AN ILLINOIS LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF PROFESSIONAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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A Word From the Practice Group Chair

This edition of Heyl Royster's Medicolegal Monitor features articles from Ed Wagner who heads our Urbana office and Roger Clayton and Greg Rastatter of our Peoria office. Ed's article discusses the brave new world of juror questions during trial. Roger's and Greg's article deals with a welcome narrowing of the definition of the physician-patient relationship.

Juror questions are new to Illinois state courts and they present exciting possibilities and potential pitfalls. They may give litigants better insight into what jurors are thinking. Doug Pomatto and Kathy Stockwell of our Rockford office recently experienced several questions from a juror who felt qualified by a college course in Business Law to cross examine medical experts during their defense in Rockford of an alleged misdiagnosis of an abdominal aortic aneurysm in a former Cook County Circuit Court Judge.

Since our last edition, Matt Thompson and I tried a wrongful death case in Tazewell County involving a 48 year old female who succumbed to a neuroendocrine cancer. There is always drama in a medical legal trial, but this one carried some extra drama due to the fact that the pathologist and the surgeon interpreted the pathology report differently. I'm happy to report, however, that although the plaintiff asked for $5,000,000 to $10,000,000 in damages, the jury in Pekin found no reason to hold either physician at fault or award any damages.

Recently Renee Monfort and Cheri Stuart, RN, of our Urbana office obtained a not guilty verdict in Kankakee for three internists on a claim that they failed to diagnose impending avascular necrosis in a diabetic foot leading to amputation and inability to ambulate with a prosthesis due to neuroma. The plaintiff's attorney asked the jury for $1,800,000 to $2,100,000 in damages, but was awarded nothing.

These outcomes are typical of the results being obtained by all six of our Illinois offices in medical liability trials in all 102 counties of Illinois.

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New Supreme Court Rule Will Allow Jurors to Submit Written Questions to Designated Witnesses In Civil Trials

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Effective July 1, 2012, new Illinois Supreme Court Rule 243 will allow a trial judge in a civil case the discretion to decide if the jurors should be allowed to submit written questions to witnesses after all counsel have finished their examinations.

As written, the new rule does not require that jurors be allowed to submit written questions, but this option is discretionary to the trial judge and can be initiated at any time during a civil trial. The option can also be terminated at any time by the trial judge. This option is not available in a criminal trial.

When this option is permitted, the trial court will decide at the conclusion of each witness' examination, whether it is appropriate for the jury to submit questions to that particular witness. Thus, a trial court may allow juror questions to be submitted to one witness and not another. If the court allows juror questions, then again at the conclusion of all examinations by counsel, the trial judge will ask the jurors if anyone has any further questions. If there is a response from the jurors that some questions are requested, then the jurors are told to put them in writing, to be collected by the bailiff and then presented to the judge. To preserve the record, each question will be marked as an exhibit. It is specifically required that the jurors will not have any discussion regarding these questions. Any such observed discussions should be brought to the court's attention as soon as practical.

Once the written questions have been collected and marked, the new rule requires that all counsel be given an opportunity to read the questions outside the presence of the jury and have an opportunity to object on the record. The trial court will rule on any objections and decide whether each question will be excluded, read to the witness or read after some modification. Once these matters outside the presence of the jury are decided, the question, if allowed, will be read to the witness, but only after the trial court expresses a required instruction to the witness that he or she answer only the question presented and not exceed the scope of the question. The rule does not dictate whether this cautionary instruction to the witness be done in or outside the presence of the jury, but the better practice will have the court do so outside the jury's presence.

The court, not counsel, will read the question and once there is a response, all counsel shall be given an opportunity to ask follow-up questions as long as these new questions are limited to the scope of the new testimony. The rule does not dictate any limitations on the number of "rounds" allowed to counsel for additional questions nor what to do if new aspects of prior testimony or new evidence altogether is admitted as part of the witness' new responses. The rule anticipates "new testimony" but does not resolve the issue of what to do if prior witnesses now need to be brought back for additional evidence in light of some new response.

The new rule also does not require nor suggest that counsel be allowed to confer with a witness before any such juror question is asked. Thus, a defendant may not be able to confer with his own counsel, an expert may not be able to confer and strategize with the attorney who prepared and presented him or her and a confused witness may not be able to ask their own questions as to what this new procedure is all about.

It is anticipated that some submitted questions will not be read at all and to avoid any hurt feelings or confusion by jurors, the new rule does require the trial judge to advise the jurors before or during the course of the trial that they should not be concerned with the reason why a question was modified or not read as the court needs to decide those issues based on the rules of evidence which govern each case.

Although the proponents of the rule argue that

it will improve juror comprehension, many are convinced that the new opportunity for juror questions will only benefit the ill-prepared attorney and the ineffective witness.

Defense counsel will need to be cautious and ready to respond with an objection that a potential juror written question is or may be beyond the scope of the plaintiff counsel's direct examination. Also, it may become evident in a juror's submitted question that the particular juror has been discussing the case outside the courtroom or exploring additional information through internet sources. If this is obvious or suggested, then the court, on its own motion, should interrogate that individual juror outside of the presence of the other jurors.

Illinois Supreme Court Chief Justice Thomas Kilbride noted that this rule did go to a Public Hearing in May 2011 and that "[B]ased on the comments of those who have used or seen the procedure at trials, such a rule enhances juror engagement, juror comprehension and attention to the proceeding and gives jurors a better appreciation for our system of justice. The rule is written so that its implementation rests with the discretion of the trial judge with safeguards so that the testimony it elicits complies with the rules of evidence."

This procedure is not unique to Illinois state courts as the majority of all state courts and all of the federal courts permit some form of opportunity for jurors to submit written questions for responses by witnesses at civil trials.

Ed Wagner is the partner in charge of our Urbana office, which covers east central Illinois. He has spent his entire legal career with Heyl Royster, beginning in 1980.

Prior to law school, Ed served in the United States Marine Corps from 1973 to 1977 and was discharged at the rank of Captain.

Ed concentrates his civil litigation practice on defending healthcare providers in malpractice claims, employers in civil rights discrimination and termination claims, governmental entities and agencies in all areas of their operation, as well as professional liability claims. With extensive trial experience throughout central Illinois, Ed has successfully defended or skillfully negotiated over 700 medical, hospital, dental, nursing home, job discrimination, and legal malpractice cases.

Ed has recently completed his third three-year term (2003-2011) as an appointed member of the Illinois Supreme Court Rules Committee which drafts, reviews and submits proposed rules and revisions to the Supreme Court on all areas of practice, procedure and ethics. He is a past co-chair of the Professional Liability Committee of the Illinois Defense Counsel.

Ed has spoken and written for many civic organizations on the issues of employers' liability and rights in the workplace and has presented at an Illinois State Bar Association seminar on corporate internal audits and investigations in Employment Law. Ed has also lectured at the University of Illinois College of Law on the topic of federal civil discovery. He has been designated one of the "Leading Lawyers" in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Bulletin. Ed has also been named to the 2009-2012 Illinois Super Lawyers list. The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

He has, on occasion, been appointed as a Special Assistant by the Attorney General's Office in extraordinary civil litigation against state officials.

Appellate Court Clarifies Physician-Patient Relationship In Medical Malpractice Cases

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A physician-patient relationship must exist in order for a duty to arise on the part of the physician. Without such a duty, no medical malpractice action can be maintained. As a general rule, the relationship arises when a patient knowingly seeks a physician's assistance, and the physician knowingly accepts the person as a patient. *Bovara v. St. Francis Hosp*., 298 Ill. App. 3d 1025, 1030, 700 N.E.2d 143, 146 (1st Dist. 1998). A recent case from the Third District of the Appellate Court clarifies this standard. The court held that merely giving advice to a caller from an emergency room, yet expressly refusing to see the individual, did not create the required relationship. *Kundert v. Illinois Valley Community Hosp*., 2012 IL App (3d) 110007.

In *Kundert,* Kameryn Kundert was born on April 18, 2007, and quickly exhibited signs of illness. He was treated at Illinois Valley Community Hospital in Peru ("Illinois Valley") on four occasions through April and May of 2007, and on May 31, 2007, his condition worsened. Unable to reach the family pediatrician at another facility, Kameryn's mother called Illinois Valley and informed the operator she needed to speak to a medical professional for advice about the symptoms. The operator transferred the call to an individual in the emergency room.

The mother advised the individual her six-week-old newborn had a high temperature, was very fussy, unable to sleep, and was refusing to eat. The mother did not recall the individual's name with whom she spoke. That individual advised the mother she was overreacting, which "was typical for new mothers," and advised the mother to administer Tylenol and give Kameryn a tepid bath. The individual further stated she was unsure of the dosage of Tylenol and instructed the mother to contact a pharmacy for that information. The mother was further advised that the symptoms described did not require immediate medical attention, and instructed her to follow up with the pediatrician the following morning. Of note, the individual expressly stated that Illinois Valley did not have the equipment or medical personnel to provide medical services to infants. The mother followed the individual's advice and called the pharmacy to determine the proper amount of Tylenol to give Kameryn.

The following morning, Kameryn was examined by the family pediatrician, and shortly thereafter transported via ambulance to Illinois Valley's emergency room. The family pediatrician advised the emergency room personnel that a septic six-week-old would be arriving. Once there, the medical personnel performed a lumbar puncture, took a chest x-ray and administered intravenous fluids with oxygen. Within an hour of arriving, Kameryn was transferred to St. Francis Medical Center in Peoria for specialized treatment. Kameryn was treated for bacterial meningitis and died on June 15, 2007.

Kameryn's parents filed a medical malpractice action against Illinois Valley, alleging that "approximately 15 hours of valuable time was lost which resulted in a delay of medical treatment necessary to sustain life." *Kundert*, 2012 IL App (3d) 110007 at ¶ 8. The complaint contained numerous allegations of negligence, including failing to recognize the signs and symptoms of meningitis, failing to properly diagnose Kameryn, and improperly refusing to instruct the mother. *Id.*

Illinois Valley moved to dismiss the case under section 5/2-615 of the Code of Civil Procedure, arguing that as a matter of law, no physician-patient relationship existed between it and the deceased infant. Illinois Valley argued that without such a legal relationship, it owed the decedent no duty. The trial court agreed and dismissed the case. The Third District Appellate Court affirmed the trial court's decision, stating that, in a medical malpractice case, a "physician's duty arises only when a clear and direct physician-patient relationship has been established." *Id.* at ¶ 11 (*quoting Siwa v. Koch*, 388 Ill. App. 3d 444, 447, 902 N.E.2d 1173 (1st Dist. 2009)). The court noted that the relationship of physician and patient is one of trust and confidence, a "consensual relationship in which the patient knowingly seeks the physician's assistance and the physician knowingly accepts the person as a patient." *Id.* at ¶ 14 (*quoting Reynolds v. Decatur Memorial Hospital*, 277 Ill. App. 3d 80, 85, 660 N.E.2d 235 (4th Dist. 1996)).

The court noted it was significant that the plaintiffs had not alleged that Kameryn's previous trips to Illinois Valley created an ongoing physician-patient relationship or any special relationship upon which a duty of care might have been based. Further, the plaintiffs did not allege Illinois Valley acted negligently during the emergency room visit on June 1, 2007. Rather, the plaintiffs stood on their second amended complaint, which merely alleged negligence arising from the single telephone conversation between Kameryn's mother and the individual at Illinois Valley on May 31, 2007.

The court relied heavily on the fact that, during the subject conversation, the individual from Illinois Valley had specifically stated Illinois Valley did not have the equipment or medical personnel to provide medical services to infants. The court felt that the conversation did not evince a "knowing acceptance" of Kameryn as a patient. *Id.* The court rejected the additional argument that the recommendations of Tylenol and tepid baths amounted to constructive acceptance of Kameryn as a patient. The mere act of dispensing advice did not equate with a knowing or even constructive acceptance of a patient.

The person with whom the mother had spoken remained unidentified throughout the proceedings. The court noted that the individual, whomever it was, did not interpret any results or actually examine Kameryn. That person merely gave an informal opinion based upon rather common symptoms (i.e., temperature, fussiness and refusal to sleep or eat). The court reasoned that to allow such a conversation to create a physician-patient relationship would have a "chilling effect" upon the practice of medicine. *Id.* at ¶ 31. It would stifle communication, education and the professional association, all to the detriment of the patient. The court voiced concern that anytime a parent called reporting a child with a fever, the response would be the same: "hang up and call 911 or drive your child to an emergency room." *Id.* at ¶ 30. The court believed such a ruling would benefit neither the providers nor consumers of medical care.

The case underscores the general rule that a physician must "knowingly accept" a patient in order for a duty to arise. While the case was ultimately dismissed, the actions of the individual on the phone at Illinois Valley were likely of concern for Illinois Valley's attor-

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neys and exposed the hospital to potential liability. It is important that medical providers ensure the processes for accepting patients into the care of physicians are well-defined. Further, staff at the facility should be aware, as outlined in policies, rules and regulations, of the guidelines on interacting with individuals not yet accepted as patients. Having competent procedures in place and training staff to follow them can greatly assist in the defense of a medical malpractice case where only a tenuous connection between the individual and hospital and/or physician is present.

Roger Clayton is the Chair of Heyl Royster's statewide Healthcare Practice Group and has spent his entire legal career with Heyl Royster, beginning in 1978 in the Peoria office. He concentrates his expertise on healthcare law, representing physicians, hospitals, long-term care facilities, and other healthcare organizations in a broad range of issues including licensure, fraud and abuse, corporate compliance, contracting, policies and procedures, staff concerns, and defense of malpractice and other litigation.

With extensive litigation experience, Roger has personally defended more than 700 medical and hospital cases, taking a significant number to verdict. In recent years, he has developed a special focus on brain-injured infant cases and other catastrophic loss cases. Many of his cases are against leading Chicago and national counsel where damages sought against his target defendants often reach tens of millions of dollars. Although always prepared to try these cases when necessary, Roger is a skilled negotiator and has had great success mediating many of these cases.

Greg Rastatter is an associate attorney with Heyl Royster in the firm's Peoria office. He is a member of the firm's business/commercial litigation, business/corporate organizations, healthcare, and toxic torts/asbestos defense practice groups, focusing on contract law and defense litigation. Greg handles many aspects of commercial business advisement, from determining the most advantageous legal structure for the business organization, ensuring the business client is legally protected as an ongoing concern, to negotiating contracts, and advising the client through mergers and acquisitions. Greg also has expertise in health law, including creating hospital and medical staff bylaws, negotiating contracts with physicians and other professionals, and advising clients on the ever-changing compliance standards required by federal, state and non-governmental organizations, such as the Joint Commission. Additionally, Greg has handles a variety of litigation matters, including toxic torts/asbestos defense and commercial litigation. Greg has served as lead defense counsel in jury trials, bench trials, arbitrations and mediations.

The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

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