



# Medical Malpractice Newsletter

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## In This Issue

- Strategies for Preventing the Introduction of Prior Bad Acts Evidence in a Medical Malpractice Lawsuit
- What Is a Revocable Living Trust?

## Strategies for Preventing the Introduction of Prior Bad Acts Evidence in a Medical Malpractice Lawsuit

The difference between winning and losing at trial in a malpractice case often comes down to the jury's impression of the defendant-physician. Typically, physicians are seen as competent and caring people. Jurors are often willing to forgive them, even when their patients suffer serious complications and hindsight suggests a different treatment decision might have been advisable. However, when past problems are mentioned, this benefit of the doubt can disappear. In light of the damaging effect that evidence of other crimes, wrongs or acts (i.e., Other Acts Evidence, or "OAE") may have, it is imperative that trial lawyers and their physician clients work together to keep it away from a jury.

## Rules of Evidence Disfavor Introduction of OAE

The rules of evidence clearly disfavor the introduction of OAE at trial. Rule 404(b) of the Federal Rules of Evidence states: "Evidence of other crimes, wrongs or acts is not admissible to show action in conformity therewith . . ." In addition, Rule 403 of the Federal Rules of Evidence precludes the introduction of otherwise relevant evidence when its value is outweighed by considerations of "unfair prejudice," "confusion of the issues," "misleading the jury," "undue delay" or "waste of time."

These two rules, which have been adopted in almost every state, typically block OAE. They take into account that OAE can cause jurors to make an inaccurate assessment about a defendant's "character" and invite an inference that on the occasion in question, the defendant acted consistently with that character (*e.g.*, Dr. Smith lost her license three years ago because she failed to follow standards for sterile technique; therefore, she must be a careless physician and was probably acting carelessly when the plaintiff was injured.) Courts have long recognized that no one is capable of accurately determining a person's character based on only a few stories about the past. Furthermore, using the vague and ill-defined concept of character to predict what a person has done, or will do in the future, is very unfair and often inaccurate. As a result, in most instances, trial courts applying these rules preclude plaintiffs from introducing OAE in a malpractice trial.

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## Hinshaw Representative Matters

Each issue of the *Medical Malpractice Newsletter* will showcase a few cases that have recently been handled by Hinshaw lawyers. We are pleased to report the following:

**Jeffrey R. Glass**, of Hinshaw's Belleville, Illinois, office, has in recent months obtained voluntary dismissals of his respective clients in seven cases, several of which were brought in St. Clair County, Illinois. In one case, *Medler v. Fairfield Memorial Hospital*, Mr. Glass' client, a hospital, was voluntarily dismissed by plaintiff prior to the case going to trial. The case involved a patient who had a bladder injury at the time she underwent a hysterectomy, which was allegedly covered up by a physician. The bladder injury was later discovered by a urologist after the patient developed incontinence. The case is currently in trial, without Mr. Glass' client.

A second case, *Winschief v. Dr. McPike*, which was pending in St. Clair County, involved a patient who had passed out due to a cardiac arrhythmia and sustained an injury to his head. The patient was later placed on Heparin at the hospital but later developed a brain hemorrhage, which ultimately caused his death. Mr. Glass successfully obtained a voluntary dismissal of his client, the patient's cardiologist.

In a third case, *Adams v. Dr. Ahmed*, plaintiff was represented by a formidable plaintiff's attorney who specializes in medical malpractice cases. The patient had been on Coumadin due to prior heart conditions and was referred to Hinshaw's client, a gastroenterologist, for anemia due to bleeding in the bowel. The gastroenterologist did a colonoscopy procedure and stopped plaintiff's Coumadin. While off of Coumadin for the procedure, the patient had a stroke and died. Mr. Glass obtained a voluntary dismissal of the gastroenterologist.

— Continued on Page 3

## Exceptions to General Rules

There are, however, several exceptions to these rules. It is therefore important that defendant physicians understand them so they may craft their malpractice defenses in a way which avoids triggering them. For example, the use of OAE to prove the existence of a "habit" or "routine practice" is permissible under Rule 406 of the Federal Rules of Evidence. If the OAE constitutes a "regular" or "semi-automatic" reaction to a certain set of circumstances, it can be introduced to establish that a defendant probably acted consistently with that habit or routine at the time in question. In an Arizona lawsuit, a court of appeals ruled that the trial court committed prejudicial error when it refused to allow evidence showing that a defendant anesthesiologist lost his privileges to perform epidural procedures at a local hospital. During the trial, which involved a claim that the anesthesiologist improperly performed an epidural, defendant testified that he could not recall how he did the procedure, but he believed that he probably followed his "routine practice." The court of appeals determined that this admission established the existence of a "habit" justifying the use of evidence establishing that this same "routine practice" was the basis for the credentialing committee of a hospital to suspend his privileges to do epidurals.

OAE may also be introduced to disqualify a defendant physician as an expert witness. In a recent South Dakota case, a defense verdict was overturned on the ground that the trial court judge prevented plaintiff from introducing evidence showing that defendant neurosurgeon's medical license had been suspended based on prior mistakes. The South Dakota Supreme Court noted that defendant acted as an expert witness on his own behalf, defining the standard of care and explaining how he had acted in conformity with the same. The court reasoned that as defendant was being offered as an expert witness on his own behalf, plaintiff should be allowed to cross-examine him just as he might with any other expert. This meant that plaintiff should have been allowed to bring up the fact that defendant had lost his license.

OAE may also be introduced to establish a defendant's "knowledge" at the time of treatment. In a Texas case, a doctor testified that he did not recognize the existence of a subcutaneous staph infection following a series of disk space injections. The doctor testified that his failure to make the diagnosis was caused, in part, by the fact that this type of infection was very rare and difficult to recognize. During cross-examination, plaintiff attempted to introduce evidence of three prior cases involving similar infections following disk injections made by the same doctor. The trial court barred introduction of this evidence. But the court of appeals reversed, explaining that the other infections established the doctor had "knowledge" and experience diagnosing and treating this type of problem.

In recent years, plaintiffs have also been successful in introducing OAE to support allegations that a physician failed to obtain informed consent. The Wisconsin Supreme Court ruled that a physician has an obligation to share information that is "reasonably necessary" for a patient to make an informed decision about a proposed treatment. This information includes "what a reasonable person in the patient's position would want to know." Using this standard, courts have determined that a physician may be required to disclose OAE involving personal complication rates, prior problems with the procedure at issue, or problems with board certification or licensing. The justification for allowing this evidence is not to prove that a physician was negligent with respect to treatment technique, but rather that he or she was negligent in failing to disclose what a reasonable patient "would want to know" about his or her physician.

## Strategies for Excluding the Admission of OAE

### Avoid "Opening the Door" and Letting It In

The best way to avoid having OAE introduced to a jury is to preclude it with motions *in limine*. However, to prepare effective motions *in limine*, it is essential to first identify any past problems in a doctor's career and avoid opening doors which allow them to be mentioned at trial.

At the beginning of a lawsuit, it is important for the defendant physician's attorney to have a discussion with his or her client and ask about problematic incidents. This will require difficult and detailed questioning. In addition, during the discovery process, questions should be asked of the plaintiff and experts to determine if there is any unaccounted for OAE.

It is also important for an attorney to prepare his or her defendant physician client for a deposition by encouraging the avoidance of absolutes. If a physician testifies, "I have *never* experienced this complication before," or "I *always* check for infection following surgery," and the plaintiff can find prior incidents contradicting these statements, a court may permit the introduction of OAE to show a lack of credibility. In addition, a court could conclude that conduct which a physician claims "always" occurs is evidence of a "routine practice" or "habit."

It is also advisable to avoid using the defendant physician as an expert witness at trial. Some courts have viewed such use as an opportunity for the plaintiff to cross-examine the physician "just like any other expert," and use OAE to impeach credibility. Similarly, using the same retained expert over and over to defend the same defendant in multiple malpractice lawsuits may open the door to the introduction of OAE for impeachment purposes (*e.g.*, "So Dr. Smith, how many times have you been retained and paid to defend the conduct of Dr. Jones?").

When faced with an argument that OAE should be allowed to prove an informed consent claim, a counterargument should be made that its introduction will destroy a defendant's ability to defend a negligent treatment claim. If a plaintiff wishes to pursue an informed consent claim, and to use OAE to do it, it should necessitate the dismissal of any negligent treatment claims. If not, the defense can argue that it is no longer possible to defend the treatment part of the case, because the jury will be tempted to infer conduct consistent with bad character, which would violate Rule 404(b) of the Federal Rules of Evidence. Furthermore, in the event that the plaintiff attempts to introduce OAE to support an informed consent claim, an argument should be made that such evidence is only admissible if the plaintiff asked the physician for specific information about his or her past prior to treatment and the information was not disclosed. There does not appear to be any obligation that a physician must openly disclose embarrassing details about past conduct without a question specifically requesting this type of information.

### Proper Preparation of Motions *in Limine*

After identifying OAE and taking steps to avoid opening the door for its introduction, effective motions *in limine* need to be filed. These motions should urge the court to require the proponent of OAE to separately and individually satisfy the following three inquiries: (1) Is the OAE relevant?; (2) Does the OAE invite the jury to draw a "forbidden inference" regarding a defendant's character and a suggestion there was action consistent with it?; and (3) Is the probative value of the OAE substantially outweighed by other considerations?

With respect to the relevancy inquiry, a proponent of the evidence should be required to establish basic facts, including proof that the other act actually occurred and that the defendant was involved in that act. Allegations of wrongdoing, or settlements of lawsuits or disciplinary proceedings without specific findings of fact or admissions, are not sufficient to satisfy this threshold relevancy requirement.

Furthermore, as part of the initial inquiry, a proponent of OAE must establish the other act is "substantially similar" to the act of malpractice at issue. Typically, no two surgical procedures are the same, and individual patients have unique physical characteristics. As a result, the reasons for an adverse result in one case may be significantly different from those in another situation. Absent establishing "substantial similarity," the threshold relevancy requirement cannot be satisfied.

With respect to the second part of the test, OAE may only be admitted if it is offered for some purpose other than suggesting that the defendant physician acted in conformity with a certain character trait. The proponent of OAE should always be required to articulate the purpose for which the evidence is being introduced. If that purpose does not clearly fit within one of the recognized exceptions to Rule 404(b), it should not be admitted. Most proponents cannot credibly state an acceptable reason for the introduction of this type of evidence. As a result, their efforts often fail.

Finally, as a last resort, it should always be argued that any probative value of OAE will be substantially outweighed by problems such as unfair prejudice, undue delay or confusion of issues. A defense attorney should always be prepared to argue that if a court is going to allow the introduction

**Michael E. O'Neill & Michelle P. Burchett**, of Hinshaw's Northwest Indiana office, recently tried a medical malpractice case in Lake County, Indiana. The case concerned a permanent brachial plexus injury to a baby delivered in 1998. Plaintiffs alleged inappropriate use of vacuum extraction and fundal pressure during the delivery. They sued both the obstetrician and the hospital nurses. After four days of trial, the jury returned a defense verdict in less than 50 minutes.

**Michael E. O'Neill & Kelly K. McFadden**, of Hinshaw's Northwest Indiana office, represented a pediatrician in a medical malpractice case involving a child who had contracted bacterial meningitis and later died. Plaintiff alleged that the pediatrician was negligent in failing to offer the vaccine, Prevnar, to the child. At the time of the subject incidents Prevnar had just come out on the market. The drug was then in short supply, and it was not then part of the standard of care to give it to persons in the child's age group.

Plaintiff voluntarily dismissed the pediatrician from the case after opening statements and Mr. O'Neill's cross-examination of the child's mother revealed multiple inconsistencies which greatly diminished the mother's credibility. The jury ultimately entered a verdict against another defendant, an ER physician, who had continued to defend the case.

**Dawn A. Sallerson**, of Hinshaw's Belleville, Illinois, office, recently defended a pulmonologist who was sued by a deceased patient's family for failure to diagnose a pulmonary embolism. The defense centered on other more likely causes of the patient's elevated d-dimer and presentation. Ms. Sallerson obtained a voluntary dismissal of the case after plaintiff's expert deposition and the disclosure of experts on the physician's behalf.

Ms. Sallerson was also successful in obtaining a voluntary dismissal of a physician who was sued for failing to anticoagulate a patient who had a history of atrial fibrillation. The doctor was the primary care physician of the subject patient, who ultimately suffered a stroke and subsequently died. The case has continued against other defendants.

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of OAE concerning some other incident involving the defendant physician, a full presentation of the facts and circumstances surrounding the incident will also be presented to a jury. Typically, courts do not want to spend the time necessary to try multiple lawsuits in front of a jury. As a result, they will often avoid the problem by excluding OAE. In the event OAE is not excluded, and the court does not allow a full evaluation of it by a jury, a strong argument can be made on appeal that a fair trial was not permitted.

Preventing the introduction of OAE in a medical malpractice trial is critical to having a fair trial. Plaintiffs are becoming more creative in their efforts to get such evidence before a jury, and the need to vigorously and thoughtfully challenge those efforts is never ending. If these efforts are successful, defendant physicians in medical malpractice cases will usually be seen in a positive light, and receive verdicts in their favor.

Patrick F. Koenen



We hope that you enjoy this publication and find it useful. We welcome your comments and suggestions. To receive the *Medical Malpractice Newsletter* by e-mail, please contact us at: [info@hinshawlaw.com](mailto:info@hinshawlaw.com).

Best Regards,

**Daniel P. Slayden**, Chair, Medical Malpractice Specialty Group  
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## What Is a Revocable Living Trust?

A revocable living trust, similar to a will, gives instructions as to how one's assets are to be distributed after his or her death. A trust is a written agreement by which ownership of one's assets are transferred to the trust. A trustee administers the trust assets according to the terms of the written trust agreement. The three parties to a trust agreement include: the grantor (the creator and transferor of the assets to the trust); the trustee (the manager of the trust assets); and the beneficiary (the recipient of the trust assets or benefits). The creator of a revocable living trust assumes the status of all three of these parties during his or her life.

The typical revocable living trust agreement states that the trust assets may be distributed to the creator of the trust during his or her lifetime and that the creator may amend or revoke the trust agreement at any time. In other words, the assets still belong to the creator of the trust. Upon the passing of the creator of the trust, the trust agreement, like a will, states to whom the trustee should distribute the trust assets. The trustee, like an executor, pays the last bills of the creator of the trust and distributes the assets to the named beneficiaries.

The number one reason individuals create revocable living trusts is to avoid probate. Probate is the term used to refer to the legal process of administering an estate. Estates belonging to those who own more than \$25,000 worth of assets at their death that are titled in their name alone (meaning not titled jointly with another or payable to a beneficiary) are subject to probate. This means that the executor of the subject will must be given court authority in order to transfer the deceased's assets. For those with a revocable living trust, the trustee will not need court authority to transfer such assets.

Advertisements for financial seminars and other promotional materials often recite that one will reduce taxes if he or she creates a revocable living trust. Unfortunately, there is no way to avoid taxes. So such statements are not true. The assets of a revocable living trust are subject to federal and state death taxes in exactly the same way as assets passing under the terms of a will.

Alissa F. Kohlhoff

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