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Medical Malpractice Law in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

MEDICAL MALPRACTICE LAW IN VIRGINIA

Fifth Edition

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8.1 GENERAL CONSIDERATIONS

8.101 Plaintiff's Perspective. Negotiation is perhaps a trial lawyer's most important skill. Because most cases ultimately settle, preparation for negotiation is critical. A favorable settlement requires maximizing and exposing a risk that the defendant seeks to avoid. To favorably settle a case, counsel must create the right environment for settlement. This requires a thorough knowledge of the case's strengths and weaknesses, complete familiarity with the medical issues and the applicable law, and knowledge of the parties and witnesses. In essence, this means investigating and preparing the case for trial.

Many considerations in negotiating and settling general personal injury claims apply to medical malpractice cases. However, some considerations in a typical personal injury case have little or no relevance in the medical malpractice arena. This is because the value of most medical malpractice cases typically exceeds the value of all but the most serious personal injury claims. In addition to the potential value of the case, a medical malpractice trial is expensive from both the plaintiff's and the defendant's perspectives. Each side will take extensive depositions, retain costly expert witnesses, and incur the expenses of preserving and preparing the testimony for trial. In addition, surgical procedures and medical terms are complicated and confusing to jurors, necessitating the use of exhibits and models to help the lay person understand the relevant facts of the case.

An additional factor in medical malpractice cases is that the defendant's professional reputation is at stake. Physicians do not want to believe that they have made a mistake that falls below the required standard of care. Even in a case where the physician might admit to a lapse in judgment,[1] a fierce defense is still maintained because of the physician's concern over being reported to the National Practitioner Data Bank and self-reporting to the State Board of

[1] While statements made in settlement negotiations are generally inadmissible at trial, "an express admission of liability, or an admission concerning an independent fact pertinent to a question in issue, is admissible even if made during settlement negotiations." Va. Sup. Ct. R. 2:408.

Medicine.[2] As discussed in paragraph 8.406 of this chapter, federal law now requires a report of all settlements in which money is paid by an insurance company as a result of a written medical negligence claim. Additionally, a practitioner must self-report and update his or her physician profile on the State Board of Medicine website.[3]

8.102 Defendant's Perspective. Obviously, the defendant health care provider views the resolution of a medical malpractice case from a different perspective than does the plaintiff, not only because the defendant health care provider's reputation in the community is at stake, but also because of the effect a settlement and any subsequent report of that settlement may have on his or her career. With the increase in managed health care, health care providers undergo increasing reviews by organizations that choose which health care providers to include on their approved lists. No health care provider wants a settlement or judgment to impair his or her ability to practice or to tarnish his or her reputation. Therefore, the defendant health care provider, defendant's counsel, and the carrier need to carefully assess every case and identify the medical issues and litigation risks before deciding whether to attempt settlement. There are instances in which defendant's counsel should ask plaintiff's counsel to provide information regarding expert witnesses and the expected testimony of those experts before the formal expert deadlines to allow the defense to fully assess the need for settlement. It may even be necessary for the experts to be deposed. In other cases, there may be business or other reasons to consider early resolution.

The fear that settlement may affect the professional's ability to practice is the largest stumbling block to swift and early resolution of medical malpractice claims involving individual health care provider defendants. It is paramount to know whether your client has a consent clause in his or her professional liability coverage at the outset so that consent does not become a barrier to resolution. However, once the decision to settle has been made, defendant health care providers and carriers want to work quickly to resolve the matter to limit the litigation costs incurred with ongoing discovery and to put the matter behind them. Most medical malpractice insurance carriers, self-insured entities, and defense counsel are willing to engage in many forms of alternative dispute resolution to resolve the case short of a long and expensive

[2] www.npdb-hipdb.com. *See also* 18 VAC 85-20-290.

[3] https://www.dhp.virginia.gov/medicine.

trial. Mediation continues to be the most popular method of achieving effective and efficient settlements.[4]

8.2 STRATEGIES AND TACTICS

8.201 Plaintiff's Perspective.

A. In General. Very few medical negligence cases settle during the claim phase, largely because the cases involve complex facts and circumstances. Moreover, the claims manager knows that he or she will almost always be able to find a physician expert who supports the actions of the defendant and will testify that either the standard of care was not breached and/or that, if breached, the breach caused no harm. As well, the claims manager understands how difficult and expensive it is for plaintiffs' attorneys to obtain credible expert testimony. Therefore, the claims manager is typically not interested in early resolution of claims, and sometimes will not negotiate even in the most obvious claims until the plaintiff has identified experts on standard of care and causation through a certificate of merit[5] and/or expert designations.

B. Assessing the Value of the Case. Before beginning settlement negotiations, counsel should determine the upper and lower limits of a possible settlement. The range may be wide because many factors can affect liability and damages.

While there is no substitute for personal experience, even seasoned lawyers can benefit from the counsel of other attorneys who have settled and tried cases in the venue at issue. It is a good idea to seek the advice of other experienced attorneys when valuing a case, particularly in the early stages of litigation when the insurance carrier will use even reportedly "premature" estimates to set their reserves. In cases with the potential for large jury awards, a lawyer may conduct a mock trial with a "ghost" jury, or a focus group, to determine the value of the case.

Counsel may also locate published records of awards and settlements as sources of information on value, including the American Association of Justice's *Professional Negligence Law Reporter*, *Jury Verdict Review & Analysis*, LexisNexis's *Verdict & Settlement Analyzer*, Westlaw's *VerdictSearch*,

[4] *See* ¶ 8.301 below for further discussion.

[5] *See* Va. Code § 8.01-20.1.

and Virginia Lawyers Weekly's *Verdicts & Settlements*. However, such sources of national information are minimally relevant to the value of cases heard by Virginia juries. There is a searchable database related to Virginia verdicts and settlements in *Virginia Lawyers Weekly*.

C. Listening to the Adversary. Counsel may learn a lot about the strengths and weaknesses of the case by listening carefully to the opponent, even during informal discussions with opposing counsel. For instance, the plaintiff may enter negotiations aware of a potential weakness in the case but may realize that defense counsel is unaware of the problem. The plaintiff's attorney can then take a firmer position in negotiations.

The reverse, however, may also be true. Defendant's counsel may identify a flaw in the plaintiff's case. Perhaps the plaintiff has a history of an injury of which plaintiff's counsel is not aware. This new information may force a re-evaluation of the claim.

D. Working With the Client. The first person to evaluate before negotiating with the defense is the plaintiff. Is the plaintiff articulate and likeable? Will the jury be sympathetic toward him or her? Working with one's own client is sometimes more difficult than negotiating with the opponent, but the plaintiff needs legal guidance and advice.

Establishing a reasonable claim for damages should begin the day the client first interviews. Beware of the client who says, "No amount of money can right this wrong." The attorney should advise the client early in the relationship that counsel will provide opinions on the value of the case after discovery is completed. In this regard, certain statements should never be made to the client. Counsel should never say, "Here is what we are going to do." The client must have a shared role in this decision-making process. On the other hand, asking, "What do you want to do?" can create an awkward situation. Most clients will not feel comfortable with that question because they do not have the training and information to answer it. In addition, counsel may be unable to live with the answer. The client deserves counsel's best professional recommendation and judgment.

A preferable approach might be to review what has been done in the case from the first day. Counsel could explain the case's weak and strong points and other relevant aspects, including liability and damages, in a straightforward fashion and then say, "Based on my appraisal, a trial jury would probably award between $_____ and $_____ in this case, and I recommend that we make a settlement demand of $_____."

E. Obtaining Client's Authorization. Plaintiff's counsel should request approval to settle for an amount that is below the more optimistic number, providing a safe fallback position if that amount is not secured. Plaintiff's counsel should obtain client authority to ask for a reasonable amount and then hope to please the client if the actual settlement amount exceeds that figure. These discussions should be documented in writing.

F. Setting the Initial Demand. Having set a range of values for the case, where should counsel set the initial demand? Does one ask for the ceiling or make a firm demand near the floor, indicating that it is a "rock-bottom" figure and not for further bargaining? The almost universal reality in negotiating a personal injury case is that participants are in a marketplace where an auction of sorts is expected to take place, and marketplace rules must be observed. The insurance carrier almost always assumes that the plaintiff has adopted a bargaining stance and will settle for less than the original demand, often for considerably less. However, some commentators believe it may be a disservice to the defendant's representative to start off with too modest a demand. Successful negotiations involve ego satisfaction of the negotiators. Insurance company adjusters may not think that they have done their job properly if they do not bargain, even if the demand might otherwise seem fair. More often than not, counsel will need to play the game of diminishing demands and rising offers to avoid a stalemate. However, counsel must avoid so overpricing the case that talk of settlement ends. The defendant may find the demand somewhat excessive, but it should not seem so out of reach that bargaining does not continue.

G. Jury Appeal of the Parties. The value of a claim usually increases when the plaintiff has strong jury appeal. For example, hard-working family people, young children, and grandparents command premium settlements. On the other hand, most physicians make good witnesses. Many defendant physicians can easily explain difficult-to-understand medical concepts because they do so routinely with their patients. Sometimes, however, a physician's peculiar mannerisms or lack of "bedside manner" can be used to the plaintiff's advantage.

H. Defense Strategies to Be Wary Of. Generally, defense counsel tries to settle the case for less than its true value to impress the insurer. Plaintiff's counsel in a medical malpractice case should be cognizant of three specific negotiating tactics:

1. The "Good Girl/Bad Guy" Team Approach. Refuse to be victimized by a "good girl/bad guy" team negotiating tactic. This tactic is often

used when multiple attorneys represent one defendant or when separate law firms represent two or more defendants. Simply, the tactic uses one negotiator who is unyielding and another who is more conciliatory. This strategy is designed to force plaintiff's counsel to grasp at whatever concessions are made by the more reasonable negotiator for fear that the unyielding negotiator's unfavorable position will be adopted.

2. Going "Off the Record." It is surprising how many attorneys succumb to this deception. A negotiator can attempt to elicit a free concession by asking "Off the record, what do you really think this case is worth?" This should not even merit a response. There is no such thing as "off the record" in negotiations. Similarly, questions such as, "Would you accept $_____?" are not offers and require guarded responses, if any. Plaintiff's counsel should respond that in the event an offer of $_____ is made, the offer will be promptly communicated to the client and a response made.

3. Line-Drawing. A serious mistake in negotiating is to suggest, "We will never take one dollar less than $_____." Successful negotiations do not permit line-drawing. Something can (and often does) happen to force one to cross the line he or she has drawn. The plaintiff's case is at its peak after the plaintiff's expert has given an impeccable deposition precisely detailing the defendant's negligence and the resulting damages. However, this momentum may be lost when the defense expert testifies during the discovery deposition regarding several issues overlooked by the plaintiff's expert, making the case tenuous. For these reasons, counsel loses credibility when he or she draws a line and then must cross it. Flexibility and compromise in the correct proportions are tantamount to successful negotiations, while inflexibility is dangerous and counterproductive.

8.202 Defendant's Perspective. After obtaining a complete and legible copy of all available medical records, defense counsel should conduct an interview with the named defendant client. If the defendant is an entity, such as a hospital, counsel should interview the employees who participated in the care at issue. Counsel should then send the medical records for review to one or more experts in the applicable medical fields or specialties. The case should be reviewed by experts who will be honest and identify both the strengths and weaknesses of the case. It is important that the experts be able to articulate the theories that are most likely to come from the plaintiff's experts as well as the theories that the defense will use to defend the case.

If it is difficult to obtain reviews from reputable experts or if, having found good experts, counsel has trouble obtaining support, it is important to