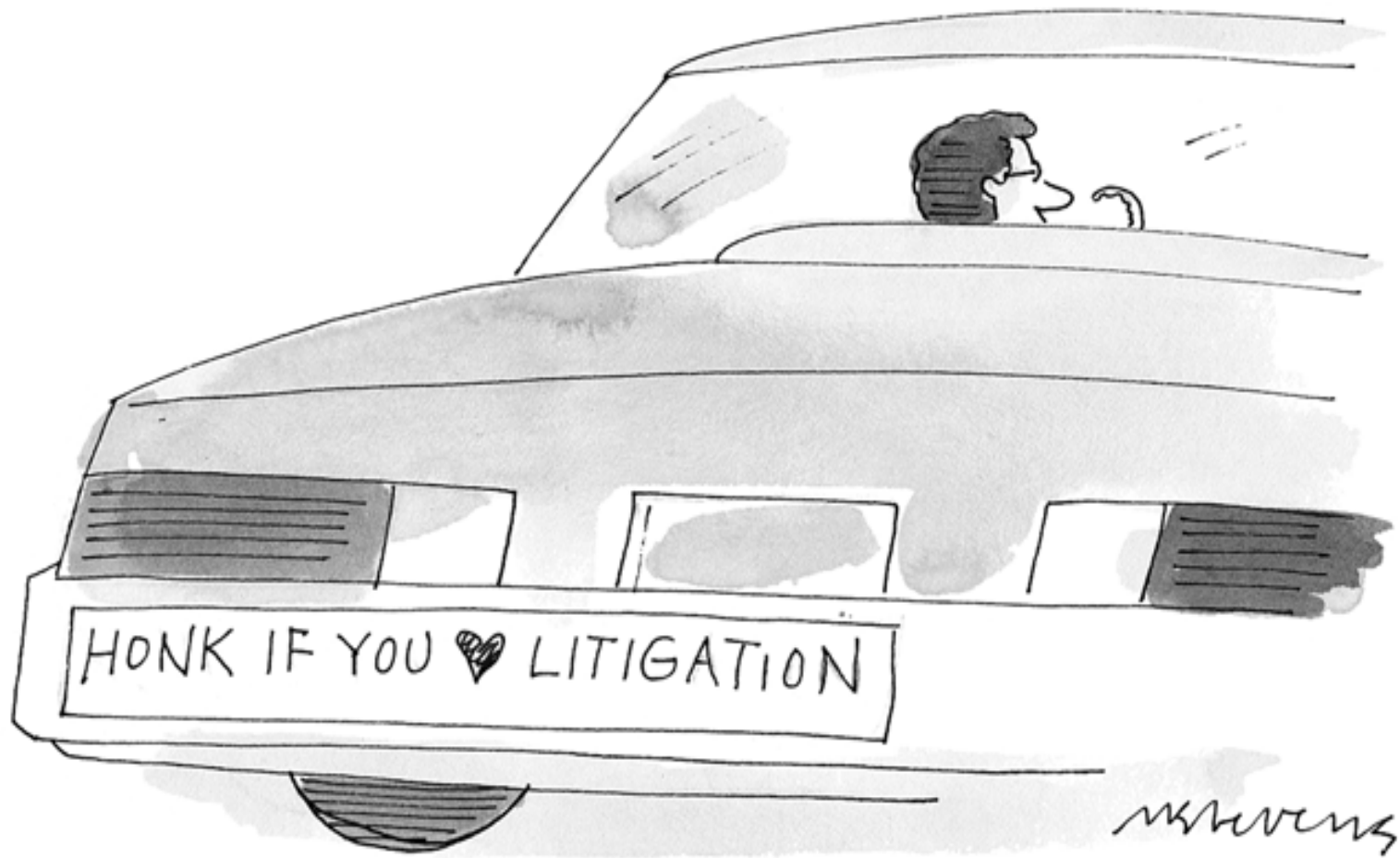


Medical Malpractice Defense: Working with Outside Counsel to Evaluate, Litigate, and Win Claims Asserted Against Providers

Presented by John Kapacinskas and Erin Secord

November 12, 2014

Fredrikson
& BYRON, P.A.



© 2005 Mick Stevens from cartoonbank.com. All Rights Reserved.

Webinar Topics Overview

- Assembling and Defending Medical Record
- Preserving and Analyzing Policies and Procedures
- Witness Preparation
- Working with Co-Defendants
- Determining Whether to Put on a Damages Case

Medical Records: Strategy and Pitfalls

- Plaintiff will challenge the integrity of the chart
- Importance of providing a complete set
- Providing exact copy of records to counsel
- Avoiding spoliation claims
 - Example: Post-hoc entry changes

Initial Request for Medical Records from Plaintiff

- Written request from patient/plaintiff
- Determining timeframe of request and scope of relevant records
- Gathering chart materials
- Incident reports
- Metadata
- Often overlooked records
 - Example: Physical Therapy records

Assembling the Complete Medical Record

- Track down records saved on other systems
- Dealing with “thinned” charts
 - Example: Long-term care
- Review Medical Records with counsel

Medical Record Issues – Paper Records

- Completeness of Record
- Preserving original/chain of custody of medical record
- Limiting physical access to medical chart

Medical Record Issues – Electronic Records

- Screen view issues
- Metadata
- Separate records systems
- Printing and accessing records
 - Example: Elderly patient slip and fall

Medical Record Issues – Other Physical Evidence

- Birth injury cases
 - Example: fetal monitoring strip
- Medical device cases
 - Example: device packaging materials
- Laboratory cases
 - Example: lab testing equipment calibration & internal handling documents
- Pharmacy cases
 - Example: Compounding formulas and mixing data sheets

Incident Reports and the Peer Review Privilege

- Peer review privilege
- Public policy justification: allowing provider to investigate the quality of care through open and critical analysis without fear of litigation consequences
- Other privileges
 - Hospital privilege
 - Nursing privilege
 - Attorney-client privilege

Considerations for Risk Managers

- Preparing incident reports
- Committee Review
- Involving counsel
- Compiling and storing medical records as part of investigation
- Incident reports not part of medical record

Defending Integrity of the Medical Record

- Produce one copy in highly usable format
- Restrict physical access to original charts
- Difficulty in defending case if medical records integrity is lost

Chain of Custody

- Maintain physical possession of chart
 - Example: providing to co-defense counsel
 - Exception: Court order regarding handwriting examination
- Entries contemporaneous with care
- Authenticity issues

Anticipating Plaintiff Efforts to Challenge Medical Record

- Produce complete, full medical record in initial production
- Gaps in medical records – Identify and find before initial production
- Persistent errors
 - Example: identical entries in long-term care containing repeated errors

Counsel's Initial Review of the Medical Record

- Physician notes
- Missing entries
- Gaps in timeline
- Identifying documents protected by peer review privilege

Preparing Timeline

- Counsel or paralegal
- Identifying key dates of care
- Examining roles of providers in Plaintiff's care
- Importance of chronology

Preserving and Analyzing Policy and Procedures

- Maintain copies of all procedures and policies in effect at the time of the care at issue
- Clinical judgment in the absence of specific written policy
 - Example: contrast dye allergy

Issues with Updated Policies and Procedures

- Role of policies and procedures in defining standard of care
- Revisions often more comprehensive
- Inability to provide policies and procedures at time of care can lead to current policy impacting legal standard of care

Witness Preparation

- Importance of witness preparation
 - Initial meeting
 - Follow-up meeting
 - Final deposition preparation
- Differentiating standards of care
- Preparing for depositions
- Preparing for trial

Identifying Individuals with Knowledge

- Examine medical record
- Initial interviews
- Defining roles in Plaintiff's care
- Plaintiff strategy of painting certain care providers as "poster child"
 - Example: Diastolic vs. systolic blood pressure readings

Initial Interview

- Determining where individual fits into Plaintiff's overall care to limit scope of testimony
- Medicine terminology and re-education
- Medical decision-making
- Causation questions
 - Knowing why decisions were made and actions were taken

Second Meeting

- Anticipating deposition issues
- Legal standard of care not the same as medical standard of care
- Themes of case
- Reasons to deviate from policy and procedures
- Avoiding criticizing other care providers
- Medical literature

Final Deposition Preparation Meeting

- Emphasizing nuances of standard of care
- Preparing for objections
- Themes of care
- Statements about other care providers

Deposition Preparation and the Attorney-Client Privilege

- Deponent will be asked about materials reviewed prior to deposition
- Materials provided to witness are discoverable
- Limited set of medical records for most witnesses
- Limit discussions with other fact witnesses

Deposition Logistical Concerns

- Allow employee to not work night before or day of deposition
- Witness sequestration
- Importance of beginning on time and attire

Deposition Pointers

- Themes of care
- Themes of the case
- Topics to avoid
- Speak clearly and slowly
- No head nodding/chair rocking

Deposition Pitfalls

- “Friendly” plaintiff’s lawyer
- Written materials defining standards of care
 - Policies and procedures
 - Medical Literature
 - State and Federal Regulations

Working With Co-Defendants

- Critical importance –
 - Appportionment of fault and damages
- Avoiding blaming co-defendants
- Managing relationships with co-defendants
- Managing relationships with co-defense counsel

Co-Defendants with Excess Liability Exposure

- Understanding which defendants have most exposure
- Plaintiff strategy of isolating defendant(s) with greatest exposure
- Strategically setting-up causation issues for trial

Evaluating Whether to Put on A Damages Case

- Liability exposure considerations
 - Information from insurer
 - Evaluation by counsel
- Early strategy decision
- Expert retention and disclosure

Damages Strategy Issues

- Traditional rule
- Excess verdict impact
- Sophisticated jurors
 - Example: mock jury experience

Plaintiff's Damages Case

- Life care planner
- Economist expert
- Present value of Plaintiff's future care

Annuity Broker vs. Economist

- Annuity broker
 - Typically, lower damages (present value)
 - Lifetime income stream
 - Preferred for most defendants
- Economists
 - Manipulation of PV calculation
 - Significantly higher damages

Conclusion

- Importance of preserving integrity of the medical record
- Understanding themes of the case
- Differentiating between legal standard of care and medical standard of care
- Working with co-defendants to drive down value of the case
- Damages issues

Questions?

John Kapacinskas

(612) 492-7235

jkapacinskas@fredlaw.com

Erin Secord

(612) 492-7446

esecord@fredlaw.com