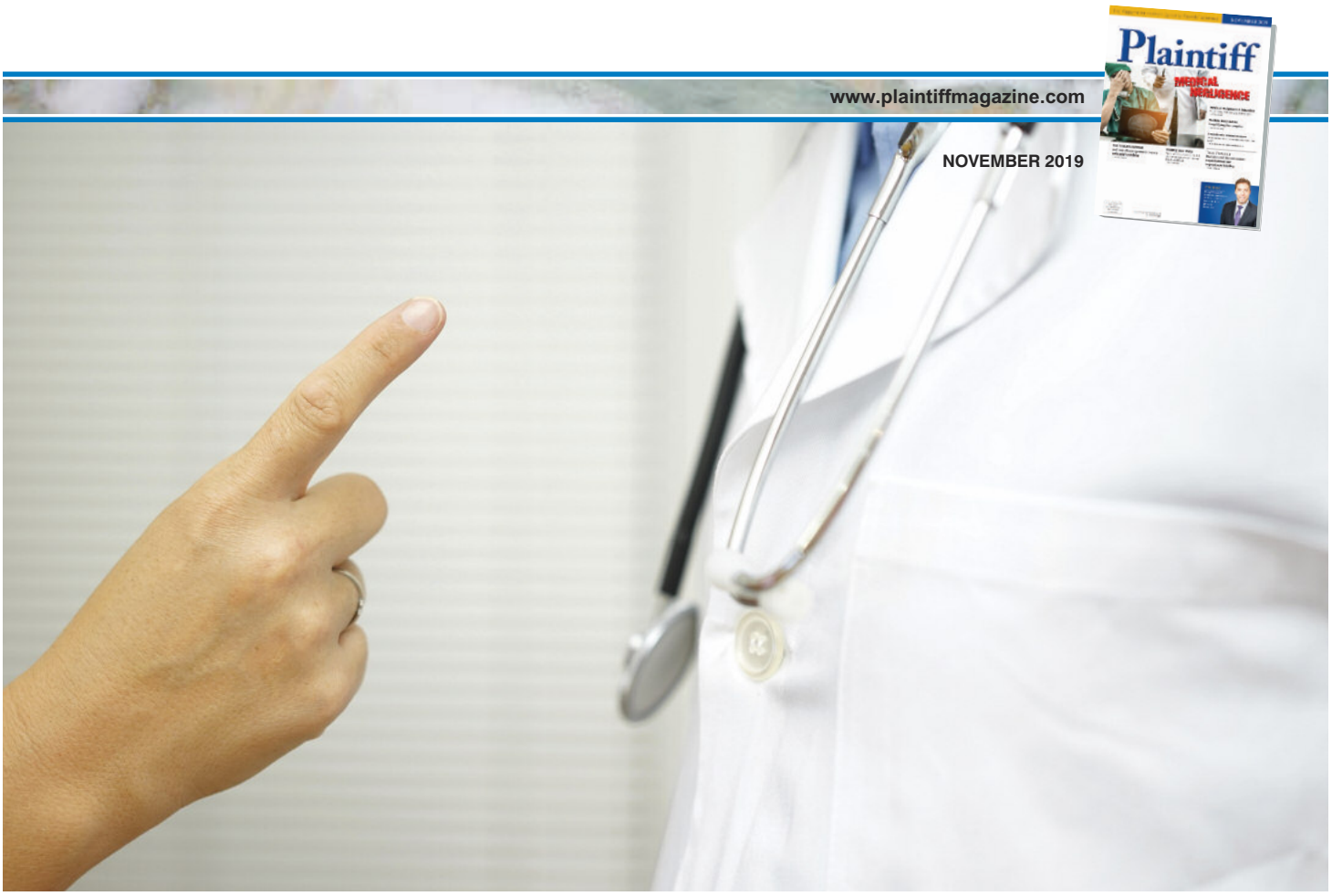

Emerging trends in medical-malpractice litigation

It's not the law that's changing, it's the players

By Jeffrey Mitchell

I have been practicing exclusively in the area of medical malpractice since 1997. I have seen a lot of changes in that time. In the first decade or so, the practice was frankly pretty static. Change was highly infrequent. That included the culture of medical-malpractice law, the law itself, carrier behavior, etc. I represented the hospitals, health systems and physicians we litigate against today. I was a defense lawyer.

The practice is much more difficult now. It's more time consuming. It's more expensive. It's more frustrating – even for those of us who are quite experienced in medical-malpractice law. I will highlight here some of these trends and their causes. I will offer tips on overcoming the new challenges in medical malpractice.

More stalling

As a general axiom in all personal injury litigation, defendants want to stall, and we, as plaintiffs' lawyers want to resolve cases as quickly and effciently as possible. This applies with even more consistency in medical-malpractice cases. The reasons are pretty simple. First, there are fewer cases being filed to defend. Thus, defense lawyers have less to do, and as a result, they will attempt to squeeze every possible hour out of a case. They will hire more duplicative experts, take more treating-physician depositions, order more meaningless records. Some carriers are keen to this and attempt to dial the defense lawyers back. Others are keen to this, but the nature of the attorney/ insured/insurer relationship prevents them from truly pushing back on the defense lawyers. Whatever the case may be, this is becoming increasingly prevalent. There are, however, certain actions you as the plainti 's lawyer can take that may help mitigate this delaying tactic.

More finger pointing

This is actually a very positive development. I was taught as a young defense lawyer never to point fingers at another defendant. It was so ingrained in defense lawyers that it was almost a religious duty. Oh, how things have changed! Fights between defendants in high-value cases are now almost a given. In multi-defendant cases of high value, I now spend half my

time dealing with these squabbles as they generally slow down the resolution of cases.

Carriers and their lawyers these days care little about starting fights with their defense brethren. Cases being filed are generally of larger value and therefore expose the carriers more. Given the fact that joint and several liability is of particular value to a plaintiff's lawyer in medical malpractice because of the absence of any valuable general damages (MICRA limit of $250K), economic damages are the meat on the bone. Carriers try to save money on larger cases by looking for angles, vis a vis another defendant at the table. I believe this development will be increasingly common as time passes.

More defense firms but fewer cases

This is related to the stalling conduct referenced earlier. The economics are simple. There are fewer medical-malpractice cases filed, yet new defense firms are popping up every year. Old, stalwart firms like my former defense firm break up, dissolving into multiple firms. Therefore, there are more firms defending fewer cases and there is intense competition among these firms to defend the remaining cases.

Leadership changes at defense firms

I predicted this trend many years ago. The defense bar that specializes in defending the medical establishment has been aging for quite some time. Many of these lawyers were starting to practice longer, oftentimes into their 80s. There had to come a point in time where some of them were going to retire. This has, in fact, now happened. Many of the more experienced, long-time defense lawyers have retired in the past five years. The same holds true for much of the leadership at the carriers and the self-insured hospital and health systems. As such, our bar is forced to deal with less-experienced defense colleagues who often lack the insight that only experience can bring. The result of this cuts both ways: the relative lack of experience can be exploited to your benefit; on the flip side, we lose the benefit of long-standing relationships that often helped resolve cases efficiently.

Lack of experience among younger defense lawyers

This was another one I saw coming. Given the retirement trend discussed above, this was a given. Now we are faced with defense lawyers who often lack any real trial experience – especially on larger cases. This is a blessing and a curse. These lawyers are inexperienced in a courtroom and can be exploited as such. On the other hand, given their lack of any real trial experience, they typically lack the skills to buy risk and settle cases that need to be settled. I have seen this trend really manifest itself over the last couple of years.

Cases are becoming much more costly to litigate

This trend applies in all types of personal-injury cases. Filing fees are going up. Costs for court reporters and trial technology are rising. Everything that is involved in pursuing PI cases costs more, but the problem is more acute in medical malpractice for one simple reason: experts. Although experts are a consideration in virtually all personal-injury cases that go to trial, they are a necessity for all medical-malpractice cases. We generally need multiple experts to successfully prosecute any medical-malpractice case – plain and simple. And given the complexity of most of these cases, we often need to hire very specialized experts who come with increasingly stout price tags. We are often hiring experts that charge more than one thousand dollars per hour. When you are hiring vascular neurosurgeons, interventional neuradiologists and the like, they don't come cheap. For example, in one case in our office: I am having to pay a world-renowned geneticist two thousand dollars. Choose your cases wisely!

Denial of the existence of joint and several liability

It's incredible that we must touch on this subject, but we do. It has become commonplace in large-exposure cases that defense lawyers for the hospital who are on the "back-end"of a case often take the position that they are not willing to pay because "it's a doctor case," i.e., a case in which the physician possesses the lion's share of liability. Obviously, this defies all logic. If you as the plaintiff's lawyer have a theory and a qualified expert to opine on the negligence of the secondary tortfeasor, the hospital, they possess often immense liability given our law pertaining to joint and several liability. This most commonly occurs in birth-injury cases because the tortfeasor physicians are almost always woefully underinsured. Despite the law, some hardheaded defense lawyers continue to take this ridiculous position during settlement discussions. As plaintiff's counsel, stand your ground. Don't buy into this. They will eventually come around and, if not, you can try your case against the deep pocket.

Defendants not wanting to pay more than another defendant

This trend is very closely tied to the discussion above. In their efforts to avoid paying an appropriate share of the freight, I hear almost universally in multi-defendant cases, where more than one defendant has legitimate liability exposure, that one defendant doesn't want to pay more than the other defendant. The origin of this stance is multi-factorial: defense lawyer ego; inter-carrier history; and relationship dynamic with the plaintiff's lawyer. Remember, they are just playing games.

Thoughts on overcoming defense tactics and achieving success

As we know, these cases are hard, even for the very few of us who solely devote their practice to medical

malpractice. Despite this reality, you can build a very successful practice by always keeping in mind a few tips that I utilize almost algorithmically in every one of our cases:

Take better cases: Our office received in excess of three thousand case calls during the last year. We filed eleven cases. It is our philosophy to only take those cases that we feel will be impossible to defend. Trust me, you will have just as much success in rejecting cases as you do taking cases.

Be transparent: As a former defense lawyer, I know what moves the needle with carriers and defense lawyers: transparency. If you have a meritorious case, show them. Don't hide the ball. Have them talk to your experts informally. Send them damage reports early. Explain your theories. Put the ball in their court. It's been my experience that carriers will always pay fair value on large cases if you essentially give them what they need so they can cover their back sides internally. Make it hard for them to say no.

Simplify: It is always easier to get a jury to award your client money if they understand your case. When a case comes in to your office, always find ways to make it easier to communicate to a jury. The same goes in presenting your case to a carrier. They only pay on what they can understand. Don't throw a bunch of darts at a wall, hoping something will stick. Avoid what I call the old "I didn't like the color of the wallpaper" approach to these cases. That approach will not only turn off a jury (and a carrier) but will never make a jury mad at the defendant, which is what you need to obtain large awards in these trials. Remember: The best things in life are simple.

Conclusion

Although challenging, medical-malpractice cases are very interesting and can be quite rewarding in both financial and emotional respects. You are representing normal members of society who have, through no fault of their own, been victims of a breach of trust by their health care providers. Using your skills as a trial lawyer and a little bit of patience, you can achieve justice for them.


Mitchell

Jeffrey S Mitchell is a partner and founder of Mitchell Leeds LLP, *with offices in San Francisco, Fresno and Los Angeles. Jeff has been honored as San Francisco Trial Lawyer of the Year. He is annually named in Best Lawyers in America, Super Lawyers and various other peer-nominated organizations. He is a highly sought after speaker around the country. He has obtained the two largest present value medical malpractice verdicts in California history. He is currently litigating malpractice cases in California, Arizona, Washington and Michigan. Jeff@mitchelllawsf.com.*