BY LINDA A. HAY AND SUSAN A. WAGENER

Beware of Potential MPL Verdict Appeals

"We the jury find for the Defendant, Dr. David Kettner." Dr. Kettner, a family practitioner, bowed his head and breathed a deep sigh of relief. It's finally over, he thought. It had been six years since he got the news that his long standing patient of 10 years, Victor Gonzalez, had died of a heart attack the evening after being in his office for a routine visit. It had been five years since he was served with a wrongful death lawsuit by Maria Gonzalez, Victor's widow. And it had been a long and exhausting two weeks that he had been on trial based on accusations that he had committed medical malpractice for not taking earlier steps to diagnose a cardiac problem, which would have prevented Gonzalez's death.

Through the life of this lawsuit and all through trial, Dr. Kettner had been strong in his own defense, as had been his trial team of defense counsel, insurance carrier, and witnesses including the experts retained to defend him. Dr. Kettner felt certain that the care he provided was absolutely reasonable and appropriate, and Mr. Gonzalez's sudden death had not been due to anything the doctor should have done sooner, or even that the patient's death could not have been prevented. The team agreed his defense was strong and that the plaintiff's case was weak, despite the sympathies. While his confidence never wavered, the trial had been both physically and emotionally one of the most stressful times of his life. Despite this long and difficult road, the vindication from the verdict was worth it. It was, indeed, finally over. Or so he thought.

Three weeks after the verdict, and faced with the prospect of walking away with nothing, Mrs. Gonzalez and her lawyers filed a post-trial motion citing alleged errors made by the court and defense counsel at trial. Dr. Kettner's lawyers responded that there were no prejudicial errors at trial and the verdict should stand. What followed was months of briefing the alleged errors during the trial, followed by an oral argument before the trial judge. About a month later, the trial judge issued a written ruling finding there was no error.

Undaunted, plaintiff's counsel filed a notice of appeal to the appellate court. That process, in the appellate court, took more than a year and a half to come to fruition after much more intensive briefing based on in-depth factual and legal analysis of the voluminous trial record with transcripts, and the volumes of court records during the years of litigation that preceded trial.

After all briefing was complete, the court allowed oral argument on the case. The defense team felt confident in their arguments, but it seemed clear that certain of the appellate judges were open to the plaintiff's arguments. After many more months awaiting a decision, the appellate court issued its written opinion. Indeed the appellate court was open to plaintiff's arguments and concluded that there had been two errors in closing argument (not in the evidence of the case) by defense counsel that the court felt prejudiced the jury enough to warrant a complete reversal of all the time and effort at trial by all parties, their lawyers, and the jury.

The actual appeal

So now, almost two years after the day of the initial jury verdict in his favor, Dr. Kettner and the trial team were faced with the

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prospect of a retrial of the case. Dr. Kettner's immediate response to this sobering news was, "I would rather go through the death of one of my parents than to have to go through trial again." It would be more than a year before a retrial was set, considering the same issues and evidence, or nearly three years following the initial verdict.

Try as he might, Dr. Kettner found it difficult to refocus all of his strength and confidence on preparations for retrial. While he remained confident in his care and knew that the retrial responsibility rested heavily on his shoulders, he found it hard to regain that momentum of concentration as he had for the first trial. Moreover, the thought of shutting down his family practice for another two to three weeks added more burden on a financial level.

Through this time, and armed with the appellate ruling, plaintiff's counsel pushed hard for a settlement of the case. The defense team, Dr. Kettner included, felt the request for settlement monies was far too high, and felt confident that the jury got it right the first time and would do so again. Finally, as the trial date approached, plaintiff counsel changed their position and lowered their demand significantly to a request to cover costs and expenses. Discussion among the defense team resulted in an agreement to try to resolve the case in view of the latest demand, and indeed the case settled at that point for a very reasonable sum based on costs.

The agreed-upon settlement and release document was signed, containing a confidentiality clause and a denial of liability, typical terms for such an agreement. The check was delivered.

More fallout

Again, Dr. Kettner thought, it was really over. Yet again, however, that proved not the case. The settlement was reported, as is required, to the National Practitioner Data Bank. While not generally accessible to the public, the report is sent to a state medical disciplinary board.

The disciplinary board contacted Dr. Kettner and asked him to provide an explanation of what happened and the basis for settling this case. His lawyers prepared a detailed outline of this lengthy history, and submitted it to the board to show why Dr. Kettner had acted properly in his care of Mr. Gonzalez.

Favorably, the board did not request an in-person conference with Dr. Kettner, and accepted his response without further action. Additionally, as Dr. Kettner learned as well, lawsuits and settlements are a subject of inquiry in hospital credentialing processes. Dr. Kettner sought his lawyers' assistance in responding to any inquiries where he had to provide details of this case.

Finally, at last, it was over.

Case discussion

This case, based in part on factors from a few actual cases, provides an extreme example of the challenges faced by practitioners and the entire defense team in the aftermath of a hard-fought malpractice case. Even with good defenses, good and committed clients, a good and solid defense team, and even with the blessing of a 12-person jury who heard all the evidence, cases can still continue on. While not many cases provide such an extreme example, there are many aspects of this scenario that doctors and defense teams

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are faced with all the time when it comes to communication with the practitioner concerning the realities of settlement, verdicts, and reporting.

The first aspect is the role of the defense team to assure that the medical defendant knows, understands, and appreciates the consequences of any decisions they are called upon to make in a case, including the risks, the benefits, and any alternatives. This process, akin to the medical informed consent process, involves a discussion with the doctor about the path the case can take, and the details of that path, with the opportunity for questions and answers, at an appropriate and timely point in the case. For example, this can be after a demand is made, a good or bad consultant review is had, or plaintiff experts are deposed.

A discussion on consent to settle should involve a frank assessment of the risks, benefits, and alternatives to settlement. Consequences can include a denial of liability in the release documents, confidentiality if agreed to, reporting requirements to the National Practitioner Data Bank, the state board, and typical processes where questions on lawsuits may arise, such as in the process of credentialing.

Discussions about trial similarly should include the risks and benefits and alternatives to trial, from the big-picture perspective, to the smaller and practical details. These details should always include the educated and honest evaluation of the case by the defense team, the consequence of a public judgement, reporting requirements, and commitment of the client to be present and engaged through the preparation for and duration of the trial. The appellate process should be a part of this discussion.

As to the more practical details, the practitioner must know about the difficulties of scheduling through trial, the realities of time off or shutting down of a practice, the logistics of trial, and being physically and mentally well prepared on all fronts. Practical details as to preparation sessions that will be needed, logistics, appearance and demeanor in and around the courtroom, and the stress of being in and around their adversaries, including the former patient and family members, are practical details that warrant discussion and help to invite not only questions, but a vested commitment by the practitioner through trial. A field trip well in advance of trial to the courthouse can be an immense help with preparations and discussions, and can help bring some level of comfort to the practitioner as to their surroundings.

Good communications among the defense team on these very important topics, as mentioned above, will help the practitioner make informed and educated decisions, with no later surprises. Regardless of how a lawsuit is ultimately resolved, informed and educated decision making with all members of the defense team drives a more engaged practitioner, which most always bodes favorably for all of the defense, and the team, even when unexpected or untoward results come down the road. A prepared, informed, and engaged practitioner is not only a better witness, but also is more likely to be a satisfied practitioner, even when unfavorable events occur. MPL

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