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What Plaintiffs' Lawyers Must Know Before Accepting a Medical Negligence Case

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I. INTRODUCTION

Medical negligence is one of the most difficult areas of personal injury practice. Not only must the lawyer have the clinical skills necessary to effectively present the case, including fronting the expenses of proper preparation, she or he must also be able to take the case to trial and afford to lose. It's easier to justify the costs to work a case up when, in your heart, you know it will probably settle. It's an entirely different matter when you directly face the reality of a defense verdict at trial with the loss of your time and significant costs advanced.

In addition to the clinical skills and money for costs advanced, the lawyer must have command of the relevant areas of medicine. Knowing the medicine usually requires hours of research on the medical literature just to be able to intelligently talk to the medical experts and a jury.

There are mine fields and traps galore in medical malpractice. Savvy case selection is imperative. The negligence must be obvious; many say it must be "jaw dropping" in order to have a real chance at winning. When evaluating a medical negligence case, all that glitters is not gold. You will make more money by turning down all but the really good cases with serious damages because questionable cases will certainly be tried and, more than likely, you and your client will both lose.

Remember, a bad bedside manner or rude demeanor isn't the same thing as negligence; neither is a bad result. Even though the burden of proof is "by a preponderance of the evidence," I think of the burden of proof as being the same as the criminal standard of "beyond a reasonable doubt" when I evaluate a medical malpractice case because, realistically, that's what it takes to win at trial. Even if the negligence is obvious, a wining case also requires a good plaintiff; the jurors must be able to see themselves in the plaintiff's shoes.

Doctors win 5 out of 6 cases that are tried. Why? There are a number of reasons: (1) defense lawyers and insurance companies have access to lots of great experts, (2) the medical malpractice defense bar is full of excellent lawyers who specialize in defending doctors, nurses and hospitals, (3) most all of the cases that the plaintiff will probably win are settled, therefore, the cases that are tried almost always result in defense verdicts, and (4) the whole political tort reform agenda has contaminated the public and your jury panel. This makes it difficult to actually try your good cases and settle your bad ones, which is what every plaintiff's lawyer aspires to. The reality is generally exactly the opposite in medical negligence cases.

Two interrelated considerations[1] that affect the dynamics of a medical malpractice claim against a physician include the National Practitioner Data Bank (NPDB), and the consent clauses found in most professional liability policies written in Oregon.

The NPDB was created by the *Health Care Quality Improvement Act of 1986*, as amended 42 USC ' 11101, 01/26/98.[2] It is essentially an information clearinghouse to collect and release

[1] Thanks to Robert Beatty-Walters for this portion of the paper. The NPDB is an important dynamic in medical malpractice.

[2] The NPDB regulations are codified at 45 C.F.R. Part 60.

certain information related to the professional competence and conduct of physicians, dentists, and, in some cases, other health care practitioners. Any insurance company, self-insured hospital, or HMO, that makes a payment for the benefit of a physician, dentist, or other health care practitioner in settlement of or in satisfaction, in whole or in part, of a claim or judgment against that practitioner, must report the payment information to the NPDB. In addition, adverse actions against a physician's privileges or license must be reported to the NPDB, whether or not payment has been made on behalf of the physician.

Access to this information is limited to health insurance plans, state licensing boards, and credentialing entities such as hospitals, clinics and the like. You cannot get this information as a plaintiff's attorney, except in very rare circumstances.[3]

The information contained in physicians' NPDB files can affect their ability to obtain privileges at hospitals, clinics, and surgical centers, and whether they are included as a preferred provider in a particular health care plan. Since the scope of the NPDB is national, when doctors apply for licenses in other states, the NPDB information is obtained as a part of the review done by the state board of medicine where the physicians apply for a license.

Even though this is not something you can control, understanding the fact that settling physicians are reported to the NPDB is important because this may drive the decision by the physician concerning whether or not to settle your case. There is no minimum amount required for reporting, so physicians will not settle cases just to avoid the cost of litigation. In fact, a physician can prevent his or her insurer from settling the claim at all.

Physicians take medical malpractice claims personally. Most professional liability policies written in Oregon contain a consent clause, which gives the insured physician the power to prevent the insurer from settling your case. So, even where an insurer could settle your case for $5,000, the insured physician could withhold consent forcing the insurer to defend the case through trial, even if it costs the insurer $200,000. Again, this is not something you as a plaintiff's attorney can control, but you must be aware that this dynamic affects whether you can get your case settled, regardless of its perceived merits.

[3] A plaintiff's attorney in a medical malpractice action may obtain NPDB information on a physician only after evidence is submitted to the Department of Health and Human Services demonstrating that the hospital or other credentialing entity failed to submit a mandatory query to the NPDB regarding the subject named by the plaintiff in the action. This evidence is not available to the plaintiff through the NPDB. 45 C.F.R. ' 60.13(a)(1)(v). In practical terms, this evidence is not available at all in Oregon. See, O.R.S. 41.675.

II. FOUR THINGS NEWER OR INEXPERIENCED PLAINTIFFS' LAWYERS MUST KNOW WHEN ENTERING THE FIELD OF MEDICAL NEGLIGENCE LITIGATION:

A. THE CARDS ARE STACKED AGAINST YOU

Most jurors don't want to admit that doctors make mistakes. We all entrust our health and well-being to our doctors. We want and need to believe we can trust them to do what's right. Besides that, understandably, most jurors properly like and respect members of the health care community.

It's not easy to convince a jury that a doctor was negligent. Trial statistics bear this out. In Oregon, there have been very few jury trials with a plaintiff's verdict against a doctor in the last two decades.

The rise of the internet with its easy access to medical information raises the bar for personal accountability on the part of the patient. No matter what the facts and irrespective of whether comparative fault is actually pled, jurors will consistently blame plaintiffs for not doing their own internet medical research, being more pro-active and getting a second opinion.

The scope of plaintiffs' rebuttal is shrinking. I'm discussing rebuttal near the front of this paper rather than at the end, as it normally occurs in trial, for a good reason. While plaintiffs' lawyers struggle to find even one well-qualified expert on a key issue, defense lawyers can easily bring two or three experts on the same point, with at least one from OHSU. I know jurors aren't supposed to count the number of witnesses, but when the defense wins the witness count and the last expert testimony they hear is a defense expert, it's very difficult for a plaintiff to win.

The opportunity to put on rebuttal experts is vital even though it's hard at the beginning of a trial to anticipate the exact issues that will be important to rebut, and the logistics in scheduling out of state witnesses for rebuttal are a nightmare. Although rebuttal is an asset for plaintiffs, it is a vanishing feature in trials. In my experience, with each passing year, more judges exercise their broad discretion to limit the scope of rebuttal. This is toxic for plaintiffs in medical negligence cases.

If you do win at trial, the defense will surely appeal. Why not? The Oregon legislature created a lesser interest rate (the lesser of 5% per annum or three percent in excess of the discount rate in effect at the Federal Reserve Bank) for appeals in medical negligence cases.[4] Compare this to the usual 9% post-judgment interest rate for non-medical negligence cases. The defendant won't lose much by appealing the case even if the plaintiff wins the appeal.

[4] ORS § 82.010 (2)(f)

B. TAKING A MEDICAL NEGLIGENCE CASE TO TRIAL IS EXPENSIVE

Medical negligence cases often require extensive document-intensive discovery, numerous depositions, medical literature research, medical exhibits in the form of models, drawings, and/or enlarged imaging studies, and the use of experts. Case costs add up quickly. By the time the case is tried, the costs can easily exceed $100,000, and birth injury cases can quickly approach $150-200,000. You will go broke with a few unsuccessful medical malpractice trials, and no, they aren't "moral victories" either.

C. DAMAGES MUST BE SERIOUS

How serious is serious? At least $400,000, and I prefer double that amount. Do the math. When your costs advanced are so high and the risk of loss is so great, the damages have to be big in order to make the case "pencil" when it comes to economic viability.

D. EXPERTS ARE ESSENTIAL AND DIFFICULT TO FIND

Finding qualified, respected experts for a plaintiff's medical negligence case is really difficult. The defense bar has all the experts it could ever need at its beck and call. Can you say OHSU or "pill hill"? Plaintiffs' lawyers must work hard to find qualified physicians who are willing to testify against a fellow doctor. Those who are willing to testify for a plaintiff become labeled and professional pariahs. Think about it. Why would any doctor later refer patients to another doctor who has testified against a fellow doctor and friend?

Assuming you can adequately fund and try a medical malpractice case the next biggest hurdle is locating and recruiting quality experts. There are companies that provide experts for plaintiffs' lawyers but that's not the best way to find experts because often the expert provided can be easily impeached as a "1-800-dial a whore." If you're lucky, researching the medical literature on the standard of care for a particular case and contacting the doctors who authored the literature can result in finding world-class experts for your case. Word of mouth between plaintiffs' medical malpractice attorneys is another way to locate medical experts.

Experts on the standard of care drawn from instate are wonderful but almost impossible to find. However, out of state experts aren't so bad on matters of causation and damages because you don't have to contend with the locality rule that applies to the standard of care and negligence.

III. THREE THINGS PLAINTIFFS' LAWYERS MUST KNOW WHEN EVALUATING A MEDICAL NEGLIGENCE CASE:

A. THE MEDICAL FACTS

Facts are everything in any case, and especially in medical malpractice.[5] Every page of the plaintiff's medical record, before, during and after the negligence, must be reviewed, plus, the person reviewing the records has to know what they mean. Medical records contain numerous medical acronyms and terms of art. Important medical facts are noted. It's not unusual to have thousands of pages of medical records. It's just as important to know what should have been charted, and wasn't, as it is to know what was charted. Chart omissions can speak volumes. If a hospital is a defendant, always request its charting policies and guidelines because they usually suggest if it isn't charted, then it didn't happen.

Medical institutions such as hospitals, health maintenance organizations, and clinics are far better target defendants than individual doctors because jurors are more willing to find a medical institution liable than a doctor. This is a good reason to name the doctor's professional corporation or the business entity the doctor is affiliated with as a defendant along with the doctor; it also may add another insurance policy. Look at institutional policies, or the lack thereof, for evidence of negligence. Hospitals should have policies for just about all medical procedures, monitoring and nursing services. Failure to have a policy can be the basis of a medical negligence claim.[6]

Careful examination of the medical records may reveal institutional negligence through nurses or other employees failing to communicate with the doctor or each other. Try to frame your negligence allegations in common sense terms. For instance, when you can show a breakdown in communication, argue that "the left hand didn't know what the right hand was doing," or that "somebody dropped the ball." Jurors are more comfortable second guessing and judging these kinds of typical acts of negligence than a "life or death" judgment call by a doctor with years of medical education and experience.

B. THE STANDARD OF CARE

Establishing the standard of care requires expert testimony. The plaintiff's experts must be familiar with the standard of care applicable at the location of the alleged negligence. It's a big advantage when the defendant doctor is board certified because this allows you to get around the locality rule concerning the standard of care since medical specialty boards are national in scope and quality.

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[5] Defense attorney John Hart generously shared his thoughts on this paper and advises that, if the potential client's factual account is at odds with the contemporaneous medical record, you might consider waiting for the phone to ring again with a better case. Generally speaking, I agree.

[6] *See Jennison v. Providence St. Vincent Medical Center*, 172 Or App 219, 25 P3d 358 (2001).

The medical literature can be used to corroborate the expert's testimony concerning the standard of care. The lay jury has to really understand the standard of care and how it applies to the defendant in each specific case. You must make complicated medical diagnoses and treatments uncomplicated in order for the jury to be willing to second guess the defendant doctor.

The defendant will always offer some explanation to justify whatever negligent act or omission the plaintiff claims occurred. "Medical judgment" is an amazingly flexible notion in the hands of a talented and experienced defense attorney, especially with the help of UCJI No. 44.03 which instructs the jurors: "Physicians are not negligent merely because their efforts were unsuccessful. A physician does not guarantee a good result by undertaking to perform a service."

With that said, UCJI No. 44.01 can be helpful to a plaintiff: "A physician has the duty to use…care, skill and diligence…A failure to use such care, skill, or diligence is negligence." (emphasis added) If you think about it, each separate word gives you a distinct criterion the doctor must meet. Using the jury instructions from the beginning to frame your case, develop your themes, and argue at closing sets the stage so the judge will sound like a chorus for your closing when the instructions are later read.

C. THE BREADTH OF A "CAUSATION" DEFENSE

While it's generally easy for a plaintiff's attorney to establish the standard of care and the defendant's breach or negligence, the plaintiff still must prove what harm the negligence caused. When a plaintiff suffers pre-existing medical conditions or is older, it's easy for the defendant to find some argument that all, or much, of the harm plaintiff now complains of probably would have occurred anyway, even if the negligence hadn't happened. Expert testimony in layman's terms is necessary to anticipate and refute all defense arguments concerning causation. Once again, supporting excerpts from the medical literature can bolster your expert's testimony.

Some words of warning: be cautious when settling out any one defendant and proceeding to trial against the remaining defendant(s). An empty chair can become an almost insurmountable barrier. All the remaining defendants will point to the empty chair making the plaintiff's attorney have to spend too much time defending the absent defendant in addition to proving plaintiff's case against the defendants in court. To truly get a settling defendant out of a case, you need to quickly finalize the settlement agreement and then file an amended complaint. The amended complaint should exclude all allegations of negligence against the settling defendant and also have the settling defendant's name deleted from the case's caption.

IV. HOW EXPERIENCED LAWYERS PREPARE THEIR CASES

Proving medical injuries can be complicated, especially where there may be conflicting expert testimony from many disciplines. Remember, whatever records you don't have, or witness you didn't depose, will be what later bites you in the ass at trial. Guaranteed.

A. A FEW BASIC PRACTICE TIPS

1. MAKE THE DEFENDANT DESIGNATE A (CORPORATE) REPRESENTATIVE TO ANSWER KEY QUESTIONS - ORCP 36 (c)

Issue a notice of deposition. These answers are later binding and admissible against the defendant as an admission against interest by a party opponent.

2. PLAINTIFFS GET THE FULL VALUE OF ANY MEDICAL BILLS

Plaintiffs are entitled to claim all economic damagesCincluding the full value of medical expenses which were billed, irrespective of any amount which was later written-off by their respective providers or insurers.

In *White v. Jubitz Corp.*, 219 Or App 62, 182 P3d 215 (2008), *affirmed*, 347 Or 212 (2009), the Court of Appeals held a plaintiff may include in his/her request for economic damages all of those medical expenses incurred B including medical expenses written-off by a medical provider. This "difference" can be a factor in negotiating a close case.

3. NO POST-VERDICT REDUCTION IN ECONOMIC DAMAGES DUE TO SOCIAL SECURITY ACT OR DERIVATIVE AWRITE-OFFS"

Defendants should not be allowed to reduce any jury award of economic damages for medical expenses due to write-offs by Medicare, Medicaid, the Oregon Health Plan, or any other progeny of the Social Security Act.

Again in *White v. Jubitz Corp.*, the court held that Medicare write-offs are exempt from post-verdict deduction by the court. In holding that Medicare write-offs cannot be deducted, the court focused its analysis on ORS 31.580(1)(d), which excludes from post-verdict reduction "federal Social Security benefits." The court determined the Social Security benefits exclusion Aencompasses all benefits flowing from the Social Security program, including Medicare." *Id.* at 76. Therefore, Medicare benefits, including those which were written-off, could not be used to reduce an award of economic damages.

In a related, contemporaneous case, the court also held when medical expenses were paid by the Oregon Health Plan, the court "could not reduce a plaintiff's award of damages by the amount of write-offs that an injured party receives pursuant to Medicaid coverage." *Cohens v. McGee*, 219 Or App 78, 80, 180 P3d 1240 (2008). Since the Oregon Health Plan is the state branch of Medicaid, these benefits also flowed from the Social Security Act, and therefore could not be reduced post-judgment by the court.

4. USE VOIR DIRE TO TALK ABOUT THE STANDARD OF PROOF

Take time during jury selection to discuss the standard of proof. Most jurors don't understand the concept of a preponderance of the evidence and think it takes much more than that to find the

defendant negligent. Discuss legal negligence versus "malpractice" and the difference between negligence and recklessness or an intentional act.

5. SCHEDULE YOUR EXPERT WITNESS AS THE FIRST WITNESS FOR THE DAY

Schedule your expert either first in the morning or first in the afternoon. Otherwise you risk the expert's testimony won't be finished by 5:00 p.m., which may require the expert to return the next day. Keeping jurors past 5:00 p.m. to accommodate an (out of state) expert who is getting paid for his time isn't smart. You're signaling jurors that you are insensitive to their commitments such as child care, transportation, and personal plans. This is in addition to your expert being upset and charging you more money.

6. NAMING PARTIES

When preparing the complaint, you should think about how to sequence the parties in the caption. The order in which multiple defendants are named in the caption usually determines which defendant goes first in jury selection, cross-examination, closing, and all other phases of the trial. This is within the plaintiff's control and important for a variety of reasons. For instance, you can fashion the focus of judgment through the order of which defendant goes first. I generally name institutions first and then individual medical providers. Also, some lawyers spend their whole careers Atail gunning" as the last named party but aren't so hot when they have to go first so it may be to the plaintiff's advantage to make them go first.

7. CONSIDER CALLING THE KEY DEFENDANT AS YOUR FIRST TRIAL WITNESS

Many plaintiffs' lawyers adhere to this tactic because they believe it allows plaintiff's counsel to control the development of the proof, and makes it difficult for opposing counsel to generate a strong direct of the witness later during the defendant's case because the plaintiff already examined the defendant. Otherwise the defendant sits through the entire trial hearing all the evidence as it comes in. S/he soon becomes familiar with the trial cadence and is never as nervous as s/he would have been if called as your first trial witness. Also as the last witness, the defendant can generate answers that accommodate everything s/he previously heard.

However, while this can be an effective tactic, seasoned defense attorneys can put on the entire defense case through the first witness, including using the defendant to be the first one to teach the jury about the medicine. One such defense attorney[7] tells me that he always prepares his clients to be the first witness called, and he is usually thrilled when that happens. He suggests that if the doctor was a bad witness at deposition, it's far better and safer to just use the deposition excerpts to define the defendant on your own terms.

[7] Mark Wagner graciously contributed these insights. I thank him for his candor in sharing his defense perspective.

8. CONSIDER TELEPHONE TESTIMONY OR VIDEO CONFERENCING IF A WITNESS CAN'T MAKE IT TO TRIAL - ORS 45.400(9)

You must make the motion 30 days before trial, unless good cause to shorten the time is shown, such as a last minute emergency that prevents your expert from testifying at trial. Judges are getting more lenient in finding good cause at the last minute. With video conferencing, you need to have copies of all the documents that are going to be offered available on both ends, so the expert can discuss them with the jury on your end and the opposing counsel can timely object. You will see more and more of this in the future, particularly in medical negligence cases with many out of state experts.

9. NO SPEAKING OBJECTIONS

"Trial courts must restrict counsel's objections to a statement of the antiseptic legal grounds without comment. After hearing counsel's objection, ordinarily the court should rule on the objection and if either party is aggrieved by the ruling the aggrieved party should ask to be heard on the objection outside the presence of the jury. There should be no occasion for discussion of legal matters before the jury." *Jefferis v. Marzano*, 298 Or 782, 792, fn 5, 696 P2d 1087 (1985). This means you stand, say Aobjection," and in a summary fashion state the basis of your objection, such as relevance, hearsay, etc. If your opponent insists on making a speech in the guise of an objection, stop it early. Few things will get you a tarnished reputation quicker amongst good trial lawyers (other than not being forthright on discovery matters) than speaking objections.

10. ORE 703 - ONE DOCTOR CAN RELY ON THE RECORDS OF ANOTHER DOCTOR IN OFFERING THEIR EXPERT OPINIONS

Any expert can comment on, and rely upon, any records they ordinarily rely upon in forming their professional opinions. This does not make the underlying documents admissible; it simply means the experts can rely upon them in forming their professional opinions. Use this rule when the plaintiff has seen a large number of doctors and you are going to call only a few. It gets the job done.

11. ORS 45.250 (1-b) READING or SHOWING THE VIDEO OF THE DEPOSITION OF A PARTY

This rule isn't in the evidence code. It's a statutory rule and powerful tool that can be used both offensively and defensively. You can stand up and read the deposition of an opposing party in the trial for any purpose without calling that witness to the stand. In some states this is called "publishing the deposition." Note this rule only applies to parties, and not to non-party witnesses. When suing a corporation, make sure the witness meets the definition of a corporate representative. Remember: When you want to read or use the deposition of a witness (rather than a party), you must first lay a foundation showing unavailability.

12. VIDEO KEY DEPOSITIONS

Use a good legal videographer to video your key depositions. That way, you can edit the depos and use the advantageous parts during trial pursuant to ORS 45.250(1-b) and also as party admissions. Not only will the jury hear what the deponent said, they'll also see it for greater emphasis.

Playing the defendant's deposition can be a preferred alternative to calling the defendant adversely early in your case. This is also true when suing hospitals. You can play the hospital employees' depositions. This kind of testimony from party opponents through their employees, agents and designated corporate representatives is characterized as admissions of party opponents and is an exception to the hearsay rule. ORE 801; ORS § 40.450.

13. USE OF AUTHORITIES ON DIRECT EXAM

Most judges allow experts to cite authorities that support their opinions on direct examination. *Scott v. Astoria R. Co.,* 43 Or 26, 72 P 594 (1903). Authorities are generally used by lawyers to impeach a witness during cross-examination, but they can be effective when used by a witness on direct. In medical negligence cases, Oregon has not adopted the equivalent of FRE 803 (18), as has Washington. The federal rule doesn't make the authorities admissible as substantive evidence, but they can be cited if relied upon. Under the federal rule, "If admitted, the statements may be read into evidence but may not be received as exhibits."

14. ORE 704 - HYPOTHETICAL QUESTIONS ARE UNDERUTILIZED

I find older practitioners are more experienced and effective in offensively using the hypothetical question to summarize a witness's testimony, and indeed sometimes their entire case. When hypotheticals are used, a frequent nonproductive objection is "misstating the evidence" when a lawyer asks a witness a question that inaccurately or incompletely incorporates prior testimony. These are usually impossible for the trial judge to resolve. The better procedure is to ask the witness to assume that a prior witness testified such and such. If the facts assumed in the question are disputed, request the trial judge to read UCJI 2.08, Hypothetical Questions. Like any (ORE 105) instruction concerning evidence, the request must be timely in order to be effective.

Hypotheticals can be potent weapons in which to try, and retry your case and, in effect, repeat your facts under the guise of the hypothetical question. If you use a hypothetical, make sure it includes all the significant evidence, both good and bad. It does no good to omit the bad because on cross-examination the opposing lawyer can have a field day impeaching your expert, "Doctor, isn't it true that your opinion is no better than the facts upon which it is based . . . ," and then recite a litany of facts that you, the opposing lawyer, chose to omit in propounding your hypothetical. If credibility is everything to a lawyer and witness, you don't need this. Preparing well-crafted hypotheticals takes many drafts and lots of time.

15. MOVING TO STRIKE THE ANSWER

"Where a question asked a witness is unobjectionable, but the answer goes beyond what was called for and improper testimony is produced, an objection to the question, including a continuing objection, will not extend to the answer," *Hryciuk v. Robinson*, 213 Or 542, 569, 326 P2d 424 (1958). The only way to reach an unresponsive or improper response is by a motion to strike the answer, not by an objection to the question.

16. MAGIC WORDS IN PROFESSIONAL NEGLIGENCE CASES

Use the following formula when you need testimony from an expert witness on the applicable standard of care in a medical negligence claim. For purposes of my example, I use an orthopedic surgeon.

First, establish (without undue modesty) your expert's background, training and experience, (a copy of his or her CV or resume is not admissible because it's hearsay). Then, that s/he was retained by your office as a consultant to assist in evaluating your client's claims. Next, establish what records the expert was provided, and what research s/he did to prepare to testify in this case. Finally, advise the expert that to the extent s/he offers professional opinions, to please limit them to those s/he holds to a reasonable medical probability or certainty.

"Are you familiar with the standard of care or >the methods of customary and proper medical treatment in that or a similar community'[8] applicable to a reasonable and prudent orthopedic surgeon at the time, place, and circumstance existing in this case?"

"Yes, I am familiar with the applicable standard of care."

"Do you have an opinion whether the conduct of the defendant met the applicable standard of care?"

"Yes, I have an opinion."

"What is your opinion?"

"My opinion is the defendant's conduct fell below the applicable standard of care."

Enlarge the allegations of negligence from the pleadings on a demonstrative exhibit and ask the expert to comment on each separate allegation and explain why, in his or her professional

[8] Our appellate courts have actually disapproved language that only refers to the "standard of care." The courts have made it clear that the expert is to be asked whether the defendant's conduct met "the methods of customary and proper medical treatment in that or a similar community." *Creasey v. Hogan*, 292 Or 154, 166, 637 P2d 114 (1981); *Mosley v. Owens*, 155 Or App 685, 690, 816 P.2d 1198 (1991); *Sanderson v. Mark*, 155 Or App 166, 172, 962 P2d 786 (1998). The courts describe "standard of care" as a legal concept and the "customary and proper methods of medical treatment in that or a similar community" to be the proper evidentiary standard and form of the question for experts.

opinion, the defendant was negligent and how the defendant's conduct failed to meet the applicable standard of care for each allegation. Have the witness check or initial each allegation when s/he has finished discussing it. When done with the liability testimony, shift to questions on causation and the (permanent) damages.

Following this template, ensures there is sufficient proof to make a jury question on each allegation of negligence so that, when the plaintiff rests and the defendants lodge their inevitable defense motions to strike each of the plaintiff's allegations of negligence for a failure of proof and later make motions for a directed verdict, the judge has no problem denying the defense motions.

If the expert is someone other than a medical doctor, it's fine to simply phrase all the questions to a "reasonable professional probability or certainty." It's also okay to use either probability or certainty, as you wish. The idea here is that the expert's opinions are more likely than not (over 50%) true and therefore are more than mere "speculation, conjecture or guesswork."

17. BE CREATIVE WITH DEMONSTRATIVE EVIDENCE

Be creative. The foundation here is, "Will this aid and assist the jury in understanding the testimony?" If the answer is "Yes," then it comes in and it goes back to the jury room during deliberations, *Christensen v. Cober, M.D.*, 206 Or App 719, 138 P3d 918, (2006). Medical illustrations are a good example of this.

18. ORE 1006 SUMMARIES OF VOLUMINOUS RECORDS

Even though this rule is overlooked by many trial lawyers, it's a neat way to resolve the problem and bother of voluminous writings, recordings or photographs. Such evidence may be presented in the "form of a chart, summary or calculation." The summary or conclusion may be oral as well as written.

The underlying documentation, plus the summary, should be made available to opposing counsel prior to trial. If there is an objection, authentication of the underlying documents can be resolved in an ORE 104 hearing. If procedure is followed, the summary should be received as evidence. Whether the documents are "voluminous" is in the court's discretion.

19. SETTLING WITH ONE DEFENDANT IN A MULTI-DEFENDANT CASE

Be careful when there are multiple defendants and one wants to offer you the policy limits to settle. It can be tempting to settle with one of multiple defendants for many reasons, such as getting money for your clients and for you to finance the case against the remaining defendants. However, this might be the most expensive decision you make.

It's extremely difficult to try a case with an empty chair where the settling defendant would be sitting had you not settled. The remaining defendants will take every opportunity to point their fingers at that empty chair. When this happens, not only do you have to make the plaintiff's case, you have to defend the settling defendant. Jurors are inclined to lay the blame at the feet of

the party who settled, thinking it's obvious that party was responsible because there was a settlement. It's far better to have all the defendants in the courtroom throwing mud at each other.

B. USE THE FAVORABLE LAW

Know the law, both favorable and unfavorable for medical malpractice plaintiffs. Even though the cards are stacked against you, there are helpful case decisions and jury instructions you need to know about and use.

1. OREGON MEDICAL NEGLIGENCE CASES

Oregon case law contains some gems for plaintiffs. For example, in the recent case, *Warren v. Impiria*,[9] the court holds that informed consent, including all its cautions about possible dire complications is not admissible in a straight medical negligence case.

2. OREGON JURY INSTRUCTIONS

Elevate the importance of jury instructions in your trial preparation. The "as is" (UCJI 70.06 Previous Infirm Condition) instruction can be lethal. Other new instructions include UCJI 16.01 Ability to Pay, UCJI 50.02 Breach of Fiduciary Duty, and hand-crafted ones on Imputed Knowledge (UCJI 30.01). Don't forget UCJI 20.07 affirms that the negligence of a subsequent health care professional is the responsibility of the original tortfeasor, as are the side effects of any medications which are also compensable. These suggestions fit within Damages Instruction UCJI 70.02, specifically #4, which invites you to supplement the standard first three damages items. Ground your case themes within the specific language of the instructions.

Request the court give the instructions before closing argument. ORCP 58 B(8). Also consider requesting that the jury be given the instructions in writing, in addition to being orally charged. ORCP 59B. Your request must be made prior to the commencement of trial. If you are willing to prepare them, the court, in its discretion, might also consider a separate set of written instructions for each juror.

In addition to focusing on the words *skill, care* and *diligence* found in the definition of negligence,[10] there are other instructions concerning the irrelevance of the defendant's ability to pay a judgment[11] and the fact that the plaintiff was more predisposed to injury is irrelevant[12].

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[9] *Warren v. Imperia*, 252 Or App 272 (2012).

[10] UCJI No. 44.01

[11] UCJI No. 16.01

[12] UCJI Nos. 70.06 & 70.07

Nurses also have an independent duty to patients and they are expected to perform their duties within the standard of care applicable to nurses: they are required to use that degree of *skill, care* and *diligence* which would have been used under the same or similar circumstances by reasonably careful and skillful nurses in the same or similar community. Nurses are obligated to carry out physician order in a competent manner.[13]

It's often advantageous to allege the doctor was the agent of the hospital (remember it's easier for a jury to find an institution negligent). Hospitals can be liable under the doctrine of apparent agency for a physician's negligence even though the doctor is an independent contractor.[14] Oregon case law and jury instructions from case law hold that an agent can be "loaned" to another principle. In certain circumstances, the borrowing party may become liable for the negligent acts of the borrowed agent if the borrower obtains the right to control not only the work to be done but also the manner of performance.[15]

If needed, the judge can also instruct the jury that an agent can serve more than one principle. This is known as dual agency. The elements of agency must be met for each principle, meaning that the agent must be within the scope of their agency relationship to each principle, and each of the principles must have the right of control of the agent.[16]

C. PLAINTIFFS' MOTIONS IN LIMINE

Pretrial motions in limine are essential to test the limits of the admissible evidence. When you have a feel for how the judge will rule on evidentiary matters you can craft your case presentation with knowledge of what "good" and "bad" facts you need to address. Some areas that should be covered by motions in limine are:

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[13] *Bremner v. Charles,* 123 Or App 95, 104-105, 859 P2d 1148 (1993); *Simpson v. Sisters of Charity of Providence,* 284 Or 547, 553-554, 588 P2d 4 (1978) (stating that hospital personnel are still obligated to carry out physician orders in a competent manner).

[14] *Themins v. Emanuel Lutheran,* 54 Or App 901, 637 P2d 155 (1981), *rev den* 292 Or 569, 644 P2d 1129 (1982); *Jennison v. Providence St. Vincent Medical Center,* 174 Or App 219, 232-236, 25 p3d 358 (2001).

[15] *Penrose v. Mitchell Bros.*, 246 Or 507, 513, 426 P2d 861 (1967); *May v. Broun*, 261 Or 28, 36-37, 492 P2d 776 (1972).

[16] *Shepard v. Sisters of Providence,* 89 Or App 579, 585-586, 750 P2d 500 (1988).

1. ARGUMENT, EVIDENCE OR COMMENT TO THE EFFECT THAT DEFENDANT WAS ACTING IN GOOD FAITH, WAS NOT TRYING TO INJURE PLAINTIFF, OR WAS EXERCISING JUDGMENT IN GOOD FAITH.

Oregon case law clearly holds that it is irrelevant that defendant may have been acting in the utmost good faith in his treatment of the plaintiff. Introducing evidence of the defendant's lack of bad motives, *e.g.*, that he tried his best or meant no harm, is an invitation to the jurors to decide the case on an improper basis, by suggesting that the defendant's good faith somehow is an element of the standard of care. The issue in this case is whether the defendant met the statutory standard of care. Allowing defendant to inject the concepts of "error of judgment" or "good faith" into the case would suggest that substandard conduct is excusable if the defendant acted without bad motives, or if he used judgment, no matter how erroneously. *Rogers v. Meridian Park Hospital*, 307 Or 612, 620, 772 P 2d 929 (1989); *Ellis v. Springfield Women's Clinic*, 67 Or App 359, rev den, 297 Or 228 (1984).

Motives of honesty or good faith are irrelevant and should be excluded. In addition, defendants should not be allowed to assert that their course of action for plaintiff amounted to a "judgment call" between two or more alternatives. *See, Rogers v. Meridian Park Hospital*, 307 Or 612, 615-620, 772 P2d 929 (1989) (disapproving jury instruction on error of judgment defense). The only proper measure is whether defendant's care and treatment of plaintiff conformed to the applicable standard of care. ORS 677.085.

2. PERSONAL INFORMATION ABOUT THE DOCTORS INVOLVED IN THIS CASE.

Whether the doctors are married, have children, volunteer in the community, belong to a church, or play professional golf are all matter which have no relevance to this case. As this is a case involving professional negligence, the doctors in their testimony should stick to professional matters involving their education, training experience, etc. OEC 401. Of course, defense counsel[17] will argue that plaintiffs can't have it both ways. If the plaintiff can talk about personal matters, family, affiliations, etc., then the defendant should also be able to put on that kind of evidence.

3. PERSONAL INFORMATION ABOUT THE CORPORATE DEFENDANTS INVOLVED IN THE CASE.

While the past history of the hospital may be interesting and even admirable, it has no relevance to a case which involved matters of professional negligence. The standard of care is the same for a non-profit hospital and its employees or agents as it is for any other entity or person in the

[17] Thanks once more to Mark Wagner for sharing his defense view on this. As Mark says, "'Turn about' is always fair play."

medical field. Discussions of past good deeds and hard work, etc., is no more than a plea for sympathy and a suggestion that defendant need not be held to the standard of care of its profession. OEC 401 and 403. Similarly, it is not relevant to this case how defendant clinic came into existence.

4. STATEMENTS OR SUGGESTIONS THAT PLAINTIFF IS SEEKING A WINDFALL, ROLLING THE DICE, OR THAT THIS ACTION IS A LOTTERY OR ANY OTHER WORDS WITH SIMILAR IMPACT.

Defense counsel in cases of this type are sometimes tempted to attack the plaintiff using popular inflammatory political language for its demeaning impact on the plaintiff, her counsel, and the process of resolving civil disputes by jury trial. No such statements or innuendos should be permitted during the trial of this case.

The South Dakota Supreme Court addressed this precise issue in *Schoon v. Looby*:

> Defense counsel's accusation that plaintiff was trying to hit the lottery by her lawsuit demeaned not only the plaintiff but also the judicial system itself and impugned the trial court's judgment of allowing the punitive damage claim to proceed. The comments denigrated the fairness, integrity, and public perception of the judicial system. Counsel's reference to playing "lotto" or "powerball" or "rolling the dice" were only meant to inflame the jury and were beyond the bounds of proper final argument….Interposing remarks such as we see here … can only be meant to persuade the jury to decide the case based on passion and prejudice.[18]

5. "ARGUMENT," EVIDENCE OR COMMENT ABOUT THE EXISTENCE OF ONE OR MORE COLLATERAL SOURCES FOR ANY OF PLAINTIFF'S ECONOMIC DAMAGES.

The question of whether plaintiff has had the benefit of health insurance or any governmental benefits for any of his medical expenses incurred and claimed herein is statutorily inadmissible at trial. Such benefits, if any, may or may not be deductible from any damages awarded herein after verdict and before entry of judgment, depending on facts not presently pertinent. ORS 18.580. For purposes of trial, all witnesses should be instructed to make no mention of any such insurance benefits, and any medical records offered in evidence should be redacted of such references.

[18] *Schoon v. Looby*, 2003 SD 123, 670 NW2d 885, 891 (2003).

6. NO SPEAKING OBJECTIONS OR ARGUMENT IN THE PRESENCE OF THE JURY.

The court should prohibit counsel from making speaking objections and from making unsolicited argument in the jury's presence.

7. TAX ISSUES.

Any evidence relating to whether a recovery by plaintiff would or would not be subject to federal income taxation, or any other form of taxation, would lead to unfair speculation by the jury and prejudice the plaintiff. Such an inquiry has been held to be inadmissible, and is otherwise irrelevant. *See, Maicke v. RDH, Inc.*, 37 Wash App 750, 753-754, 683 P2d 227 (1984) (It is improper to include income taxation as a deduction when figuring lost earning capacity of a decedent which is the majority rule); OEC401-403. No mention or inference of tax issues should be allowed.

8. INSURANCE.

The defendant should be precluded from stating, implying, or otherwise suggesting that a judgment will be paid from personal assets, or that they have limited insurance coverage or that they, their patients, customers, or the public in general will be financially harmed in any way by a plaintiff's judgment, through higher malpractice premiums or the like. *Benton v. Johnson*, 45 Or App 959, 963, 609 P2d 890 (1980); OEC 401-403 and 411.

9. REASONABLE MEDICAL PROBABILITY.

Defendant's witnesses should be prohibited from expressing medical causation opinions which are not based on reasonable medical probability. It is settled law in Oregon that, for medical opinion testimony to be admissible it must be based on probabilities, not mere possibilities. In *Crawford v. Seufert*, 236 Or 369 (1964), the court held that "for medical opinion testimony to have any probative value, it must at least advise the jury that the inference drawn by the doctor is more probably correct than incorrect. If the probabilities are in balance, the matter is left to speculation. Speculation filtered through a jury is still speculation. *Crawford*, 236 Or at 369.

The court in *Gregg v. Oregon Racing Commission*, 38 Or App 19 (1979) quoted *Crawford* and stated: For expert medical opinion "to have any probative value it must advise the jury that the inference drawn by the doctor is more probably correct than incorrect." *Gregg*, 38 Or App at 22.

D. USE CONSULTING EXPERTS

One of the most common mistakes lawyers make is failing to hire one or more in-house health care experts to help them prepare a case. An intelligent and experienced nurse is a cost-effective resource who can provide many of the same services as more credentialed medical experts. Nurses can usually translate records, perform literature searches, and identify consulting experts.

Before hiring or relying on any nurse consultant, interview several attorney references who can candidly advise whether the potential consultant was cost-effective, resourceful, as well as savvy. Many nurses of varying ability advertise their services. Make sure you use a good one.[19]

Consulting experts can assist the lawyer in many areas:

1. **TRANSLATING THE CONTENTS OF ALL HEALTH CARE RECORDS.**

Do you have all of the records? What else should you have? What do all those words mean?

2. **INTERPRETING THE RECORDS.**

Anyone with a dictionary can translate. Interpretation is much more, and includes the ability to explain the relationships among various facts. Examples include appropriate medication dosages and their synergistic effects, or the clinical differences. Different cases present different issues. More than one expert may be required.

3. **LOCATING, REVIEWING, AND EXTRACTING RELEVANT PROFESSIONAL LITERATURE.**

Experts have published treatises and articles expressing opinions on virtually any given proposition. Computer-accessed data bases contain all of the major professional journals and publications in English. These include free internet services, such as Medline, maintained by the National Library of Medicine, which indexes more than 18 million biomedical articles.

Publishers of professional journals also provide online access to their journal contents for a per-article fee. Professionals with university affiliations often have access to these and many other sources without cost through their institution. These services provide primarily brief abstracts of the work, but you can retrieve the full text of most works electronically, typically for around $30 each, although an increasing number of articles are available without cost. You can locate articles using descriptive phrases like “Cocaine and Driving,” “Post-Traumatic Stress Disorder,” or “DSM-IV-TR,” and winnow them down by logically combining searches (simple searches can provide tens of thousands of results) thus permitting a review of the abstracts of all of the articles in a particular area of inquiry.

If there is a specific medical test administered by an opposing expert and you want to cross-examine the expert about the limitations of this test, enter the test name in the computer to call up the titles and abstracts of all articles that relate to that test, beginning with the most recent. Your consulting expert will save you time by reviewing the abstracts and choosing articles you need in full copies. If you are so inclined, helping with the literature review is both interesting

[19] Defense attorney John Hart tells me that even the defense bar has been burned by bad nursing consultants over the years.

and informative. It is an easy way to become quickly conversant with an area. This often serves the lawyer well later when he or she cross-examines an opposing expert.

Recognized texts, treatises, and articles from professional journals are powerful resources, especially during cross-examination. In some jurisdictions, they are admissible as substantive evidence, and in others only for cross-examination and impeachment. Ask your expert to locate, retrieve, and analyze recent relevant and authoritative literature for you.

4. HELPING TO DRAFT DEPOSITION AND TRIAL QUESTIONS FOR EXPERTS.

In-house consultants can review the reports of opposing experts to identify their strengths and weaknesses and locate fertile areas for cross-examination. They can also scrutinize the clinical notes, treatment records and medical tests administered along with the results and interpretation of the results.

5. IDENTIFYING AND LOCATING QUALITY EXPERTS FOR TRIAL TESTIMONY.

Consulting experts can evaluate defense experts' credentials, examining their academic and clinical experience and publications, and reviewing the quality of the research and validity of any data offered to ultimately support their conclusions.

The last thing you need is an in-house expert who tells you what you want to hear. An expert who has expressed unfavorable opinions about key issues in your case is invaluable in identifying the weaknesses in your case and suggesting possible remedies or responses. A consultant's highest calling is to serve as the loyal opposition and tear your case apart. Better to hear it early when it can be dealt with, than to later suffer shell shock in the courtroom.

E. THE PROCESS OF ANALYSIS

The nurse or consulting expert you hire must obtain all of the relevant health care records from before and after the injuries occurred that gave rise to the litigation. If there is a possibility that there are preexisting injuries, you must have all applicable records. There must be no omissions.

The analysis must be factual, brief, and straightforward, with no humanistic, soft-hearted substitutions for facts. An in-house expert reviewing hospital records to determine if a nurse or physician breached the standard of care must ask:

1. EXACTLY WHAT DID THE DOCTOR OR NURSE DO, OR FAIL TO DO, THAT WAS IMPROPER?

The standard of care is ordinary reasonable care, not heroism. The question therefore is not what *could* have been done in hindsight, but what *should* have been done prospectively.

2. ASSUMING THERE HAS BEEN NEGLIGENCE, HAS IT REALLY CAUSED ANY DAMAGE?

This is the crucial causation question. Even assuming that there was a breach of a duty, meaning negligence, how can we be sure that this caused any injury? Are there alternative explanations for the injuries?

3. EVEN IF NEGLIGENCE HAS CAUSED AN INJURY, HOW SIGNIFICANT ARE THE CONSEQUENCES?

In other words, are the damages large enough that a jury will award enough dollars to justify your accepting the case on a contingency fee basis?

Limit the analysis to the acts of negligence that are most obvious and have contributed to the most significant losses. Be suspicious when the reviewer finds too much fault or finds damages for which there is no alternative explanation or causation.

Have a respected, competent, board-certified expert in the area of the purported negligence review the records.[20] Rely on opinions that apply only to the expert's area of expertise. In other words, a neurologist should review the work of a neurologist and not that of a neurosurgeon.

Does the reviewing expert think that the services fell below the standard of care, and furthermore, that this failure was a material factor contributing to significant losses? If so, review the literature which existed up to and at the time of the purported negligent act to determine the state of the art in the specific area of negligence. The issue is not whether this reviewing expert would do it differently, but whether any reasonable and prudent expert would conduct himself or herself as the defendant did. Was the procedure the defendant followed consistent with any recognized, albeit minority, school of thought? If so, there probably is no breach of the legal standard of care.

Few nurses, few experts, and unfortunately not enough lawyers really appreciate what the practical elements of proof are in a medical negligence case. The standard of care is determined when and where the services are rendered. What care the plaintiff would have received at the Mayo Clinic or a metropolitan hospital with specialty services, or at the same place three years later, is irrelevant. What level of care would a careful, skillful and diligent doctor have rendered at that time in that place, and did the questioned conduct fall below that standard or level of care?

[20] John Hart advises to be extremely reluctant to rely upon what your physician consultant says when it falls outside his or her field of medical specialty. Apparently the defense bar faces some of the same issues plaintiffs face in working up cases!

Never pinch money or time in the screening process. It's better to put dollars up front for experts to thoroughly evaluate the case than to later try it and lose it, along with a lot of your money and time.

Less than one in ten professional negligence cases that excite young plaintiff's lawyers is worthy of accepting, not to mention trying. Our office has a doctor and nurse help us review all prospective cases, and bad bed-side manner aside, we only accept two or three cases a year, if that. All that glitters is not gold.