

OAJ Medical Negligence Section Article January 2015

THE CONTINUED MARCH OF TORT REFORM
-vs-
THE CONTINUED DECLINE IN PATIENT SAFETY

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In my last two articles as Chair of the Medical Malpractice Section of OAJ, I have focused on asking for an increase in the activity, interest and involvement in the fight against an onward marching legislature that is focused on eroding, and ultimately destroying, the fabric of medical negligence laws in Ohio. In this article I want to focus on the prospect of educating our clients to become advocates for the rights of families and patients injured, or killed, as a direct result of medical negligence.

Quite often there are requests within our own ranks for foot soldiers in the fight against medical malpractice “reform” as well as requests for money to pump into a political system that is clearly not representative of our own professional interests. However, we rarely consider the built-in asset that we all have in our practices with clients and family members represented in the past. While I’m not about to ask OAJ to complete a study of how many total representative cases have been brought by our ranks, it would be easy to guess that across the state of Ohio tens of thousands of individuals and hundreds of thousands more family and friends have been directly impacted by our representation as medical malpractice lawyers. Why then do we not directly ask for the help of those individuals who have seen firsthand the horrible effects of tort “reform” and how our one-sided laws have become blind to the suffering and needs of our clients? I believe it is incumbent upon each and every one of us who practice either specifically or even remotely in the area of medical negligence to use our respective bully pulpits to educate our clients and ask their assistance to spread the word of the destruction of the fabric of laws that are meant to protect their rights.

I suspect each and every one of you has had an occasion to explain to your clients that an Affidavit of Merit is required to file a lawsuit. I explain to my clients that it will be up to a doctor to determine if a doctor can eventually be sued in Ohio. Once those words are out of my mouth they are met with my clients’ disbelief when they thought the lawyers made the ultimate decision. While not everybody who practices in this area of law has that discussion with their clients, I would urge you at some point during your case to educate your clients on the current status of the law in Ohio. We have a captive audience to discuss the caps on damages, the requirement of the aforementioned Affidavit of Merit, the one year statute of limitations, or any other of the other aspect of the law that negatively has impacted the client’s rights over the last 10 to 15 years.

Furthermore it is an opportunity to educate your clients on the sheer facts and statistics that we currently have to show the inverse relationship between tort “reform,” with its promise to improve patient safety and quality of care, and the clear evidence that these laws have done nothing to reverse an advancing deterioration of the safety of patients in a medical setting.

For example, in 1984 the Institute of Medicine estimated that up to 98,000 Americans died each year from medical errors. However, updated statistics were published in the *Journal of Patient Safety*, Sept. 2013 - Vol. IX - Issue 3, which indicates the number is now between 210,000 and 440,000 preventable medical errors that directly contribute to the death of patients. That makes medical errors the third leading cause of death in America, behind heart disease and cancer. (*How Many Die from Medical Mistakes in U.S. Hospitals*, Marshall Allen, Pro Publica, Sept. 20, 2013.) Those errors, and deaths, have been estimated by the Institute of Medicine to cost Americans between \$17 billion and \$29 billion per

year.

So the question is this. When we all know that there is a decrease in the number of medical negligence cases being brought, coupled with the clear evidence that there is an increase in the errors that contribute to patient harm and death and an increased cost to the American people, why do our legislators continue to pass laws for doctors and hospitals protecting them from the cost of the harm they cause. The cost is the cost of the medical errors regardless of whether it is borne by the responsible party or by the American taxpayer through the cost shifting protections passed into law. Very often, when I arm my clients with this information, I have found that they share this information with their friends, family, colleagues and other contacts they have in their life. While I'm but one drop in a large bucket, I would urge the rest of you to open the spigot, because I am convinced that eventually a full bucket will be born and we will eventually have hundreds of thousands of Ohioans asking the question; why do doctors and hospitals need more protection?

In the end, while our numbers are small, I think we underestimate the power of those that we reach and the opportunities that we have to educate.

As such, over the next six months, the OAJ Medical Section will produce literature that you can share with your clients that set forth factual evidence of the decline of the safety of medicine in the United States and the increase of protections for those who cause those harms. Please feel free to call me with any specific data that you have as we continue to gather that information to produce the literature. I am hopeful that by the time the OAJ May convention rolls around we will be able to arm each and every one of you with lethal information that can be used to spread the word.