The Pulse
News From The Medicine & Law Committee

SURPRISING CHANGES TO MEDICAL MALPRACTICE: TIPS’ LATEST BOOK MAY SAVE ATTORNEY ERRORS

By: Prof. James T. O’Reilly

Let’s do the math on medical liability after the Affordable Care Act: 23,000,000 people without insurance will enter the marketplaces for health insurance. Many have significant deferred medical needs. Many will come to the 9,000 clinical sites of existing neighborhood nonprofit health clinics that are federally subsidized. None of these sites carry medical malpractice insurance, because Congress has placed them under the Federal Tort Claims Act. The 3 paralegals employed in a federal office building in Washington will resolve all of the claims of medical error liability from these sites. These clinics’ patients are barred from making any state law medical malpractice claims. Their federal SF-95 claim forms are subject to mandatory obligations and tight time deadlines. A claimant’s attorney fee is capped at 20% of the award made in response to a claim, or 25% if the claim is later filed in a non-jury trial with no punitive damages, in federal district court. Do the math; what’s in it for a plaintiff’s counsel? Let’s add it up.

A privately insured patient Mary’s diseased left arm should have been amputated at Jones Hospital, but her right arm was removed by mistake. After a state court jury heard of the loss of her violin career, jurors awarded $4 million against the hospital, of which $2 million was punitive damages for negligently credentialling the alcoholic and emotionally impaired surgeon. Her attorney fee was $400,000 on the first million and one-third of the remainder, for a total of $1.4 million. The next day, her cousin Barry was misdiagnosed with testicular cancer at the Jones City Clinic, and full castration followed after the clinic’s referral to the same negligent surgeon at Jones Hospital. Barry sued after pathology data showed he had been incorrectly diagnosed, and expert surgeons swore that he was improperly treated. Jones City Clinic is subsidized as a “deemed federal” nonprofit entity, so Barry’s only remedy, an administrative claim, was mailed in to the federal agency, documenting a loss valued at

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On behalf of the TIPS Medicine and Law Committee, thank you for taking the time to read our newsletter. We hope you find the content informative and enjoyable and that you like our new newsletter name, The Pulse. As the name suggests, we hope to be a lifeline for members looking to stay abreast of issues relevant to those of us whose practice involves medicine and law. We appreciate the work of the authors who have contributed to this inaugural edition of The Pulse and our Newsletter Vice Chair, Stephen Still, deserves a special thanks for his hard work in putting this newsletter together.

This is an exciting time to be Chair of the TIPS Medicine and Law Committee. We kicked off the 2013-2014 bar year with a great committee business meeting at the ABA Annual Meeting in San Francisco. We have a terrific lineup of Vice Chairs this year, all of whom are eager to advance the important work of our committee.

One of the goals we set for ourselves this year is to do a better job of benefiting the more than 800 members of our committee by delivering more substantive content to assist our members in their practices. How will we do this?

First, we are dedicated to increasing our use of technology and social media to reach our members. Here is a list of the ways you can participate in topical discussions and stay informed of committee events:

• Visit our website at http://ambar.org/tipsmedicine\law.

• Sign up for our Listserv by clicking “subscribe” in the Listserv/Member Info box located in the lower right hand corner of the committee website.

• The Medicine and Law Committee has a presence on LinkedIn as a subgroup of the American Bar Association Tort Trial and Insurance Practice Section. To join us, please go to http://www.linkedin.com/groups/Medicine-Law-Committee-2710509/about?trk=anet_ug_grppro.

• Our committee’s newly-created twitter account can be found by searching for our twitter handle, @ABATIPSMLC.

• Facebook friends can “like” us at http://www.facebook.com/pages/Medicine-and-Law-Committee-Tort-Trial-Insurance-Practice-Section/30183648610.

Second, we will continue to publish quality articles concerning important developments in medicine and law. We are working on our annual survey of the law article, which will be published in the TIPS Law Journal. Last year’s survey article can be found below under “Publications and Articles by our Members.”

Finally, we will continue to deliver timely and informative CLE programming. This year, we intend to emphasis “timely.” We are actively monitoring the dockets of the United States Supreme Court and state appellate courts for upcoming decisions important to practitioners in medicine and law. When any such decision is handed down, we will be the first to offer programming so that our members can quickly understand how their practices are affected. Yet another reason to follow us closely on social media!

Please feel free to reach out to me if you have any thoughts regarding topics you would like to see our committee address or if there is any way that you believe our committee can be of greater value to you. I look forward to a fun and informative year as Chair of the Medicine and Law Committee.

Jim Wells is a partner with Haines & Associates in Philadelphia. His practice is focused on representing plaintiffs in complex personally injury cases including medical malpractice and products liability. He can be reached at jwells@haines-law.com.
LETTER FROM THE EDITOR

Welcome to another exciting Bar Year and welcome to the Medicine & Law Committee Summer/Fall 2013 Newsletter! Please note our new title – The Pulse – appropriately named by Chair Jim Wells. I greatly appreciate the opportunity to serve as the Committee’s Newsletter Editor this year.

In this issue, you will find a very timely and informative review of a new textbook from TIPS entitled Medical Malpractice: Avoiding, Adjusting & Litigating in the Challenging New Climate by Professor James T. O’Reilly. Your editorial staff believe all will enjoy and benefit from Professor O’Reilly’s analysis.

I also call you attention to a new section of the Newsletter – the Member Spotlight. Please join me in congratulating Gail V. Ashworth, this month’s spotlighted member. We will continue to spotlight members throughout the year and welcome nominations for members to be spotlighted in the future.

If you have ideas for articles or would like to contribute to our Newsletter, please contact me at any time at sstill@starneslaw.com.

It is my pleasure to serve as your Newsletter Editor and, again, I hope you find this edition to be informative.

Although I, unfortunately, will not be able to attend the upcoming TIPS Fall Meeting, I trust everyone will enjoy (and behave) themselves and look forward to hearing the stories after the meeting.

All the Best,
Stephen W. Still, Jr.

Stephen W. Still, Jr. is a partner with Starnes Davis Florie LLP in Birmingham, Alabama. The majority of Stephen’s practice is devoted to defending nursing home malpractice claims and direct claims against insurance companies for breach of contract, bad faith, and fraud, although he practices extensively in a variety of other areas, including commercial litigation, representing both plaintiffs and defendants, and in the area of manufactured housing litigation. Stephen also devotes a significant portion of his practice to representing healthcare providers in regulatory matters.

Link Up With Medicine & Law

The predominant social networking site for business people and professionals is LinkedIn. The Medicine & Law Committee has joined in this movement, and has created a site on LinkedIn. Our site is a subgroup of the ABA TIPS site.

Please look for us on LinkedIn, and connect up with us. We plan to develop a useful network for sharing information, questions, and resources to quickly benefit our members.

Join us!
Medicine and Law Committee Meeting
SAVE THE DATE!

TIPS will be holding its Fall Meeting at the Minneapolis Marriott City Center October 9 to 13, 2013.

The Medicine & Law Committee will be holding a member meet-and-greet happy hour on Friday, October 11, 2013, at 3:45 p.m. in the lobby lounge located on the Fifth Floor. We hope to see you there!
TIPS SPOTLIGHTS A LEADER: GAIL VAUGHN ASHWORTH

By: Tasha C. Blakney

At the Annual Meeting in San Francisco, the Tennessee Bar Association recognized one of our own, Gail Vaughn Ashworth, largely for contributions made to the TIPS section. Cindy Wyrick, President of the Tennessee Bar Association (and also an active TIPS’ter and Medicine and Law Committee member in her own right), proudly presented the award to Gail for her dedication both to the Tennessee and American Bar Associations.

Gail is a past president of the Tennessee Bar Association, where she was instrumental in developing the TBA’s Leadership Law (“TBALL”) program. Her experience with TBALL would later serve her well in helping TIPS underpin the foundations of the widely successful Leadership Academy initiative. Affectionately dubbed the “Queen of Caucus,” Gail has been the centerpiece and, often, the driving force behind the success of these two leadership programs.

When Gail isn’t working hard as a litigator, mediator, and active Medicine & Law Committee member, she is serving her Nashville community in a host of meaningful ways. She has served as chair of the board of directors for the Tennessee Justice Center, the Tennessee Legal Community Foundation, and the Legal Aid Society/Nashville Pro Bono Campaign for Justice. She is a sought after speaker for seminars and was recently a faculty member and student mentor at the ABA/TIPS/ABOTA National Trial Academy.

If all of this weren’t enough, Gail is an avid marathon runner, a classical pianist, and a motorcycle enthusiast. Needless to say, catching up with her is no easy task! But, we were grateful to catch up with her long enough for this interview for The Pulse:

**The Pulse:** Where do you practice and in what way does your practice involve medicine and law?

Gail: I practice law at Wiseman Ashworth Law Group PLC in Nashville, Tennessee in a small firm with eight other lawyers. We also have an office in Memphis. Our firm represents individuals and companies in all areas of health care law including civil litigation in State, Federal and Administrative Courts at the trial and appellate levels. I also handle licensing issues for health care professionals, serve on a medical ethics committee, advise on medical ethics and represent plaintiffs in personal injury and wrongful death cases.

**The Pulse:** How long have you been involved with the Medicine & Law Committee?

Gail: I have officially been a member of the Medicine & Law Committee for six years and hope to continue for many more years.

**The Pulse:** In what ways have you been involved with the Committee?

Gail: I had the opportunity to co-present at a CLE during the ABA/YLD Spring Meeting in Nashville in 2012 with fellow Committee member Stephen Still, which was a great experience. I attend Committee meetings, participate in Committee conference calls and I am currently working on membership for the Committee.

**The Pulse:** How has your involvement with the Medicine & Law Committee benefitted your practice?

Gail: I have met many interesting and talented lawyers who practice law in private, corporate and government settings, and also judges, scholars and authors. The exchange of ideas and issues in the conference calls, meetings and contacts of our Committee is very helpful to me, particularly in growing resources and getting to know people with such in-depth knowledge of cutting-edge and relevant medical-legal issues. However, Committee members are also excellent sources of basic medical-legal law, which is very important to me. My contacts with Committee members have also helped me in my mediation practice.

**The Pulse:** What do you enjoy most about the Committee?

Gail: I am pretty “old school,” as I really enjoy the in-person meetings when we see each other as a group at
TIPS meetings, ABA Meetings and CLEs. We have very interesting members from all over the country who do many very different and exciting things as lawyers and I like to see and hear from them.

The Pulse: What advice do you have for new members to the Committee?

Gail: Participation in telephone meetings, in-person at TIPS meetings, writing an article or suggesting article topics, webinars and other program ideas are all great ways to get to know other Committee members while contributing to your own professional development. The Committee is also fun and we sometimes meet over breakfast, lunch or for drinks. The Committee is very welcoming so just show up or call in.

The Pulse: What is your most interesting story from an ABA or TIPS meeting?

Gail: By far one of my most memorable TIPS moments was my first meeting of Past TIPS Chair Ginger Busby, which occurred at a Delta counter in the Atlanta airport in the fall of 2007 while en route to the TIPS Fall meeting in Pinehurst, North Carolina. There had been (the usual) late gate change in Atlanta and she was at the counter persuading the gate agent to allow her to board the plane although they were moments from closing the doors and the flight was overbooked. I was behind her in line and guessed her identity due to John Tarpley’s descriptions of her, as we were all on the new Leadership Academy Task Force but I had not yet met Ginger, so I introduced myself to her. Ginger’s charming demeanor won the day and we were both allowed on the plane. When we arrived at the Raleigh-Durham airport, there was no ground transportation available to Pinehurst, including no rental cars, and Pinehurst is 75 miles away from the airport. Ginger managed to convince a total stranger who was outside picking up his son to give not only the two of us, but another stranded stranger who turned out to be one of the members of the new TIPS Leadership Academy, plus all of our luggage (there was quite a bit of that) a ride with him and his son all the way to the hotel in Pinehurst (did I mention this was 75 miles away), although he was not going to the hotel. I was very relieved although somewhat concerned as he said his name was Norman, he never told us his last name and he was rather evasive about what he did in Pinehurst. We made it to the hotel just in time for the opening program and were very grateful to Norman and his son.

Our most sincere congratulations to Gail for her much-deserved recognition and, Gail, we hope you’re a member of this Committee for a long time too!

Will You Be Our Friend?

The Medicine & Law Committee is looking for some friends. We have established a Facebook page for our Committee. If you are on Facebook, please search for Medicine and Law Committee-Tort, Trial & Insurance Practice Section, and when you get there, click that you “Like” our Committee.

We are looking at interesting and informative content to deliver to our members through our status postings and event updates.

This will also provide you with access to other Committee members who have joined the Facebook phenomenon.
SURPRISING CHANGES... Continued from page 1

$200,000. One of the 3 federal paralegals in Washington examined the claim, agreed the Clinic-referred surgeon erred, and granted half the claimed amount. GAO sent a check for $100,000, and the attorney fee for Barry maxed out at $20,000. That same week, her brother in law Terry hired an attorney to file suit for recurring pain from Jones City Clinic’s mismanagement of his leg treatment in July 2012. The attorney sued in state court, invested $12,000 in preparing the case, but then Terry was startled when the case was dismissed, as the federal statute of limitations for filing tort claims had passed, leaving no federal and no state remedies. Terry was angry, and sued for legal malpractice while filing a bar grievance against that attorney.

In the new textbook from TIPS, Medical Malpractice: Avoiding, Adjudicating & Litigating in the Challenging New Climate, the pathways into and out of the modern medical malpractice maze are explained. No prudent lawyer should walk alone through the tortured path of medical torts as it evolves in this highly regulated sphere.

The world has changed since you first entered law practice to rescue the victims of harmful errors from bad doctors. As the number of nonprofit medical clinics with federal subsidies nears the 10,000 mark, and millions of newly insured patients flood these clinics with long-delayed medical needs for care, a big shift is occurring “behind the scenes”. Many victims of medical errors will be startled to learn that their remedy for error is up to the 3 paralegals inside the Department of Health & Human Services in Washington, D.C. State law malpractice defenses and processes are all available to the HHS claims defenders. But state law juries and punitive damages are not available to the plaintiffs, if a rejected claimant sues in federal district court. Around Cincinnati, where the text’s experienced authors practice, 46 different clinics hold the little known “deemed federal” status that protects them. These clinics carry no insurance for medical malpractice because they cannot be sued in state courts. Even a grossly negligent doctor inside a clinic, or in a hospital to which clinic patients are referred, will never be liable in tort and will never be listed in the National Practitioner Data Base for serious medical error liability. Awards are only against the United States, and few have ever overcome a damage award or denial of claims on appeal.

If you ask, “Should I increase my own legal malpractice coverage before I accept these cases?”, the authors say a resounding “YES”. Yes, medical malpractice claim deadlines and federal court deadlines will surprise some less experienced plaintiff’s lawyers, leaving the attorney’s own liability coverage as the only “deep pocket” for the injured patient to sue. Should I reject all med-mal claims against any nonprofit clinics? No, it is possible that a clinic might not have gone through the federal coverage process; for those clinics that are deemed federal, it may be possible to cover one’s expenses of case investigation and expert witness affidavits within the 20% cap on fees -- if the amount of the federal claim is large, and if the HHS paralegal adjudicator decides that the errors were serious enough to merit an award. But you may be startled at how little net income the plaintiff’s lawyer earns for the effort that is put into these cases.

How depressing….but wait! There are bright spots in medical malpractice coming soon to a patient near you. The Affordable Care Act’s lowest priced health insurance exchange policies, called “Bronze level plans”, may require the insured person to pay a very large co-pay and deductible, unless the patient uses the insurer’s option of quick and easy “telemedicine”, medical consultation from a remote doctor from the comfort of the patient’s laptop, or “kiosk medical clinics”, small offices inside chain grocery or drug stores that purport to diagnose and treat small medical needs for families, while they get their groceries or diapers.

Given the cost-savings choice, medical care by remote doctors or by local in-store nurses seems to be a great option for the symptoms of disease or malaise felt by the lower income patient who now holds the Obamcare-subsidized insurance card. Great option for savings: yes; great option for accurate diagnoses: maybe not. Since diagnostic errors are historically the basis for the biggest malpractice verdicts in tort cases, remote docs and nearby nurses may bring the stingy health insurer and the hard-selling marketer into the courtroom as defendants in future med-mal cases against nurses and doctors. The astute reader of this book finds out how, when and why to hold the owners of these new vehicles for medical errors to the consequences of their mistakes.

TIPS members and lawyers on all sides of the med-mal debate need to own a copy of Medical Malpractice: Avoiding, Adjudicating & Litigating in the Challenging New Climate. You will learn a lot of the next decade’s medical error litigation problems and solutions. You’ll wonder why and how and when – but we’ll bet that you increase your legal malpractice liability if you stay in this field.
Register Today!

www.americanbar.org/tips

Register today for the Tort Trial & Insurance Practice Section’s Fall Leadership Meeting. Offering valuable CLE programming, various networking events and public service opportunities, this is a meeting you won’t want to miss!

Fall Meeting CLE Programs

Wednesday, October 9, 2013
- Commercial Transportation: Four Hot Topics for the Trucking Lawyer
- Electronic Data Recorders or the Proverbial “Black Box”: Questions Concerning Admissibility Preservation and Ownership of the Data After a Motor Vehicle Accident

Thursday, October 10, 2013
- When Passing the Bar is a Lifelong Challenge
- More Diligence is Due: What Every Lawyer Must Know About Insurance
- 2014 Health Insurance Market: New Challenges
- Dialog with General Counsel

Friday, October 11, 2013
- Advanced Theories of Recovery and Subrogation 201

Hotel Reservations
Please call the hotel directly at 612/349-4000 or toll free at 800/229-8280 to make your room reservation. The room block will be held until exhausted or until Tuesday, September 17, 2013 at 5:00pm (CST).

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<td>13 Symposium: Animal Shelter and Rescue Law</td>
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