Inside the Litigation Process:
Behind the Scenes of a Medical Malpractice Lawsuit

By: J. Thaddeus Eckenrode, Seibel & Eckenrode, P.C., Attorneys at Law

(The second article in a multipart series detailing the events that occur during the investigation and litigation of a medical malpractice lawsuit)

Introduction
In Part 1 of this series, we examined the first 60 days after receipt of the initial suit papers and explored the first contact that a physician might have with defense counsel in preparation to defend against a malpractice suit. In this part of the series, we look at the next 90 days in the process, including initial discovery tools, and other possible ways to attack the plaintiff's petition at an early stage.

Part 2: Initial Discovery and Legal Counter-attacks (the next 90 days)

Written Discovery
Shortly after a lawsuit is filed, and usually within the first two to three months of a suit's potentially long life, the and carry the weight of any question that could be posed to you while on the witness stand while under oath." parties fire the first salvos over each other's bow in the form of "Interrogatories" and "Production (Document) Requests". These requests are a form of "discovery". There should generally be few, if any, "surprises" at trial if counsel has utilized the discovery process thoroughly.

When plaintiff's discovery requests are presented to you for your review by your attorney, you may wonder why they are inquiring about certain items, and whether some things which you feel are personal should have to be answered. Your attorney will likely have already filed objections, however, to those requests which are legally inappropriate or irrelevant. There is a vast difference between what is "discoverable" and what is "admissible", as well. Certain information requested of you in interrogatories (e.g., about past malpractice suits, etc.) may not be admissible in evidence at trial (as irrelevant or prejudicial), but is clearly discoverable in depositions or interrogatories to allow plaintiff's counsel to investigate the facts or a physician's background, history, or credibility further.

Answers to interrogatories are given under oath, and carry the weight of any question that could be posed to you while on the witness stand under oath. By fully answering interrogatories, you prevent being accused (at least with these materials) as a liar are trial, and will probably shorten your eventual deposition somewhat, as plaintiff's counsel won't need (although sometimes will) to rehash these issues.

When responding to any discovery requests, always communicate your response only to your attorney and let him/her review them and edit them, if necessary, for submission to the court and/or other parties. You should never communicate with anyone but your attorney or insurance company representative about any issue in the case once suit is filed.

Motions to Dismiss and the Health Care Affidavit

The legislators in the State of Missouri enacted a law more than a decade ago that requires a plaintiff in a malpractice suit or file an affidavit within 90 days of suit staring that he/she has had the case reviewed by a qualified expert and that the expert found merit to the claims raised.

The law has far more bark than bite, however, as the plaintiff is nor required to provide an affidavit from the supposed expert himself, nor does the expert's identity even have to be disclosed. Although some cases have probably been dismissed at an early stage because plaintiff's counsel could find no support for their allegations, there are occasions where we have suspected that unscrupulous plaintiff attorneys have filed such an affidavit without having ever spoken to an expert, despite the potentially serious ramifications of a false affidavit.

While a motion to dismiss is routinely filed by defense counsel after the expiration of 90 days without plaintiff having filed the affidavit, most plaintiffs have little difficulty convincing the judge to give them additional rime to obtain the affidavit, and even when a dismissal is ordered, it is done "without prejudice", which means that the suit can be re-filed within one year.

Source: The Keane Insurance Group; Oct. 1998