

WINNING MALPRACTICE CASES



By: J. Will Axon, J.D., Partner in the law firm of Starnes, Davis & Florie, LLP

While at dinner, a longtime friend and physician recently asked me, "What wins medical malpractice cases?" It was a casual question, but he delivered it with a genuine sense of curiosity. It was also a disarmingly simple question, demanding a simple answer. So I replied simply, "Aside from good care . . . preparation." This one-word answer is altogether true, and from a lawyer's standpoint, I was confident no other single word could better answer such a broad question. But my friend was not satisfied. He politely told me that my answer didn't really help him. He was right. Like most doctors today, he was aware of the constant threat of malpractice lawsuits, and he was just looking for some helpful advice.

We talked at length over the course of dinner, and I emphasized that just as every patient is different, every lawsuit is different too. I gave him some specific examples and war stories within his particular specialty, but I struggled to give him a working answer which he could carry back to his practice in any meaningful or beneficial way. Afterward I continued to wrestle with his question, and I even spoke with some much wiser souls at my firm about what would constitute a good answer. This article represents what I should have told my friend.

At the outset, I should acknowledge how pertinent this question is. Over the years, my firm has handled hundreds of malpractice cases across Alabama, and as the healthcare industry (particularly in Jefferson County) has grown, so has the number of lawsuits. To state the obvious, doctors are now treating more patients in Jefferson County than ever before, and doctors now have more information available to them than ever before. In the current climate of healthcare reform, we've all become familiar with the debate surrounding the vagaries and expenses of "defensive medicine". No doubt with a presidential election on the horizon, we will hear more. Implicit within this debate is the notion that "defensive medicine" is equivalent to "needless medicine". I'm sure there are certain situations where this is true, but those situations never make it to my office. I've never once heard a plaintiff's attorney criticize a doctor for ordering a "needless" test, but I cannot count the times I've heard a plaintiff's attorney, with the benefit of hindsight, argue that a doctor "cut corners" or "ran

a medical red light" because he or she didn't order one. Suffice it to say, because the volume of patients has increased, and because the information available (or obtainable) to doctors has also increased, my friend's question is not only pertinent, but in some instances unavoidable.

Still, answering such a broad question is challenging because it requires such a broad answer. The specifics within each case are paramount and cannot be over-stated, but the truest answer to my friend's question begins and ends from the perspective of a jury. They are, after all, the arbiters who render a thumbs-up or thumbs-down decision at trial. In talking with jurors over the years, we've found that most jurors approach a medical malpractice trial with three fundamental questions at the forefront of their mind. Very often, these three questions form a filter through which each juror organizes and considers specific pieces of evidence as they formulate an ultimate conclusion. What I should have told my friend is, more often than not, winning a malpractice case involves getting a "yes" answer to these three questions:

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Ambassador - The Referring Physician's Connection to UAB

In June 2007, UAB Physician Services launched Ambassador, a secure Web-based tool providing referring physicians with a personal, electronic connection to the UAB Health System.

Once registered, physicians have the ability to view the UAB EMR (electronic medical record) system, allowing them to view clinical notes, discharge summaries, labs, reports, and other documents related to their patients' UAB outpatient and inpatient visits. Additionally, Ambassador allows physicians to complete and send the referral form online, eliminating the need for calling or faxing patient demographics during business hours.

The program has been extremely well received throughout the community and continues to grow. Since its 2007 inception, over 17,000 patients have been added to Ambassador, and over 1,100 referring physicians from around the region are accessing the portal.

"Ambassador is a valuable tool for our referring physicians,

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UPCOMING EVENTS

June 20	The Wayne Finley 811 Breakfast Club Meeting will be held at 8:30 a.m. in the JCMS Board Room. Executive Committee Meeting – 6:00 p.m. Foundation Trust Meeting – 5:30 p.m.
July 18	Executive Committee Meeting – 5:30 pm
Aug. 4	MASA's Resident Fellow Section will meet at the Jefferson County Medical Society Board Room to hear speaker Wade Payne. The meeting begins at 6:00 p.m. and includes dinner. **Partnered with Jefferson County Medical Society
Sept. 19	Foundation Trust Meeting – 5:00 p.m. Executive Committee Meeting – 6:00 p.m. Board of Directors Meeting – 6:30 p.m.
Sept. 20	The Wayne Finley 811 Breakfast Club Meeting will be held at 8:30 a.m. in the JCMS Board Room.

Contact Juanita Pruitt at 933-8601 or jpruitt@jcmsalabama.org for more information regarding any of the above events.

Upcoming MASA Seminars

Ensuring Quality in the Collaborative Practice

The Medical Association of the State of Alabama, the Alabama Board of Medical Examiners, and the Alabama Board of Nursing have partnered to present a seminar for physicians, advanced practice nurses and certified nurse midwives who are involved in or considering a collaborative practice agreement. The seminar is open to members and non-members of MASA. There will be two different meetings – **September 1** in **Dothan** and **December 1** in **Birmingham**. Find out more information by visiting MASA at www.masalink.org and looking under the Education tab or contact MASA's Department of Education at (334) 954-2500 or (800) 239-6272 for more information.

Prescribing Controlled Drugs

This Intensive Course in Prescribing Controlled Drugs is designed for physicians, dentists, and physician assistants in all specialties who need or wish to increase their knowledge and ability to effectively prescribe and control medications without the potential for abuse. There will be two different meetings – **July 15-17** in **Mobile** and **November 19-20** in **Birmingham**. Find out more information by visiting MASA at www.masalink.org and looking under the Education tab or contact MASA's Department of Education at (334) 954-2500 or (800) 239-6272 for more information.

In Memoriam

The JCMS wants to acknowledge the recent passing of the following JCMS members:

Alpheus Monroe Deason, Jr., M.D.
April 9, 2011

George A. Omura, M.D.
April 19, 2011

John Sellers Whitehead, M.D.
May 5, 2011



THE MEDICAL OFFICE

At The (Medical) Plaza in the heart of Gardendale, Alabama

Now available for the first time in Gardendale, Alabama is "The Medical Office" time share at The (medical) Plaza. The Plaza has a proven successful history with medical tenants due to the great location and the privacy provided by it being set back from Fieldstown Road, the main thoroughfare in Gardendale and the convenient/safe parking lot on the entry level. A physician's office is now available for one or two days per week and only requires a minimum of an 18 month lease.

The Medical Office includes waiting area with two rest rooms, registration counter, four examination rooms, kitchenette, office and storage. Each examination room includes exam chair/fold out exam table, stationary chair, doctor's stool, examination light and wash stand with cabinet. Lockable storage cabinets/room will be provided for each physician's equipment and supplies.

The Medical Office may be used up to 12 hours per day, which means up to 48 hours per month (one day per week). It is anticipated that this space will be leased very quickly. Please call the number below for additional information or if you would like to see the space.

McAdam Properties LLC
1200 Beacon Parkway East, Ste #706
Birmingham, Alabama, 35209
205-903-7175
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Is this the type of doctor I want for me and my family?

There is no getting around this threshold question. In a very real way, a doctor on trial is being interviewed by every juror in the courtroom. Getting a "yes" answer to this first question begins with a doctor's education, training, and experience, and then carries forward with their diligence and communication skills. For defense attorneys, the medical profession has already given us a wonderful gift in terms of the rigors of getting into medical school and the long hours of study, training and practice which follow. What is even more valuable to a defense attorney is the thousands of small things which doctors do for their patients every day. Every time you re-schedule a no-show, or your office calls a patient at home for follow up, you've given another gift to your defense attorney. Every time you initial a lab result or document something personal about your patient, this is another gift. I could go on and on, but the bottom line is that taking a personal interest in your patients makes it much easier for a juror to take a personal interest in the outcome of your case.

Is this doctor telling me the truth? In simplest terms, a doctor's defense must match up with the evidence in the chart. In some format, most physicians have heard lawyers like myself harp on about the importance of copious documentation. Often lost in this message is the equally important feature of accurate documentation. The reason myself and others are guilty of this is very simple - - the battleground for virtually every malpractice trial boils down to a handful of entries within a clinic or hospital chart. Even though it's impossible to document all the care a patient receives, rest assured that at every given opportunity, a plaintiff's attorney will delight in saying, "If it wasn't charted, it wasn't done". They will delight even more in pointing out entries which are either inaccurate or late or both. Most of all, plaintiff's attorneys are posi-

tively beside themselves at the prospect of an altered or fraudulent record. The next time you pick up a pen or put your fingers on a keyboard to update a chart, please keep in mind that you are creating the most important witness who will testify in a potential malpractice case involving yourself or perhaps your colleagues. Above all, you want this witness to be truthful and thorough.

Did this doctor care? Counterbalancing the positive image which doctors have earned as respected professionals is the often negative experience of seeking treatment in today's medical marketplace. This is to say that every juror will have sat for what they feel is way too long in a hospital or clinic waiting room. They will have filled out an ever-mounting stack of paperwork, and many will have undergone an outpatient procedure which not long ago was standard inpatient therapy. In short, jurors often feel that medicine has become a mechanized and impersonal process. Of course, anything a doctor can do to dispel this perception is valuable. Compassion will not only serve a doctor well in the courtroom, it may prevent a lawsuit altogether. Providing conscientious and thoughtful treatment is obviously the shortest route to getting a "yes" answer to this last question. Communicating (and documenting the communication) is also crucial. Most jurors understand that diseases can be difficult to diagnose and complications can arise from treatment. They are far less understanding when a plaintiff's attorney can convince them that a doctor did not care about a patient, and consequently, the patient fell through the cracks. Before finalizing this article, I called my friend and told him what he had started with his question. We talked about the three "yes" answers, and had a few laughs as well. As with him, I hope you can find something useful within the broad strokes outlined above, and on behalf of everyone at my firm, we wish you well in your practice.

Annual JCMS Day at the Ballpark



Special Thanks

Special Thanks to Healthcare Financial Services for sponsoring the 2011 Annual JCMS Day at the Ballpark



Dick Williams and Robin Long from Healthcare Financial Services

JCMS Members Elected to MASA Positions

During the MASA Annual Meeting, held in Sandestin on May 27-29, T. Michael Harrington, M.D. was elected President-Elect of MASA. In addition, Darlene Traffanstedt, M.D. was elected to serve on the Council of Medical Education and Mark Williams, M.D. was elected to fill an At-Large position on the council of Medical Services.



Drs. Buddy Smith, Chairman of the Board of Censors (L), and Steve Furr, President of MASA (R), presented JCMS member, Dr. Michael Fleenor, with the 2011 William Henry Sanders Award for service above and beyond the call of duty in the public health arena at MASA Annual Awards Program on May 27, 2011.

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and allows for improved quality of care through enhanced communication", says Mary Gibson, RN, Director of Physician Services & UAB Connect.

Ambassador is available to any referring physician. Once access is requested, a secure token and username is issued to the physician. One of four licensed, registered nurse liaisons delivers the registration packet and demonstrates the program to the physician and office staff. Physician Services is also able to deliver the Ambassador information to those physicians located outside of the liaison territory via certified mail.

Physician Services is currently working on updates to the Ambassador portal, allowing added features as well as a more user-friendly look and feel. By updating the user interface of Ambassador, physicians will have a more concise view of their patients' encounters, as well as the ability to customize the appearance of their portal.

For questions about Ambassador, please contact UAB Physician Services at 205.934.6890 or email physicianservices@uabmc.edu.

Check Your Information on the JCMS Website!!!

The JCMS has a new interactive website which can be found at www.jcmsalabama.org. The new website, which was designed by InfoMedia, is another way we can keep members informed as well as offer assistance to the public. One exciting feature of the website is the online information offered about our members. For years the Society has taken calls from the public asking for referrals as well as asking about the educational background and training of physicians to whom they have been referred or who they are considering as their physicians. We would like to be able to give them the most accurate and up to date information as possible.

We have the ability to customize your display page by adding your photograph and a brief description of your practice. We are in the process of adding photographs taken by RCL Portraits to the website, and we will be glad to add a link to your office's website to allow patients and other physicians to obtain additional information about you and your practice. The information displayed on the website is based upon the most recent information we have on file. Please take a moment to review your information for accuracy and completeness—just visit the website and click on the "Find a Doctor" tab. Let us know if there are any additions or corrections which need to be made and feel free to send us a photograph if you did not have one taken by RCL, your practice description and your website information so we can update your online directory listing. You might also consider sending us information regarding additional languages spoken, which board certifications you hold and any sub-specialties, since those are also questions we frequently receive. You can send additional information, photographs and corrections to us at mwise@jcmsalabama.org.

In The News

Steven J. Kulback, M.D., was recently elected a Fellow of the American College of Physicians, as well as being elected President of the Medical Staff of St. Vincent's East. Dr. Kulback practices Internal Medicine at Alabama Internal Medicine, P.C., in the Birmingham area and has been Board Certified since 1983. He also serves as a Board Member of the Jefferson County Department of Health.

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Attention Residents

MASA's Resident Fellow Section (RFS) has partnered with the Jefferson County Medical Society to provide a presentation in the Going Alone After Residency series. Wade Payne of the Medical Practice Resource Group will be the guest speaker and will talk about how to shop for the best policy at the best price. The meeting will be held at the Jefferson County Medical Society on **Thursday, August 4th**.

The meeting begins at 6 p.m. and includes dinner. RSVP to MASA's Director of Membership, Jennifer Hancock, at (800) 239-6272 or by email at jhancock@masalink.org.

Webinar instructions will be available two weeks prior to the event.



New Members

Chad Eric Austin , M.D.	Physical Med & Rehab
Mark A. Buckmaster, M.D.	Pediatric Anesthesiology
Ericka D. Campos, M.D.	Resident
Carolyn Lee Dobbs, M.D.	Preventive Medicine
Mallik Edupuganti, M.D.	Resident
Pavani Ellipeddi, M.D.	Internal Medicine
James Michael Johnston, M.D.	Neurological Surgery
Scott T. Kelley, M.D.	Internal Medicine
Anthony Lessa, M.D.	Family Medicine
Steven Glen Lloyd, M.D.	Cardiology
Jason Allen Lowe, M.D.	Orthopedic Surgery
Scott Thomas McKnight, M.D.	Surgery
Joel Ashby Mixon, M.D.	Diagnostic Radiology
Tuan V. Nguyen, M.D.	Neurosurgery
Daryl C. Osbahr, M.D.	Fellow
Blake Elliott Pearson, M.D.	Neurological Surgery
Aaron Provisor, M.D.	Resident
Steven Guy Sheils, M.D.	Anesthesiology
Tina Y. Simpson, M.D.	Pediatrics
Deborah A. Stanford, M.D.	Emergency Medicine
Maria Tirado, M.D.	Resident
Heather R. Waldrop, M.D.	Resident

Ask Robin Long for your MEMBER DISCOUNT !

The Jefferson County Medical Society has arranged for its members to receive special discounts for collection and billing services. By special agreement with Healthcare Financial Services, LLC (HFS), members will get outstanding collections results and services while paying low contingency fee rates...no results, no fees for JCMS members. Take advantage of your JCMS affiliation and call Robin Long at 601-420-1242 or 1-877-747-7072 (Client Services). Your benefits will be worth the call as HFS designs a special campaign for your specific needs. Be sure to mention your membership with JCMS to receive the discounted rate.

See ad on page 6

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