damages: Double Dipping by Plaintiffs – Mike Denning, Rockford
- Electronic Medical Records: Emerging Issues in Litigation – Richard Hunsaker, Edwardsville – Bill Sherwood, Southern Illinois Healthcare
- Credentialing and Potential Hospital Liability – Ann Barron, Edwardsville
- Beware the Reptile: Understanding and Neutralizing Reptile Tactics – Doug Pomatto, Rockford
- Hospital Liability Issues in the Treatment of Jail & Prison Inmates – John Hoelzer, Springfield