Updates and Handling Potential Problems/Difficulties in Professional Medical Negligence Cases

by

Franklin D. Beahm
A. Rebecca Wilmore
Beahm & Green
New Orleans, LA

Nakisha Knott
Gainsburgh, Benjamin, David, Meunier & Warshauer
New Orleans, LA

Jeffrey A. Mitchell
The Cochran Firm
New Orleans, LA

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I. *Borel* and *Warren*, Two Supreme Court Pronouncements Have a Profound Effect on the Louisiana Medical Malpractice Act.

In Borel v. Young, 989 So.2d 42, 2007-0419 (La. 11/27/07), *on rehearing* (Jul 01, 2008), *rehearing denied* (Aug 29, 2008), the plaintiffs timely filed a malpractice complaint with the Louisiana Patient's Compensation Fund against two doctors and a hospital, thereby satisfying the requirements of La. R.S. 40:1299.47(B)(1)(a)(i) that no action may be filed against a health care provider before a claimant's proposed complaint has been presented to a medical review panel. This timely request suspended prescription until ninety days following notification of the panel's issuance of an opinion against all parties named in the complaint and all joint and solidary obligors and all joint tortfeasors. La. R.S. 40:1299.47(A)(2)(a). Within 90 days of being notified of the panel's opinion, the plaintiffs filed suit in district court against the hospital, but not against the two doctors.

After the three year period provided in La. R.S. 9:5628, plaintiffs attempted to amend their petition to add the doctors and their insurer, and when this failed, they filed a separate lawsuit against them which was later consolidated with the original suit. In response, the defendants filed an exception of prescription. Plaintiffs contested, arguing that La. C.C. art. 2324(C), providing that "[i]nterruption of prescription against one joint tortfeasor is effective against all joint tortfeasors," applied such that their timely suit against the hospital interrupted prescription against the other joint tortfeasors. In *Borel,* the supreme court disagreed and held that "the more specific provisions of the Medical Malpractice Act regarding suspension of prescription against joint tortfeasors apply to the exclusion of the general code articles on interruption of prescription against joint tortfeasors, LSA-C.C. art. 2324(C)." *Borel, supra* at 69.

In summary, Borel holds that a plaintiff may not belatedly **add a defendant** to a medical malpractice case utilizing the general codal provisions of timely interruption by one joint tort-feasor as interrupting prescription against all other joint tort-feasors. The medical malpractice statute is prescriptive, not preemptive, and it governs medical malpractice actions over the more general code provisions.

Then along came the Warren decision in which the Louisiana Supreme Court was asked to decide the issue of whether new plaintiff can be added as a party more than one year after the date of the death of a patient in a medical malpractice case. Warren v. Louisiana Medical Mut. Ins. Co. 21 So.3d 186, 2007-0492 (La. 12/2/08). Rehearing granted (Feb 13, 2009), on rehearing (Jun 26, 2009).

On October 10, 12, and 13, 2000, Terry Wan-en received medical treatment from various health care providers, and, on October 13, 2000, he died. Alleging that his death was caused by substandard medical care which led to a delay in diagnosing and treating a heart attack, on September 11, 2001, Pamela Warren and Theresa Rene Warren filed a medical

malpractice complaint with the Louisiana Patient's Compensation Fund. Pamela and Theresa Warren are the wife and daughter of the decedent.

At the time the PCF complaint was filed, the decedent's other daughter, Sarah Warren Jimenez ("Sarah"), was aware of the filing **but consciously chose not to be involved in the matter**. Pamela Warren and Theresa Warren timely filed suit against defendants in the Nineteenth Judicial District Court alleging wrongful death and survival actions. **Again, Sarah chose not to join in the suit. On July 6, 2004**, nearly 4 years after the death of her father, Sarah filed an amending petition seeking to be added as a plaintiff asserting survival and wrongful death claims

In its original decision, the Supreme Court held that the amended pleading adding a new plaintiff after the expiration of the prescriptive period related back to the timely filing of the original petition pursuant to La. C.C.P. art. 1153. On rehearing, the Court stated that its previous holding was contrary to *Borel,* as well as to *LeBreton.*

La. C.C.P. art. 1153 provides that "[w]hen the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading."

The Court reasoned:

> *LeBreton* and *Borel* stand for the proposition that medical malpractice claims are governed by the specific provisions of the Medical Malpractice Act regarding suspension of prescription to the exclusion of the general codal articles on interruption of prescription. These cases are equally applicable here. The expressed reasoning behind the holding in *LeBreton* was that if the general rules on interruption were to apply to a medical malpractice action, "then the prescription and suspension provisions provided in the Medical Malpractice Act will be written out," and "[t]herein lies the conflict." *LeBreton, supra* at 1230.
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> Although La. C.C.P. art. 1153 does not "interrupt" prescription as did the general codal articles in *LeBreton* and *Borel,* "relation back" of an untimely filed amended petition directly avoids the application of prescription by allowing a claim that would have otherwise prescribed to proceed. The effect of this interference is that if relation back is allowed, the "prescription and suspension provisions provided in the Medical Malpractice Act will be written out," which, as we recognized in *LeBreton,* presents "a conflict." *LeBreton, supra* at 1230.

Further, the application of La. C.C.P. art. 1153 "would potentially subject a health care provider to an indefinite period of prescription, ... a result clearly at odds with the purpose of the [Act]." *Borel, supra* at 68, n. 12. Because medical malpractice actions are governed by the specific provisions of the Act regarding prescription and suspension of prescription, under *Borel,* we find that any general codal article which conflicts with these provisions may not be applied to such actions in the absence of specific legislative authorization in the Act. The Act has no rules allowing relation back of pleadings for medical malpractice claims. The application of Article 1153 would permit the adding of an plaintiff subsequent to the expiration of the three-year period provided for in La. R.S. 9:5628, and would read out of the statute the prescription and suspension period provisions by La. R.S. 9:5628 and La. R.S. 40:1299.47; therefore, La. C.C.P. art. 1153 may not be applied to the medical malpractice action under the reasoning of *LeBreton* and *Borel.*

In Sum, Warren held that Sarah Jimenez claims for the wrongful death of her father were prescribed because they were not filed within one year from the date of his death and she could not use article 1153 of the Louisiana Code of Civil Procedure, which allows for the relation back of an amended petition to a timely filed original petition, to interrupt that time period.

These cases more generally stand for the proposition that the Medical Malpractice Act, not the general codal articles, govern medical malpractice cases. Adding late defendants is now a pitfall. This will force plaintiff's attorneys to sue everyone because defendants or plaintiffs cannot be added later, even if they are joint- tortfeasors. Of course, this will perpetuate the defense argument of a frivolous suit naming everyone involved.

THE AFTERMATH OF BOREL AND WARREN

It is clear that in the aftermath of Borel and Warren, defendants will attempt to extend the reach of these decisions even further. Here is one actual recent example:

> Query: AFTER BOREL AND WARREN: Does La. R.S. 9:5628, on prescription, govern wrongful death actions arising out of medical malpractice or does the Civil Code Articles on wrongful death apply?

9:5628. Actions for medical malpractice

A. No action for damages for injury or death against any physician, ..., whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

Several recent defendants have attempted to extend the holding in Warren to argue that under this statute, plaintiffs' failure to bring a medical malpractice action against the medical malpractice defendants when the suit was timely instituted by the surviving spouse now bars them from successfully bringing a wrongful death action within one year from the date of death of their father. (If the death occurred more than three years from the act of malpractice). In so doing, the defendants argue that Warren impliedly overruled a previous Supreme Court ruling on this issue.

The Louisiana Supreme Court has already expressly rejected this reasoning as "intolerable." In Taylor v. Giddens, 618 So.2d 834 (La. 1993), the Louisiana Supreme Court expressly held that La. R.S. 9:5628 DOES NOT provide a prescriptive period for wrongful death actions in a medical malpractice case. The court specifically reasoned:

> In contrast, the wrongful death action does not necessarily come into existence simultaneously with the malpractice action or even come into existence while the victim's malpractice action is viable. Consequently, if La. R.S. 9:5628 controlled the prescriptive period for wrongful death actions, a certain class of wrongful death claimants would be time-barred from filing suit before their cause of action even arose. The statute would not equally affect all medical malpractice wrongful death claimants or treat them the same. See *Crier v. Whitecloud on reh'g,* 496 So.2d 305 (La.1986). Wrongful death claimants whose malpractice victim died within the prescriptive period would be allowed to seek damages, while those whose malpractice victim died after the expiration of the malpractice action prescriptive period would be denied the right to seek damages. Their remedy to address their civil wrong would have been eliminated prior to the accrual of their cause of action. Such a result is intolerable, as it discriminates among wrongful death tort claimants.

The Supreme Court, on rehearing in Warren, never even discussed, much less overruled Taylor v. Giddens. Any suggestion to the contrary is not supported by a single citation or any

reported history on Warren or Taylor in the research. (Query for discussion: Does the Louisiana Supreme Court implicitly overrule other important decisions without discussing them?)

Moreover, such an argument also is directly contrary to a previous medical malpractice case with virtually the same exact facts wherein the court allowed the plaintiffs to bring an action for wrongful death of their son 15 years after the date of the malpractice, but within one year from the date of his death. In Rajnowski v. St. Patrick Hospital of Lake Charles, 768 So.2d 88 (La. App. 3rd Cir. 6/07/00,) Richard and Nancy Rajnowski were the parents of Richard Rajnowski, Jr. (Ricky) who was born on February 1, 1983, at St. Patrick Hospital of Lake Charles. In 1986, when Ricky was about three and a half years old, the Rajnowskis filed a medical malpractice suit individually and on behalf of their minor child against Dr. Floyd Guidry; his insurer, St. Paul Fire & Marine Insurance Company; and St. Patrick Hospital. The Defendants then filed a peremptory exception of prescription averring that, because a period of three and one half years had passed since the alleged malpractice, the action had prescribed. The trial court granted the exceptions of prescription as to both Defendants and dismissed the suit with prejudice. The Rajnowskis appealed that ruling, and the court affirmed the trial court's judgment.

Ricky died on February 27, 1998, at the age of 15. On February 23, 1999, his parents filed a wrongful death suit against the same defendants that they sued in 1986. They alleged that Ricky died as a result of deviations in the standard of care by Dr. Guidry during prenatal treatment. Defendants filed exceptions of res judicata and prescription arguing that La. R.S. 9:5628 controlled the wrongful death action. The Rajnowskis argued that a wrongful death cause of action does not come into existence until the tort victim dies.

The court agreed with the Rajnowskis and denied the exceptions of res judicata and prescription. The court reasoned:

> The reference to actions for death in LSA- R.S. 9:5628 applies solely to survival actions as they are derivative of the malpractice victim's action. Further, wrongful death actions are not dependent upon the victim having a viable malpractice action. The date of the malpractice victim's death determines when the prescriptive period commences running, as that is the date the claimant's are injured.

Id. at 90

The court noted that the determination that the prescriptive period for wrongful death actions arising from medical malpractice are not within the scope of LA. R.S. 9:5628 did not

alter the affect that the medical malpractice provision has on wrongful death actions. Those actions continue to be governed and procedurally controlled by the Medical Malpractice Act.

II. 2010 Update on the Status of the Medical Malpractice Cap

In 2009, Louisiana Representative John Bell Edwards was tasked to bring together a coalition of all the parties in the medical malpractice arena to see if a consensus could be reached in passing a bill which would increase the cap on damages in medical malpractice actions. Representatives from The Louisiana Hospital Association, LAMMICO (the largest insurer of physicians in Louisiana), the nursing home industry, the state doctor's association and individual lawyers who represent doctors and hospitals, and representatives from the Louisiana Association for Justice all met for more than a year to try and hammer out a consensus bill.

Predictably, these time-consuming efforts failed without producing a single bill upon which the parties could sign off. The defense bar could not agree amongst themselves and their clients on key issues of a bill like: LAMMICO wants to dissolve all medical review panels; the doctors and hospitals do not

The final blow to the coalition's efforts was Insurance Commissioner Jim Donelon's recent lawsuit wherein he sought a declaratory judgment seeking to have the Louisiana Patient's Compensation Fund treated under the rules of an insurance company. This would require them to raise money to provide for their "unfunded liability." This hurdle made it impossible for the PCF to consider raising a cap if they had to come up with $300 million plus because of this potential threat.

To combat this problem, a bill was introduced in the 2010 Legislative session to specifically allow the PCF to operate outside the Insurance Commissioner's authority and to continue to operate with "unfunded liability for the future." Commissioner Donelon vehemently opposed this bill, but it unanimously made it out of committee. If it passes, perhaps the coalition will restart its discussions.

The impetus of all of this is a fear that the Louisiana Medical Malpractice Act will eventually be declared unconstitutional by the Louisiana Supreme Court and that will send this area of the law into complete chaos. Given the status of several pending cases, this is a very real fear:

Pending Cases

Arrington v. Galen-Med, (latest cite 947 So.2d 727 (La. 2/2/07))– This case challenges the cap on damages as violating the Louisiana Constitution's provision of an adequate remedy. The $500,000 cap, which was put in place in 1975 has never been adjusted for inflation and today is worth less than $140,000 in 2010 dollars. If adjusted for inflation, the cap would be worth over $1.7 million. The Third Circuit has already heard this case and decided the cap was unconstitutional. The Louisiana Supreme Court sent the case back to the trial court for a full blown trial holding that the issues were not properly before the court. This case will be tried soon and will make its way back to the Third Circuit and the Supreme Court.

Taylor Oliver – The Third Circuit had also recently heard arguments on a case in which the constitutionality of the Act was challenged as it applies to nurse practitioners. This group of healthcare providers was never added to the definition of qualified healthcare providers. Additionally, there has never been a showing or proof that a crisis existed for these HCP, which would be a quid pro quo for limiting damages against them. This case was argued in May, 2010.

2010 Legislative Update

HB 264- made it out of committee in the 2010 legislative session. This bill added occupational therapist, licensed respiratory therapist, licensed radiologic technologist and licensed clinical laboratory scientist to the definition of healthcare providers protected by the cap. Again, no showing was made to demonstrate that any crisis existed for these HCPs which would require a protection by a cap. This was specifically raised by representatives opposing the bill, but it nevertheless made it out of committee and passed the house. It was awaiting final approval in the Senate at the time of this writing, but is expected to pass.

HB 427 - was an attempt to provide virtual immunity for emergency room physicians unless their acts were intended to cause harm to the patient. This bill died in committee. Even staunch proponents of the cap could not support this draconian attempt to provide immunity for admitted negligent acts of emergency room physicians which caused harm to their patients.

HB 175 - to raise the cap died in committee after extensive testimony from victims of medical malpractice who testified how the low cap severely impacted their lives following catastrophic losses to their loved ones. This shows the overwhelming resistance the legislature has to resolving this problem without a decision by the court.

HB 1018 – attempts to Legislatively overrule the Third Circuit's opinion in Mey Yen by requiring prisoner claims for medical malpractice (which relate to care rendered outside the correctional facility which are subject to administrative review) to be submitted to a medical review panel before being brought in district court. It passed the House and was awaiting final passage by the Senate as of the time this paper was written. It is expected to pass.

III. Ex Parte Communications with Treating Physicians – An Update

Ex Parte communications with the plaintiff's treating physician in a personal injury case has been the subject of many cases dating back to the 1996 decision in Boutee v. Winn Dixie, 674 So.2d 299 (La. App. 3rd Cir. 4/17/96) which prohibited such meetings unless conducted through normal discovery vehicles with notice to counsel for plaintiff. Lawyers representing health care providers in medical malpractice actions were quick to argue that such a prohibition did not extend to medical malpractice cases. Recent jurisprudence has rejected these arguments and confirmed the old rule in personal injury cases.

In Wood v American National Property & Casualty Ins. Co. 1 So.3d 764 (La. App. 3rd Cir. 12/23/08), the court upheld the trial court's grant of a motion in limine which excluded evidence of a physician's treatment of plaintiff for purposes of impeachment due to an illicit ex parte communication between defense counsel and plaintiff's treating physician. In so doing the court reasoned:

> Thus, [plaintiff] only waived her patient's privilege as to her medical records with [her treating physician] in the limited context of testimony at trial or through the use of proper discovery methods. Id. at 768.

The Wood court relied upon its previous ruling in Coutee v. Global Marine Drilling Co., 04-1293 (La. App. 3rd Cir. 2/16/05), 895 So.2d 631 rev'd on other grounds, 05-0756 (La. 2/22/06), 924 So.2d 112. In Coutee, a non medical malpractice personal injury case, plaintiff's treating physician was deposed by the defense regarding his opinions on plaintiff's medical condition and work capacity. His physician opined that the plaintiff could not perform medium-heavy work. After the deposition, the physician had an ex parte meeting with defense counsel during which defense counsel presented him with documents and information not shown at his deposition.

During trial, and at the surprise of the plaintiff, the doctor changed his testimony from what he stated in his deposition based on the information received at the ex parte conference with defense counsel. Subsequent to losing his lawsuit, Coutee filed suit against [his doctor]. Coutee alleged that [his doctor], by participating in ex parte communications with the

defendant in his personal injury case, had (1) breached the physician-patient privilege; (2) intentionally inflicted emotional distress upon him; and (3) invaded his privacy.

After a bench trial on the merits of Coutee's claims against [his doctor], the trial court found that [his doctor] had breached the physician-patient privilege and that Coutee had shown that he was entitled to damages in the amount of twenty thousand dollars from [his doctor] for emotional distress. [His doctor] appealed that ruling.

The Third Circuit affirmed this ruling holding:

Coutee did waive his right to keep [his doctor] from testifying, but he did not waive his right to keep [his doctor] from participating in an unauthorized, ex parte meeting with his patient's adversary and discuss his patient's relevant condition. As such, this statute still does not allow [his doctor] to breach his obligation to Coutee to uphold the physician-patient privilege. Id. at 646.

The Louisiana Supreme Court reversed the affirmation of the trial court's awarding damages for the ex parte disclosure finding that the damages suffered by Coutee were not caused by the ex parte communication. However, the Supreme Court did not discuss the waiver analysis contained in the discussion by the Third Circuit and thus the validity of such analysis remains unimpeached.

The most recent case involving the issue of ex parte communications with treating physicians did involve a medical malpractice case. In Ernst v. Taylor, 17 So.3d 981 (La. App. 3rd Cir. 2009), Ms. Ernst claimed that her treating physician was allowed to testify about his treatment of her in violation of the health care provider-patient privilege found in La. Code Evid. Art 510 because the doctor and defense counsel met in private without notice to her or her attorney. Defendants argued that La. Code Evid. Art 510(F)(1) provided that there was no privilege related to factual matters pertaining to liability in medical malpractice claims. Defendants argued that defense counsel's meeting with the doctor did not concern her current treatment or physical condition.

The court held that the physician patient privilege was breached by the doctor. It reasoned:

> There is no doubt that counsel for defense and [the doctor] discussed Ms. Ernst's physical condition. And while [the doctor] may not have been treating Ms. Ernst at the time of trial, his treatment of her was discussed as defense counsel and [the doctor] reviewed Ms. Ernst's medical records. Furthermore, on questioning [the doctor], defense counsel stated, "When you and I met, I

> told you all I wanted you to do was talk about your treatment of this patient; is that not true?" [The doctor] confirmed that as an accurate statement.
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> Clearly, Ms. Ernst's current treatment and physical condition were discussed with [the doctor]. As in Coutee, 895 So.2d 631, proper discovery methods were not followed, with notice given to Ms. Ernst's attorney as required by La. Code Evid. Art. 510(F)(2). The privilege was breached. Id at 987.

The court went on to state:

> While [the doctor] did not specifically testify about the standard of care in this case, his testimony definitely had an impact on the standard of care issue. Having found that the trial court erred in admitting the testimony of [the doctor] which affected the standard of care issue, the jury's determination that [the defendant doctor] did not breach the standard of care is owed no deference, so we find it necessary to conduct a *de novo* review of the issues in this case; whether [the defendant doctor] breached the standard of care, causation, and damages.

This decision clearly demonstrates the potential dangers involved in attempting ex parte communications in a medical malpractice case. It also demonstrates that the same factors considered by the court in personal injury cases regarding patient-physician privilege also apply equally in a medical malpractice case.

IV. Peer Review

Often, when an act of malpractice occurs, the claimant may be interested in obtaining the records of hospital or peer review committees related to the alleged malpractice. Is the claimant entitled to this information?

Louisiana Revised Statute, 13:3715.3, provides in pertinent part, that "all records, notes, data, studies, analyses, exhibits and proceedings" of any hospital committee or the peer review committee (broadly defined), "shall be confidential wherever located and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be available for discovery..." Traditionally, when malpractice is alleged against a health care provider, the defendant, in response to requests for records such as quality assurance findings and/or information, issues a standard response; "not discoverable as the information sought is confidentially protected pursuant to La. R.S. 13:3715.3, Peer Review Committee Records". However, in *Smith v. Lincoln General Hospital*, 605 So. 2d 1347 (La. 1992), the Louisiana Supreme Court warned about interpreting the scope of the peer review committee privilege too broadly.

The *Smith* court stated that the purpose of the peer review statute is "intended to provide confidentially to the records and proceedings of hospital committees, not to insulate from discovery certain facts merely because they have come under the review of any particular committee." Rather, when a plaintiff seeks information relevant to his case that is not information regarding the action taken by a committee of "honest self-critical study" but merely factual accounting of otherwise discoverable facts, such information is not protected and does not come within the scope of information entitled to that privilege.

How does the claimant overcome the hospital's resistance to providing what he or she perceives to be critical information? The trial court, at the request of the claimant, may conduct an in camera inspection of the records in an effort to separate discoverable facts from the proceedings, analysis and conduct of the committee. See e.g. *Sepulvado v. Bauman* 753 So.2d 207 (La. 1999). The Supreme Court is *Smith* provided guidance for the trial court's review:

> [W]hen a plaintiff seeks information relevant to his case that is not information regarding the action taken by a committee or its exchange of honest self-critical study but merely factual accountings of otherwise discoverable facts, such information is not protected by any privilege as it does not come within the scope of information entitled to that privilege. 605 So.2d at 1348

Just three years later the Supreme Court again noted: "These provisions are intended to provide confidentiality to the records and proceedings of hospital committees, not to insulate from discovery certain facts merely because they have come under the review of any particular committee." *Gauthreaux v. Frank*, 656 So.2d 634 (La. 1995). For instance, factual summaries (statements against interest) by a defendant health care provider, even if only in the possession of the committee, would be discoverable. In fact, the statute contains the following: "However, no original record or document, which is otherwise discoverable, prepared by any person, other than a member of the peer review committee or the staff of the peer review committee, may be held confidential solely because it is the only copy and is in the possession of a peer review committee." La. R.S. 13:3715.3(A)(2). Thus, while there is a peer review committee privilege, it is a narrow exclusion, and can be an invaluable source of facts to support a malpractice case.

Assuming the outcome of the litigation and/or settlement does support the patient/plaintiff's case, how does this affect the physician/defendant?

V. The National Data Bank

The primary medical malpractice insurers in Louisiana provide a consent to settle clause for the physicians they insure. The consent clause allows the physician to have the final say as

to whether or not a settlement will be entered. One issue that most physicians consider when consenting to settlement is the National Practitioner Data Bank.

If a settlement is entered that involves a payment of any indemnity dollars, a report has to be made to the National Practitioner Data Bank by the insurance carrier.

The National Practitioner Data Bank (NPDB) was established by Title IV of public law 99-660, the Healthcare and Quality Improvement Act of 1986, as amended (Title IV). Final regulations governing the NPDB are codified at 45 C.F.R. Part 60. Responsibility for NPDB implementation resides with the Bureau of Health Profession, Health Resources and Services Administration, U.S. Department of Health and Human Services (HHS).

The goal of the NPDB is to improve the quality of healthcare by encouraging state licensing boards, hospitals, professional societies, and other healthcare entities to identify and discipline those who engage in unprofessional behavior. Another stated purpose is to restrict the ability of incompetent physicians, dentists, and other healthcare practitioners to move from state to state without disclosure or discovery of previous medical malpractice payments and adverse action history. Adverse actions may involve licensure, clinical privileges, profession society membership, and exclusions from Medicare and Medicaid.

For some physicians, particularly older ones, having never been reported to the National Data Bank is a subject of much professional pride, and is very difficult for them to make a decision to undertake a settlement that would require such reporting. However, the NPDB has greatest effect on young mobile physicians who may be moving to a new facility or moving from one state to another. The NPDB will be accessed by the healthcare facility during the credentialing process. Such facilities have a password and submit a query to the Data Bank. The facility will receive a list of judgments or settlements, all of which will be discussed with the physician before credentialing is granted.

The U.S. Department of Health and Human Services has issued a lengthy and detailed National Practitioner Data Bank Guidebook, publication number HRSA-95-255. This guidebook contains information that is helpful in determining how settlements may be completed without the necessity of reporting to the NPDB. That document contains a section on Loss Adjustment Expenses (LAE) which is basically any payments that are not those made for compensation of injuries. These expenses may include actual billable hours, expert witness fees, deposition and transcript costs, copying costs, and basically any other actual costs that can be documented and do not constitute an indemnity payment. LAEs must be reported if they are paid in conjunction with an indemnity payment, but not otherwise.

Another approach sometimes explored when the NPDB is an issue, is the dismissal of a defendant physician from a lawsuit. Payment made to settle a medical malpractice claim or action is not reportable to the NPDB if the defendant healthcare practitioner is dismissed from the lawsuit prior to the settlement or judgment.

<u>However, if the dismissal results from a condition in the settlement or release, then the payment is reportable</u>.

The NPDB Guidebook explains this difference in the following manner:

In the first instance, there is no payment for the benefit of the healthcare practitioner because the individual has been dismissed from the action independently of the settlement or release. In the latter instance, if the practitioner is dismissed from the lawsuit in consideration of the payment being made in settlement of the lawsuit, the payment can only be construed as a payment for the benefit of the healthcare practitioner and must be reported to the NPDB.

The guidebook also addresses payments by multiple payers. Any medical malpractice payer that makes an indemnity payment for the benefit of the practitioner must submit a report to the NPDB. Generally, primary insurers and excess insurers are obligated to make an indemnity payment for the benefit of a particular practitioner and so must submit a report to the NPDB. The following example is provided:

> For example, if three primary insurers contribute to a payment, all three insurers are required to submit separate MMPRs to the NPDB. Each insurer should describe the basis for their payment in the narrative description of the settlement to avoid the impression of duplicate reporting.

Another possible exception relates to individual practitioners. Individual practitioners are not required to report to the NPDB payments they made for their own benefit. This "guideline" was adopted by the NPDB based upon a decision by the Circuit Court of Appeals for the District of Columbia (445 (DC Circuit 3F. 3D 1993)) in which the court held that the NPDB regulation requiring each "person or entity" that makes a medical malpractice payment to report the payment was invalid, insofar as it required individuals to report such payments. Thereafter, the NPDB removed reports previously filed on medical malpractice payments made by individuals for their own benefit and no longer requires the individual practitioner to report the payments.

On the other hand, a professional corporation or other business entity that makes a payment on behalf of a practitioner, even one consisting only of a sole practitioner, must report such payment to the NPDB. If that same practitioner makes a medical malpractice payment out of personal funds, the payment is not reportable.

As to payments that are actually reported to the NPDB, the physician is given the opportunity to add a statement to the report as to why the settlement was entered. These statements are limited to 4,000 characters, including spaces and punctuation. While physicians may dispute the factual accuracy of a report or whether the report was submitted in accordance with the NPDB's reporting requirements, the physician may not dispute a report in order to simply protest a decision made by an insurer to settle a claim. It is for this reason that most physicians insist on having an insurance policy that contains a consent to settle clause. This, obviously, is an impediment to resolving claims on both sides.

VI. EXPERT REPORTS

- The production of expert reports is an issue that frequently arises in medical malpractice cases.

- If the court directs the parties to disclose expert reports in its scheduling order, the parties do so accordingly. (See Paragraph C below.)

- However, if the court's scheduling order does not provide for expert reports, the parties are not required to ask their expert witnesses to draft a report and to produce same (unless a party files a contradictory motion under Paragraph B).

- If a party wants an expert report from another party's expert witness and the court does not require one, the party seeking the report must pay the expert a "reasonable fee." (See Paragraph D 3 below.) This usually results in the party seeking the expert report foregoing the report and simply taking the deposition of the expert because that will have to pay for the deposition, which is generally quite costly, depending on the physician and his/her specialty.

- With regard to an expert's fee, a party may file a motion to set the expert's fee asking the court to reduce the fee. If granted, the party who retained the expert witness will end up paying the difference between what the expert charges and what the court orders he/she be paid.

La. C.C.P. Art. 1425 provides in pertinent part:

B. Upon contradictory motion of any party or on the court's own motion, an order may be entered requiring that each party that has retained or specially employed a person to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony provide a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor and the data or other information considered by the witness in forming the opinions. The parties, upon agreement, or if ordered by the court, shall include in the report any or all of the following: exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

C. The disclosures of Paragraph B of this Article shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures required pursuant to Paragraph B of this Article shall be made at least ninety days before the trial date or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Paragraph B of this Article, within thirty days after the disclosure made by the other party. The parties shall supplement these disclosures when required by Article 1428.

D. (1) Except as otherwise provided in Paragraph E of this Article, a party may, through interrogatories, deposition, and a request for documents and tangible things, discover facts known or opinions held by any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Paragraph B, the deposition shall not be conducted until after the report is provided.

(2) A party may, through interrogatories or by deposition, discover facts known by and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Article 1465 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this Paragraph; and with respect to discovery obtained under Subparagraph (2) of this Paragraph, the court shall also require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

E. (1) The expert's drafts of a report required under Paragraph B of this Article, and communications, including notes and electronically stored information or portions thereof that would reveal the mental impressions, opinions, or trial strategy of the attorney for the party who has retained the expert to testify, shall not be discoverable except, in either case, on a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

VII. SPOLIATION

- A plaintiff asserting a state law tort claim for spoliation of evidence must allege the defendant intentionally destroyed evidence. *Deselle v. Jefferson Parish Hosp. Dist. No. 2*, Fifth (La.) Circuit, No. 04-CA-455, 24 (10/12/04); *Quinn v. Riso Investments, Inc.*, 869, 927 So. 2d (La. App. 4 Cir. 03/03/04).

- The tort of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. *Pham v. Contico International, Inc.,* 759 So. 2d 880, 882 (La. App. 5 Cir. 03/22/00); *Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1*, 970 So. 2d 1100 (La.App. 5 Cir. 10/16/07).

- Where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. To prevail on a cause of action for spoliation of evidence, therefore, the proponent of that cause of action must demonstrate that the party possessing the evidence knew that a lawsuit based on that evidence had been filed (or would be filed) and that the party possessing the evidence intentionally destroyed the evidence for the purpose of depriving the litigants of the use of the evidence. *Smith v. Jitney Jungle of Am.,* 35,100 (La. App. 2 Cir. 12/5/01), 802 So. 2d 988, 995, *writ denied*, 02-0039 (La. 3/15/02), 811 So. 2d 913. Allegations of negligent conduct are insufficient.

- In these post-Katrina times, spoliation is an issue surfacing regularly in cases where hospitals were destroyed in the storm.

- In cases where plaintiff requests documents and materials years after the case has begun, this is problematic, especially when documents not contained within a patient's medical chart are requested (i.e., OR logs, employee timesheets, etc.).

- Generally, Louisiana courts have declined to recognize spoliation of evidence as a separate tort. However, see *Bethea v. Modern Biomedical Services, Inc*., 704 So. 2d 1227, (La.App. 3 Cir. 11/19/97) in which the Third Circuit found a viable cause of action for impairment of a civil claim and spoliation of evidence existed. Although the court found no statutory duty was imposed on the defendants to preserve the evidence and avoid hindering plaintiffs' claim, the court nonetheless found a duty existed under La. C.C. art. 2315.

- Speculation of damages has been a concern in recognizing the tort of spoliation of evidence since in most cases it is impossible to determine the ultimate effect, if any, that the missing evidence would have on the pending or potential litigation. See *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966 (W.D. La. 1992).

- Where there is a duty to preserve evidence arising from a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence, then there is a cause of action for the breach of this duty; moreover, a showing of something more than the general tort duty to act reasonably under the circumstances is required. Therefore, in a

case where a hospital had a duty to preserve medical records under La. Rev. Stat. Ann. § 40:2144(F)(2), a breach became actionable under a theory of negligence; however, a spoliation claim was unable to stand because the record was devoid of evidence that the hospital intentionally destroyed the records at issue in a medical malpractice claim. *Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1*, 970 So. 2d 1100, 2007 La. App. LEXIS 1913 (La.App. 5 Cir. 2007), *writ denied* by 973 So. 2d 756, 2008 La. LEXIS 175 (La. 2008).

The Louisiana Hospital Records and Retention Act (La.R.S. 40:2144) provides in pertinent part:

F. (1) Hospital records shall be retained by hospitals in their original, microfilmed, or similarly reproduced form for a minimum period of **ten years** from the date a patient is discharged.

(2) Graphic matter, images, X-ray films and like matter that were necessary to produce a diagnostic or therapeutic report shall be retained, preserved and properly stored by hospitals in their original, microfilmed, or similarly reproduced form for a minimum period of **three years** from the date a patient is discharged. Such graphic matter, images, X-ray film and like matter shall be retained for longer periods when requested in writing by any one of the following:

(a) An attending or consultant physician of the patient.

(b) The patient or someone acting legally in his behalf.

(c) Legal counsel for a party having an interest affected by the patient's medical records.

G. A certified copy of the hospital record or graphic matter, images, X-ray film and like matter shall be deemed to be an original for all purposes, and shall be admissible in evidence in all courts or administrative agencies as if it were the original.

VIII. INCIDENT REPORTS

- Incident or investigative reports created by a hospital, public or private, are not shielded from discovery by a privilege if they are not created by a policy-making committee or personnel committee.

- The courts narrowly construe the peer review privilege and limit it to records, notes, data, studies analyses, exhibits and proceedings **of** the committee. Documents that are otherwise discoverable and prepared by any person other than a member or the peer review committee or the staff of a peer review committee, may not be held confidential solely because it is the only copy and is in the possession of a peer review committee. The courts will not allow other documents outside of the peer review committee to be kept confidential because that would have a chilling effect on discovery. Incident and investigative reports created *before* the peer review process, even if they relate to a

particular physician who is going through the process, will most likely not be considered privileged documents, for all of the above reasons.

- When a plaintiff seeks information not regarding the action taken by a committee or its exchange of honest self-critical study but merely factual accountings of otherwise discoverable facts, such information is not protected by any privilege as it does not come within the scope of information entitled to that privilege. *Smith v. Lincoln General Hospital*, 605 So. 2d 1347, 1348 (La. 1992).

- The Louisiana Supreme Court has drawn a distinction between policy-making/personnel committees and committees that are purely investigatory in nature. If reports are created by a policy-making or personnel committee, they are within the protected scope. However, if they are created by a "purely investigative vehicle," they are not privileged.

La R.S. 13:3715.3 concerns the confidentiality of peer review committee records (not reproduced in full here):

A. Notwithstanding the provisions of R.S. 44:7(D) or any other law to the contrary, all records, notes, data, studies, analyses, exhibits, and proceedings of:

(1) Any public hospital committee, medical organization peer review committee, any nationally recognized improvement agency or commission, including but not limited to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or any committee or agency thereof, or any healthcare licensure agency of the Louisiana Department of Health and Hospitals, public hospital board while conducting peer reviews, dental association peer review committee, professional nursing association peer review committee, extended care facility committee, nursing home association peer review committee, peer review committee of a group medical practice of twenty or more physicians, peer review committee of a freestanding surgical center licensed pursuant to R.S. 40:2131 et seq., or health maintenance organization peer review committee, including but not limited to the credentials committee, the medical staff executive committee, the risk management committee, or the quality assurance committee, any committee determining a root cause analysis of a sentinel event, established under the bylaws, rules, or regulations of such organization or institution, or

(2) Any hospital committee, the peer review committees of any medical organization, dental association, professional nursing association, nursing home association, social workers association, group medical practice of twenty or more physicians, nursing home, ambulatory surgical center licensed pursuant to R.S. 40:2131 et seq., ambulance service company, health maintenance organization, any nationally recognized improvement agency or commission, including but not limited to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or any committee or agency thereof, or any healthcare licensure agency of the Louisiana Department of Health and Hospitals, or healthcare provider as defined in R.S. 40:1299.41, or extended care facility committee, including but not limited to the credentials committee, the medical staff executive committee, the risk management committee, or the quality assurance committee, any committee determining a root cause analysis of a sentinel event, established by the peer review committees of a medical organization, dental organization, group medical practice of twenty or more physicians, social workers association, ambulatory surgical center licensed pursuant to R.S. 40:2131 et seq., ambulance service company, health maintenance organization, or healthcare provider as defined in R.S. 40:1299.41, or private hospital licensed under the provisions of R.S. 40:2100 et seq., shall be confidential wherever located and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be available for discovery or court subpoena regardless of where located, except in any proceedings affecting

the hospital staff privileges of a physician, dentist, psychologist, or podiatrist, the records forming the basis of any decision adverse to the physician, dentist, psychologist, or podiatrist may be obtained by the physician, dentist, psychologist, or podiatrist only. However, no original record or document, which is otherwise discoverable, prepared by any person, other than a member of the peer review committee or the staff of the peer review committee, may be held confidential solely because it is the only copy and is in the possession of a peer review committee.

B. No employee, physician, dentist, public or private hospital, organization, or institution furnishing information, data, reports, or records to any such committee with respect to any patient examined or treated by such physician or dentist or confined in such hospital or institution shall be liable in damages to any person by reason of furnishing such information.

C. No member of any such committee designated in Subsection A of this Section or any sponsoring entity, organization, or association on whose behalf the committee is conducting its review shall be liable in damages to any person for any action taken or recommendation made within the scope of the functions of such committee if such committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him.

La R.S. 44:7 Hospital records

A. Except as provided in Subsections B, C, and E of this Section and R.S. 44:17, the charts, records, reports, documents, and other memoranda prepared by physicians, surgeons, psychiatrists, nurses, and employees in the public hospitals of Louisiana, adult or juvenile correctional institutions, public mental health centers, and public schools for the mentally deficient to record or indicate the past or present condition, sickness or disease, physical or mental, of the patients treated in the hospitals are exempt from the provisions of this Chapter, except the provisions of R.S. 44:36 and 39. Nothing herein shall prevent hospitals from providing necessary reports pursuant to R.S. 22:976, R.S. 29:765, R.S. 40:2019, and R.S. 44:17, nor shall any liability arise from the good faith compliance therewith.

B. The governing authority of each public hospital, adult or juvenile correctional institution, public mental health center or public state school for the mentally deficient, may make and enforce rules under which these charts, records, reports, documents or other memoranda may be exhibited, or copied by or for persons legitimately and properly interested in the disease, physical or mental, or in the condition of patients.

C. Whenever the past or present condition, sickness or disease, physical or mental, of any patient treated in any hospital, adult or juvenile correctional institution, center or school, set forth in Subsection A of this Section shall be at issue or relevant in any judicial proceeding, the

charts, records, reports, documents and other memoranda referred to in said Subsection A shall be subject to discovery, subpoena and introduction into evidence in accordance with the general law of the state relating to discovery, subpoena and introduction into evidence of records and documents.

D. The records and proceedings (1) of any public hospital committee, medical organization committee, or extended care facility committee established under state or federal law or regulations or under the bylaws, rules, or regulations of such organization or institution or (2) of any hospital committee, medical organizational committee, or extended care facility committee established by a private hospital licensed under the provisions of R.S. 40:2100 et seq. shall be confidential and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be public records and shall not be available for court subpoena. No physician; hospital, whether public or private; organization; or institution furnishing information, data, reports, or records to any such committee with respect to any patient examined or treated by such physician or confined in such hospital or institution shall, by reason of furnishing such information, be liable in damages to any person. No member of such a committee shall be liable in damages to any person for any action taken or recommendation made within the scope of the functions of such committee if such committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him. However, medicaid or medicare benefits or insurance benefits provided by a private insurer shall not be denied to any person due to inability to secure records or proceedings referred to in this Section. Nothing contained herein shall be construed to prevent disclosure of such data to appropriate state or federal regulatory agencies which by statute or regulation are otherwise entitled to access to such data.

E. The governing authority of each public hospital, adult or juvenile correctional institution, public mental health center, or public state school for the mentally deficient, shall make available for inspection and copying and shall release upon request an abstract of the patient's record in which all identifying data has been properly encoded to assure confidentiality relating to patients treated in such institutions to the Louisiana cancer registry program established pursuant to R.S. 40:1229.70 et seq.

F. All records of interviews, health surveys, questionnaires, laboratory and clinical data, reports, statements, notes, and memoranda, which contain identifying characteristics of research subjects, hereinafter referred to as "confidential data", and which are procured and prepared by employees of public universities, medical schools, and colleges for the purpose of research, and acting in accordance with institutional Internal Review Board policy and procedures for research involving human subjects, shall be exempt from the provisions of this Chapter and shall be subject to the following provisions:

(1) No part of the confidential data shall be available for subpoena nor shall it be disclosed, discoverable, or be compelled to be produced in any civil, criminal, administrative, or other proceeding, nor shall such records be deemed admissible as evidence in any civil, criminal, or administrative proceeding, or other tribunal or court for any reason.

(2) Nothing in this Section shall prohibit the publishing of data that does not identify individuals or groups which have been assured confidentiality of identification.

(3) Nothing in this Section shall prohibit the publication of results of the research that maintains the confidentiality of the identification of the individual or group that is the subject of research pursuant to this Section.

(4) Nothing in this Section shall prohibit the voluntary disclosure of identifying characteristics of research subjects provided the researcher obtains the consent of the individuals so identified prior to the release of the information.

IX. Conclusion

Obviously, counsel on behalf of both the plaintiff and defendant must be aware of the potential risks and downfalls of their respective actions, particularly as it relates to discovery issues and medical malpractice cases.