

# MEDICOLEGAL MONITOR

A REVIEW OF PROFESSIONAL  
LIABILITY AND HEALTHCARE ISSUES


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## A Word From the Practice Group Chair

In this edition, we explore two developments in Illinois law that might leave physicians feeling generally less loved. To think that the entire region might view your next medical malpractice trial on television might be alarming, but like most fears, it is probably greatly exaggerated. The media probably will not take much interest in medical malpractice litigation once they see how slowly it moves and how clinically it deals with subjects that would usually garner an “R” rating from the censors. With the joy of a new found freedom, the electronic press might initially show some interest in the run-of-the-mill malpractice trial, but after a very brief span of time, they will probably have no more interest in it than the paper press presently does. By this time next year, the electronic media will probably not be much involved in medical malpractice litigation unless some physician files a motion to bar the press, which is by-far the worst way to avoid the press. You simply don’t escape the attention of bulls by waving red flags.

Greg Rastatter’s article deals with new case law which protects the credentialing process from litigation discovery and in that sense does the medical profession a great favor albeit by restricting individual physician’s rights. The credentialing process should be confidential. If Illinois courts allowed physicians to litigate credentialing matters more extensively, the only people who would benefit from that would be the lawyers representing the litigants. Somehow that doesn’t sound like a recipe for a better world.

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- Cameras Coming to a Courtroom Near You: What Are the Rules and What Impact Might They Have
- Illinois Appellate Court Dismisses Physician’s Lawsuit Seeking Information Gathered by Hospital in Assessing Potential Employment

### **Cameras Coming to a Courtroom Near You: What Are the Rules and What Impact Might They Have**

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Probably everyone saw portions of the O.J. Simpson and George Zimmerman trials, because each was a high profile case broadcasted on live television. Now, cameras are coming to Illinois courtrooms.

In January 2012, the Illinois Supreme Court approved the use of “extended media coverage” in the courtrooms of judicial circuits that applied for such coverage and received approval. “Extended media coverage” essentially means the use of still cameras, video cameras, and audio recording. Over time, 40 Illinois counties have applied for and received approval to allow extended media coverage in their courtrooms.

Attorneys and clients must familiarize themselves with the applicable rules for extended media coverage, and must consider and prepare for the practical implications if cameras will be present at trial. While such media coverage will likely be limited to criminal cases in most instances, it will inevitably occur in high profile civil cases, including some medical malpractice cases. And, if extended media coverage proves to benefit one side or the other over time, attorneys representing those parties will undoubtedly push for more and more coverage.

#### **Who or What is Considered “Media”?**

Historically, the media may have been thought of as newspapers and television stations. Today, however, the term media may include biased blogs, so-

cial media, or other similar internet media that does not follow basic standards of journalism. Luckily, Illinois rules operate with a more historical definition of media, thus limiting who may request to cover the trial and hopefully ensuring a certain amount of fairness in reporting. In order to be credentialed under the rules, a media member or organization must be regularly engaged in news gathering and reporting, cover judicial proceedings on a consistent basis, and must regularly follow basic journalistic standards for ethics, accuracy and objectivity.

#### **Request for Extended Media Coverage**

Extended media coverage is not allowed as of right. Instead, a credentialed media member must make a written request and have that request granted by the court before extended media coverage is allowed. The request for media coverage must be made at least 14 days before the trial or hearing the media member wishes to cover. Further, the written request must be provided to all attorneys. The 14 day requirement allows the defense time to consider the request and make appropriate objections prior to the trial or hearing.

#### **Objection to Extended Media Coverage**

Objections to extended media coverage may be raised by the parties to the lawsuit and may also be raised by witnesses. In either case, a written objection is required, but the timing of the objection can differ for parties and witnesses. If a party, i.e. plaintiff or defendant, wishes to object, his written objection must be filed at least 3 days before the beginning of the trial or hearing. Witnesses must be advised by the attorney presenting their testimony of the right to object, and the witness must file his objection before the beginning of the trial or hearing.

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The rule also allows the judge to exercise discretion to consider objections that do not comport with the timing requirements.

Once an objection to extended media coverage has been made, the judge may rule on the basis of the written objection alone, or he may choose to hear evidence. At his discretion, the judge may choose to hear evidence from a party, witness, or media coordinator before ruling.

It would be inadvisable to object to media coverage in a trial where no member of the media has made a written request for coverage. Such a pre-emptive motion would be likely to draw media interest where none previously existed.

### **Technical Requirements and Sharing Equipment**

Technical requirements for the cameras and other equipment are provided in the rules. The overall theme of these rules is to ensure that any equipment is not obstructive or disruptive during the trial or hearing. The equipment cannot produce distracting lights or noises during operation. Further, no flashbulbs or other lighting may be used to aid the cameras.

The rules limit the amount of equipment allowed in the courtroom, again with the overall goal of limiting obstructions and distractions. A maximum of two still cameras and two television cameras are allowed, but the judge may choose to limit that to only one still camera and one television camera. Only one audio recording system is permitted. Obviously, if multiple media outlets wish to cover the trial or hearing, they may be required to share the video and audio stream under the rules.

### **What May be Filmed or Photographed**

Most trials and other hearings may be recorded, with exceptions limited mostly to the area of family law. Importantly though, several portions of the trial cannot be recorded. Jury selection cannot be recorded at all, and the media is forbidden from filming or photographing individual jurors or the jury as a whole. This is an important protection provided in the rule, because if a juror is assured that he cannot be recorded, the juror should feel less inclined to consider public opinion in deciding the case. Further, the media may not record interactions between the lawyer and client, between opposing lawyers, or between the judge and the lawyers, i.e. sidebars. And, no materials, papers or exhibits can be recorded unless they are admitted to evidence or shown to the jury. These limitations are obviously important to protect the confidential attorney-client relationship, among other things. Finally, no filming is allowed during recesses or in the public areas or hallways, which provides some known off-camera time.

### **Live Blogging**

A judge also has discretion to allow live blogging during a trial or other proceeding, which does not include visual or audio recording. The most typical example of live blogging would be tweeting, but includes any transmittal in text form of testimony, proceedings, and summaries from the courtroom. Again, only credentialed news media are allowed to engage in live blogging.

The rule allowing for live blogging simply says that it may be allowed upon request. It does not provide a time-period within which the request must be made, and does not provide for objections. However, the decision to allow live blogging is left to the “absolute discretion” of the judge, and therefore, it seems reasonable that a judge would also be vested

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with the authority to allow objections and consider whatever he deems necessary. In any event, an objection can always be stated on the record, whether or not the judge chooses to consider it.

### Required Jury Admonishment and Jury Instruction

Jurors cannot be photographed or filmed, with the apparent goal of minimizing any influence or consideration of public opinion. Carrying this theme further, the rules require the trial judge to read an admonishment to the jury at the beginning of the trial and an instruction to the jury at the conclusion of trial regarding the media coverage. Of course, the admonishment and instruction advise the jury that they should not be influenced by or draw inferences based upon the presence of the media. Also, importantly, the admonishment advises the jury they cannot be photographed or filmed as a group or individually, and it advises the jurors to inform the court if the cameras are distracting or cause an inability to concentrate.

### Practical Considerations and Potential Effects

At the outset, the lawyer and client should consider whether they do or do not want cameras in the courtroom. In most cases, the defense would prefer cameras not be present so that the trial is focused exclusively on liability and damages, not extraneous issues. If a request for extended media coverage is made, the lawyer and client should ask themselves why the request is being made, and whether a written objection should be filed. If an objection will be filed, however, it should be based upon specific facts or concerns in that case. The Illinois Supreme Court and local judicial circuit have already determined, from a policy standpoint, that cameras should be allowed if the rules are complied with. Therefore,

objections based upon general concerns that cameras may be disruptive or may have a negative impact on the jury are likely to fail.

### Conclusion

While most defendants and their lawyers are opposed to cameras in the courtroom, it appears that they are here to stay for the foreseeable future. Given the national trend toward cameras in the courtroom and instantaneous media, it's hard to imagine that these rules will ever be reversed. Therefore, attorneys and clients will need to carefully consider how to operate within the rules in a way that most favors the presentation of their case.



**Matt Thompson** concentrates his practice in the area of civil litigation, especially the defense of medical malpractice and professional liability cases. Matt regularly defends physicians, nurses, hospitals and clinics in professional liability claims involving significant injury or death. He has successfully assisted in the defense of multiple medical malpractice actions to jury verdict. Matt has also defended complex product liability actions involving catastrophic injury.

## Illinois Appellate Court Dismisses Physician's Lawsuit Seeking Information Gathered by Hospital in Assessing Potential Employment

**Greg Rastatter**

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In *Davis v. Kewanee Hospital*, 2014 IL App (2d) 130304, the Second District of the Illinois Appellate Court rejected a physician's attempt to obtain records utilized by a hospital in assessing the physician's qualifications for potential employment. Kewanee Hospital had offered employment to Dr. Davis, a surgeon and anesthesiologist, contingent on credentialing by the hospital. The hospital obtained information from Dr. Davis's professional references and subsequently withdrew its offer of employment. Nearly three years later, Dr. Davis requested from the hospital copies of all data from all sources used by the hospital in reaching its decision. The hospital refused, and Dr. Davis filed suit.

In granting the hospital's Motion to Dismiss, the court held that neither the Medical Studies Act nor the Health Care Professional Credentials Data Collection Act ("Data Collection Act") provided Dr. Davis with a private right of action to sue the hospital. Both statutes contain language protecting information gathered in the credentialing process as confidential but also contain provisions declaring the "claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision [to deny staff privileges], was based" or "to deny a health care professional, health care entity, health care plan, or hospital access to or use of credentials data." See 410 ILCS 517/15(h); 735 ILCS 5/8-2101. It was these exceptions on which Dr. Davis relied.

The Court rejected this analysis, finding the purpose of both statutes is to protect the general

public by ensuring meaningful self-evaluation and regularity in the credentialing process, not to protect physicians whose performance was under review. Further, neither statute was enacted to prevent injury to physicians due to lost employment prospects, but rather to prevent increased rates of death and illness. Allowing a private right of action under these circumstances, thereby allowing the physician to obtain the identity of those who provided negative information, would only serve to deter candid disclosure and undermine the purposes of the statutes.

Finally, both statutes provide for negative consequences for violations of the 'physician right to access' provisions: the Medical Studies Act makes a violation a Class A misdemeanor (See 735 ILCS 5/8-2015), and the Credentials Act provides for fines by the Department of Public Health up to \$1,000 for the first offense and \$5,000 for every subsequent offense (See 410 ILCS 517/40). The court noted Dr. Davis was not left without a remedy, as he may pursue a common-law cause of action for slander. Accordingly, neither statute provided Dr. Davis with a cause of action to obtain the desired records.



**Greg Rastatter** is a member of the firm's healthcare, business/commercial litigation, and business/corporate organizations practice groups. Greg's experience includes 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.



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