The By-laws of the Trial Lawyers Section are currently undergoing a long-needed revision. This effort is being led by our Secretary, Bob Mansbach. After speaking with Bob and reading the current By-laws carefully, I thought it would be well to provide a brief summary of the activities of the Executive Council in our attempt to carry out the purposes for which the Trial Lawyers Section was formed.

The Trial Lawyers Section was founded in 1967. Our purposes are to provide an organization and a forum within which Florida Bar members can discuss issues which arise in trial work, to assist the courts in efforts to improve the administration of justice, to work with other committees regarding standardized judicial procedures, to instill a desire to improve our skills so that we can better serve our clients in courtrooms and in chambers through improved advocacy skills, and to preserve and protect the jury system.

We endeavor to carry out these goals by presenting timely and relevant seminars, addressing proposed rule changes, filing amicus briefs on issues before the Florida Supreme Court, running a trial team competition for the Florida law schools at the Mid-year Meeting, jointly presenting a lecture at the Annual Convention on “The Independence of the American Lawyer,” and providing input on legislative issues. Our website (www.flatls.org) also provides written materials relating to trial issues, such as a standard release form, the Discovery Handbook which is updated annually, and Guidelines for Professional Conduct.

To achieve our objectives, particularly when addressing legislative issues which deal with access to courts, we have traditionally filled the staggered terms of the Executive Council with an equal number of plaintiffs personal injury lawyers and medical malpractice and tort defense lawyers, with a few commercial lawyers. This approach provides a more diverse perspective on issues and gives us enhanced credibility with our lobbying efforts. This is important because a Legislative Committee was established in 1986, and we employ a legislative consultant who helps with proposed legislation or budgetary issues in Tallahassee, which increasingly deal with access to courts.

Our Annual Meeting lecture is jointly sponsored by the Chester Bedell Memorial Foundation, and I am pleased to announce that we will once again be joined by the Criminal Law Section. Our speaker will be noted journalist Martin Dyckman, who wrote for the St. Petersburg Times for many years. He authored a book entitled A Most Disorderly Court, which deals with the scandals which plagued the Florida Supreme Court in the 1970’s and the reforms which followed. I am sure that Mr. Dyckman will provide an interesting perspective on “The Independence of The American Lawyer.” The luncheon will take place on Friday, June 26, 2009 at the Orlando World Marriott, and we would like to have you join us.

Sincerely,
Frank M. Bedell
The Law: Trial Lawyers Tell All

They told physicians what they look for in a malpractice claim.

Now we're telling you.

by Shirley Grace\(^1\)

Why do patient’s sue?
Because they perceive malpractice, says Manhattan plaintiff’s attorney, Jeff Kimmel.

A patient’s perception may be influenced by actual medical facts, but his relationship with you and your staff and how well you think you’ve handled a negative medical outcome weighs very heavily in a decision to sue. “Almost everyone says that if the doc had only apologized or been nice to me, or if he would’ve come to me,” the lawsuit could’ve been averted, says Kimmel, a partner is the law firm of Salenger, Sack, Schwartz & Kimmel. “But he tried to cover it up, or ignored it, or had been arrogant about it. Now it’s war.”

Of course, a bad treatment outcome does not necessarily mean malpractice. People sometimes die during procedures. Complications do occur. Whose fault is it? Sometimes it is the doctor’s: often, it’s not. That’s why Kimmel and other plaintiff’s lawyers are very selective in the cases they’ll take (and still lose more often than they win, on average). Here’s one of their secrets: They’re not looking merely for cases of physician error; they’re also looking for unsympathetic defendants—for physicians who seem unfeeling. Take steps now to protect yourself. Here’s how, straight from the ones on the other side of the courtroom.

What Makes a Good Case?

For trial lawyers, establishing the facts is the first important step. What exactly happened? When did it happen? Who was involved? Where does it leave the patient? This is very specific evidence, but it must be in place to support the claim, says Kimmel, either “in the records or strikingly omitted from the records.” Kenneth Levine, a 20-year veteran plaintiff’s attorney based in Boston, says, “lawyers’ opinions don’t matter as much as it might seem.”

So, the documentation in a patient’s chart—or lack thereof—is of supreme interest to a trial attorney. So is the damage, which must be life altering and severe. A scar that turned out a half-inch longer than expected? Maybe. Loss of brain function? Bingo.

Also, such damage must have actually happened. “We often get calls where people say, ‘I could’ve died!’ Well, you didn’t.” says Kimmel. No case.

Most lawyers are not medical experts, but they know how to secure one to review a case and offer an opinion. This opinion must solidly support the damage, backed up by the expert’s immutable credentials in that exact area—a slippery slope for the trial attorney.

Finally, a good trial attorney will consider the plaintiff’s likeability, as in, is he or she? “Some people just aren’t,” says Levine, and a plaintiff with an off-putting demeanor can quickly poison a case. Levine also looks for certain other deal-breaking signs that divulge a person’s inner gold digger. “If I meet with somebody and in that first meeting the person asks how much the case is worth,” he says, “I generally don’t take that case.”

A Picky Profession

Believe it or not, reputable trial lawyers who specialize in litigating malpractice cases do not relish taking every case to court. Why? Because “we’re likely to lose,” says Kimmel. He estimates that 80 percent of medical malpractice cases that go to trial rule for the defendant—much worse odds than most other personal injury cases.

The U.S. Department of Justice numbers differ only slightly. According to government data from 2003 (the latest available), medical malpractice is the second-toughest type of tort case for plaintiffs to win at trial, with defendant physicians prevailing in 63.3 percent of verdicts.

The Justice Department’s data reflect trials in federal court; most malpractice claims are heard in state court, and states vary widely in terms of verdicts for plaintiffs. Still, the majority of cases don’t even get that far: According to a 2006 Harvard School of Public Health report, 61 percent of medical malpractice suits are settled out of the courtroom. And it takes a sizeable chunk of change for lawyers to prepare for such cases—$50,000 would

continued, next page

<table>
<thead>
<tr>
<th>Type of Tort Case</th>
<th>Number of Jury and Bench Trials</th>
<th>Percent Found for Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal employers’ liability</td>
<td>68</td>
<td>69.1%</td>
</tr>
<tr>
<td>Motor vehicles</td>
<td>311</td>
<td>56.9%</td>
</tr>
<tr>
<td>Marine</td>
<td>128</td>
<td>53.9%</td>
</tr>
<tr>
<td>Other personal injury</td>
<td>419</td>
<td>46.3%</td>
</tr>
<tr>
<td>Airplane</td>
<td>16</td>
<td>43.8%</td>
</tr>
<tr>
<td>Assault/libel/slander</td>
<td>34</td>
<td>38.2%</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>147</td>
<td>36.7%</td>
</tr>
<tr>
<td>Product liability</td>
<td>194</td>
<td>33.5%</td>
</tr>
</tbody>
</table>

Source: Federal Judicial Center, Integrated Data Base (Civil) Fiscal years 2002-03.

---

\(^1\)This is an example of several articles written about medical malpractice for physicians.
be a “normal” outlay, says Kimmel. Meanwhile, with many states passing laws capping damages for pain and suffering (often at $250,000), and the amount of any judgment that attorneys can take home, the potential payout for plaintiffs’ lawyers is greatly reduced, without any reduction in their risk.

“It’s nowhere near what the public thinks,” says Kimmel. “In New York there’s no huge payout (for attorneys). Statutorily, it’s less than a third [of the award]. It goes down to 10 percent... on a sliding scale once you collect over $1 million.

According to a 2001 study of the 75 largest U.S. counties, conducted by the Bureau of Justice Statistics, medical malpractice plaintiffs win only 27 percent of trial cases—compared to 52 percent for all other plaintiff-won tort trials. Even winning a case is no guarantee the plaintiff will see any real cash forthcoming.

Another Justice Department study, using data collected on 43,000 closed cases between 2000 and 2004 from Florida, Illinois, Maine, Massachusetts, Missouri, Nevada, and Texas (all of which are required by state law to submit information on closed medical malpractice claims), found that most plaintiff-won claims closed with no compensation to a claimant at all.

Shields Up

The threat exists, of course, but you really do have a reasonable amount of control over whether you’ll ever be sued. Prevention is key. The steps to avoiding lawsuits are tried and true and bear repeating.

• Be nice. All the time. “Patients are very forgiving if they like you. Communicate. Talk to them. Treat them like they’re human beings.” says defense attorney Scott Nichols, a partner in the Houston office of Strasburger & Price. “You’re less likely to get sued, and you’re more likely to have a good result.”

Develop relationships with your patients by truly listening to them and validating their concerns. “Try to consider the perspective of the patient. You have knowledge, they have none,” says Kimmel. In these WebMD-centric times, you do have to contend with patients who have read about [insert-frightening-medical-fact-here] on the internet thrusting the printout at you to prove it. Is it a valid concern? Maybe, maybe not. Address each instance separately. Help your patients to understand what good information is and what’s claptrap. Embarrassing them by dismissing out hand any procured information will do nothing to keep communication flowing between the two of you.

• Connect with referring specialists. Levine suggests that you make a point to maintain a dialogue with anyone who treats your patients. “Read the report and talk to the person who did the test,” he says.

• Become a history buff. Make sure you read your patients’ medical histories completely. “Generally, it’s a little nuance that you missed, and then there’s another little sign,” says Levine. “Take the time, particularly if it’s a new patient transferred to you.”

• Document well. “Good, exact notes are the best defense against medical malpractice cases,” says Levine. “You offered a caesarean section, but the patient refused. Write it down.” Include in your notes what you said, what the patient said, any instructions you gave, questions you asked, anything and everything that seems relevant. But for goodness sake, says Kimmel, “Never alter any record without indicating it is an addendum.” Maybe you really did mean to add that notation about how your patient refused a follow-up mammogram, but it’s too late now. Changing a document can be the kiss of death in litigation matters.

• Stay within your area of expertise. More and more physicians are adding ancillary services to their practices to shore up increasingly flabby bottom lines (due to decreasing payer reimbursements). Such widening of your scope of practice can be good, but be careful that you “don’t follow the dollar sign,” warns Stuart Grossman, a partner with Grossman Roth, P.A. in Coral Gables, Florida. “We have a lot of people doing a lot of different types of surgeries—a lot of line-crossing.”

A sorry mess no more.

Because you’re human, it’s likely that eventually, you will make a medical mistake. Hopefully, it will be minor and easily rectified. But if not, the very best action you can take to avoid a lawsuit is to disclose your error, continued on page 7

<table>
<thead>
<tr>
<th>WHEN PLAINTIFFS WIN, HOW MUCH ARE THEY AWARDED?</th>
<th>Number of Trials With Awards to Plaintiff</th>
<th>Median Amount Awarded for Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal employer’s liability</td>
<td>43</td>
<td>$124,000</td>
</tr>
<tr>
<td>Motor Vehicles</td>
<td>152</td>
<td>$164,000</td>
</tr>
<tr>
<td>Marine</td>
<td>55</td>
<td>$203,000</td>
</tr>
<tr>
<td>Other personal injury</td>
<td>156</td>
<td>$90,000</td>
</tr>
<tr>
<td>Airplane</td>
<td>7</td>
<td>Insufficient data</td>
</tr>
<tr>
<td>Assault/libel/slander</td>
<td>10</td>
<td>$115,000</td>
</tr>
<tr>
<td>Medical malpractice</td>
<td>49</td>
<td>$600,000</td>
</tr>
<tr>
<td>Product liability</td>
<td>55</td>
<td>$350,000</td>
</tr>
</tbody>
</table>

Source: Federal Judicial Center, Integrated Data Base (Civil), Fiscal Years 2002-03
From Non-Pecuniary To Pecuniary: Measuring Hedonic Damages

by Steven Collard

Generally speaking, pecuniary damages are those kinds of damages which can be measured, typically the replacement costs for services, past wage losses, medical expenses, future earning capacity and medical care costs. Hedonic damages, or the loss of the capacity of enjoyment of life, traditionally would be labeled a type of non-pecuniary damage. However, this traditional distinction between pecuniary and non-pecuniary damages may be changing with respect to how economists compute damages. There are new measurement devices that can be used to value tort loss and a growing consensus on the value of a statistical life.

The age old question presented to economists continues to be how do you quantify a non-pecuniary loss? Is there a logical framework for translating non-pecuniary loss into quantifiable monetary damages? What is the benchmark value of a healthy statistical life? Juries need help calculating the value to an injured party of the quality of life lost to an injury or illness.

For decades Health scientists have attempted to quantify the burden of disability or loss on a person's ability to function in his environment. The measurement stick is time. Medical Outcome Studies research report the results in terms of QALY’s, or Quality-Adjusted Life Years, or in HALY’s, Health-Adjusted Life Years. Health scientists use the term DALY’s Disability-Adjusted Life Years. Disability weights, or quantifying the loss due to the disability, are found in many different studies. Health scientists call upon health professionals covering all aspects of medical treatment and research, and then look at what a person would typically do in his day-to-day activities. They employ Time Trade-Offs and Person Trade-Offs methods to categorize the relative impact of various health conditions. This examination of a life then permits the health scientist to note how the impairments from injuries or illness affect these day to day activities in terms of time lost – time lost in not being able to perform a given activity or function and time lost in taking more time to perform an activity or function.

The National Highway Traffic and Safety Administration publish studies that detail the economic impact of automobile crashes. Their health scientists have developed a Functional Capacity Index (FCI) based on medical information acquired through the Abbreviated Injury Scale. Health Scientists with the World Health Organization have determined that a disability weight must be standardized and must consider the individual’s age at the time of the onset of the disability, because life is valued greater during the productive years. It is necessary for a health scientist to know the expected length of time that the disability will exist. This determination of time necessarily requires an examination of the injured party's prior health. Most health scientists apply a discount rate in computing future time loss because most people value future time at the end of a life expectancy less than the loss of time at present.

Numerous methodologies have been used to place a value on human life. One methodology uses an analysis of punitive damages in jury verdicts in wrongful death cases caused by drunk drivers. Other methodologies include a Willingness-to-Pay or Contingent Valuation Survey.

Research by Kniesner, Viscusi, Woock, and Ziliak in a discussion paper titled “Pinning Down the Value of Statistical Life” (October 2007) addresses the economic properties of estimates of the value of statistical life (VSL). Previous estimates of VSL ranged from about $0.5 million to $21 million. These health scientists reworked the econometric issues and concluded the before-tax estimated value of a statistical life ranges from about $5.5 to $7.5 million, and considering a nominal 15% tax, ranges from $4.68 to $6.38 million after tax. This research has been widely accepted as the most current work in determining the value of a statistical life.

Tort law has at least two purposes – to compensate injured victims and to deter harm causing activities. The receipt of monetary compensation by injured persons from at fault defendants acts as a deterrent for others to avoid similar at fault conduct. However, if the at fault defendant is not fully charged for the monetary damages sustained by an injured party then the deterrent effect of tort law is compromised. One could surmise that if the monetary damages awarded to persons injured by at fault defendants in automobile accidents had consistently equaled the full amount of damage sustained by that injured party then perhaps automobile accidents would still not be a “number one” cause of death and injury for so many people.

For example, take the example of a 32 year old lawyer who survives a car crash...
Prominent Trial Attorney Ilisa Hoffman Joins Abadin Cook

Ilisa W. Hoffman, formerly with Stephens Lynn Klein LaCava Hoffman & Puya, P.A. has joined Abadin Cook as a partner, announced Kimberly Cook, one of the firm’s founding partners.

As a trial attorney for close to 25 years, Hoffman is well-known throughout South Florida for her successful defense of medical and dental negligence cases, as well as nursing home, hospital malpractice and general liability cases. She joins veteran medical malpractice defense litigator Kim Cook in strengthening Abadin Cook’s trial litigation department.

“We are so pleased that someone of Ilisa’s caliber and experience has joined the firm,” Cook said. “She has the experience required to successfully defend these complex cases.” Cook added, “Ilisa has top-notch trial skills as well as the widespread respect of her clients, peers, and judges, making her an ideal choice for Abadin Cook.”

A native of Miami, Hoffman graduated from Ohio State University and the Cleveland-Marshall College of Law. She was elected to the prestigious Board of Trial Advocates (ABOTA) and has held memberships in the Florida Bar Association, Florida Defense Bar Association, Dade County Defense Lawyers Association, Dade County Bar Association and Florida Association of Women Lawyers. Annually recognized by her peers as a Florida Super Lawyer, Hoffman was chosen in 2008 as one of the “Top 50 Women Lawyers” in the State of Florida.

Hoffman has lectured in areas of medical negligence, loss prevention and risk management. She is a past member of the 11th Judicial Circuit Grievance Committee of the Florida Bar. She is an AV-rated litigation lawyer by Martindale-Hubbell, the highest rating available.

Hoffman and Cook are among the few female trial attorneys in Miami who have pursued full-time careers as litigators while raising their children. “Being a trial attorney and a mom are two full-time jobs that are extremely difficult to balance,” Hoffman said, “but I’ve been able to manage partly due to being extremely organized and partly due to the fact that I love the practice of law and being a trial lawyer. It was hard, but I never missed a school event or a basketball game. When I am in trial, I give 100 percent – but I still found a way not to miss what was important in my children’s lives. Now that my children are grown and in college, I can devote even more than 100% to my clients’ defense.

“There are very few female lawyers in Miami that pursue trial work while raising families. I feel blessed to be able to work with Kim, another one of the few woman trial lawyers who is also a full time mom,” she added.

Now that they’ve teamed up under “one roof,” Cook and Hoffman look forward to trying cases together. “Our clients now will have two highly competent, experienced trial lawyers working together on their behalf,” Hoffman said.

Carlos A. Fabano, formerly an associate at Stephens, Lynn, LaCava, Hoffman and Puya, P.A. has also joined Abadin Cook as an associate in the trial litigation department.

A member of the Dade County Bar Association and Cuban-American Bar Association, Fabano previously served as a judicial law clerk to the Honorable Fredericka G. Smith, Miami-Dade County Circuit Court. Although he had once considered a career in medicine, Fabano still maintains a strong interest in medicine. “Most physicians provide optimal care to their patients,” he said. “Lawsuits really take an emotional toll on the physician. It feels great to successfully defend a physician and contribute to the practice of medicine in this way.”
and household chores estimated at 18 hours per week, only 34% of the time in a year has been considered, and 66% has not been. The after-tax value of a statistical life year is the after-tax range of value of life, $4.68 to $6.38 million divided by the average life expectancy of a human at birth (77.5 years), or $60,387 to $82,323 per statistical year. If only consideration is given to her life expectancy of 49.3 years (based on 2006 Vital Statistics/Life Tables for a 32 year old female) 19.72 years would be the time lost to disability. Simply multiply the disability weight, .40, times the Life Expectancy for this figure.

However, since we prefer saving lives of younger adults who offer productivity compared to children and elderly, one must consider age-weighting (4%) and time discounting (3%), which reduces the time lived with disability to 11.19 years.14 Years Lived with Disability, YLD’s, is equal to the disability weight times the duration of disability, but considers the fact that humans prefer time today over time in the future and considers that time during our productive years is more valuable than earlier and later years.

Also, since pecuniary damages of earning capacity and household services are considered, are they double-counted if one doesn’t subtract these losses from the loss of pleasure of life costs? If we consider that the time to enjoy life is potentially equal for all humans, rather than subtracting pecuniary dollars from non-pecuniary dollars, it is better to take the component of time in work and household production from the time of life 34%, and calculate an after-production value of life in a range of $39,855 to $54,333.

The resulting loss of the enjoyment of life for this lawyer is between $445,983 and $607,983, in terms of present value. Note the How Much and How Long components are calculated as follows:

How Much:
- Value of a Statistical Life: $5.5 to $7.5 million.
- Minus 15% for the After-tax Value of a Statistical Life: $4.68 to $6.38 million;
- Divide by Average Life Expectancy of 77.5 years for the After-Tax Value of a Statistical Life Year: $60,387 to $82,323;
- Removing 34% for Work and Household production to avoid double-counting gives an After-tax value of a statistical life year in a range of $39,855 to $54,333;

How Long:
- Life Expectancy for humans at birth is 77.5 years;
- Life Expectancy for female age 32 is 49.3 years;
- Multiplying the Disability Weight of 0.40 times the Life Expectancy at age 32 is 19.72 years; considering the combined Age-weighting and discount rates of 7% results in a term of Years Lived with Disability of 11.19 years, and multiplying this times the average range of value of a statistical life results in a loss in a range of $445,983 and $607,988.

Car crashes will continue to be one of the most prevalent causes of death and disability to Americans as long as it continues to be profitable to the manufacturers and insurance companies. There is missing the monetary disincentive that forces safer means of transportation. When the true cost to the victim misses two-thirds of the resultant time lived with disabilities, tort law is ineffective in its deterrent property, and under compensates. Would the manufacturers and insurers allow cell phone talking while driving, knowing it increases the likelihood of crashes, if they were fully responsible for the costs to the individual and society?

(Endnotes)
1. Steven M. Collard, M.Ed. is a Consultant with Earning Capacity Assessments, Inc., and an Adjunct Professor of Law at the Shepherd Broad Law School at Nova Southeastern University since 1998. He can be reached at (813) 417-9168.
5. http://www.pophealthmetrics.com/content/1/1/9
6. A Time Trade-Off asks “how many years at the end of your life would you be willing to trade today to NOT get health condition X?” (diabetes, or HIV, for example), and a Person Trade-Off would consider the amount of money a policy maker would appropriate in extending the length of life or quality of life for a group of X persons with condition A compared to a group of Y persons with condition B. These calculations are valid and reliable.
9. Stan V. Smith, Ph.D., “Jury Verdicts in Drunken Driving Cases”, Journal of Forensic Economics 11(1), 1998, p67-68. Dr. Smith’s Ph.D. Dissertation used Jury Verdict Research, Inc. information on 666 cases. Dr. Smith uses a single, multidimensional measurement of impairment in order to evaluate the degree to which the award is tied to the actual injury suffered by the plaintiff. He calculates and compares punitive damages in total disability as equating to the implied value of life, $2.2 to $4.8 Million, and concludes that juries are doing a competent job of determining appropriate damages awards.
10. Wage-Risk Studies: This research determines wage differentials associated with jobs of increasing risk, and uses that differential to calculate the value of a statistical life. Based upon this research, the range of value for a human life is $1.75 million up to $5.43 million, with a mean average value of $3.59 million, stated in terms of 2007 dollar values. Contingent Valuation Surveys: This research identifies how much people are willing to pay for a small change in risk, and multiplies the amount consumers are willing to pay for various safety components of goods (e.g., organic vs conventional food; additional safety features in an automobile). Based upon this research, the range of value for a human life is $2.54 million up to $6.2 million, with a mean average value of $4.4 million, stated in terms of 2007 dollar values.
12. In these older studies, the fatality-risk variable is either by industry or occupation, and relied upon cross-section wage regressions for which a fatality risk measure involving substantial measurement error is matched to the worker.
13. Knieser, et al used state of the art econometric principles along with the Panel Data from the Panel Study of Income Dynamics and the most combined the fatality-risk measurement into 720 industry-occupation cells, which resulted in greatly reducing the measurement error, and used data from the U.S. Bureau of Labor Statistics data from the Census of Fatal Occupational Injuries (CFDI) which is the most comprehensive inventory to date of all worker fatalities.
Topics in Evidence... Another Successful Seminar!

By: Caroline Iovino, Code and Rules of Evidence Committee

I am excited to report that our Evidence Seminar held on March 5, 2009 was a huge success! Thank you so much to all of you who assisted in our marketing efforts. Our attendance numbers almost doubled in the last week. I would like to give a special thanks to Rob Eschenfelder, Jackie Hogan Scola, Stephen Williams and Ervin Gonzalez for helping us secure the best speakers on earth (certainly and finished at 4:30 p.m. Lunch was the seminar was held at the Tampa Airport Marriott. It was an all day event that began at 9:45 a.m. and finished at 4:30 p.m. Lunch was served at the seminar, which was a great time saver and allowed us to have five fabulous speakers.

The morning kicked off with an energetic and informative presentation from Assistant Attorney for the City of St. Petersburg, Jeanine Williams. Ms. Williams tackled a difficult subject. She presented on Attorney/Client Privilege. She really explained how metadata buried in e-mails and other electronic communications can come back to haunt the practitioner and gave great advice for how to avoid and/or solve the problem of “stuffing the rabbit back into the hat.”

Ms. Williams was followed by Hon. Charles E. Williams, Twelfth Circuit. Judge Williams gave our audience the perspective on how evidence is received not only from the bench, but the jury. Seminar attendees commented that they benefited greatly from hearing the judicial perspective, and enjoyed learning what Judge Williams had gleaned from the many jurors with whom he had the opportunity to interact over the years.

After lunch, Miami based criminal defense attorney, Milton Hirsch, delivered an animated and skillful presentation on confronting scientific evidence. Mr. Hirsch’s performance was an encore to last year, when he spoke on how to present scientific evidence. The audience loved him so much last year, that they all commented they would love to see him again. Well, he did not disappoint, as all comment cards indicated Mr. Hirsch’s presentation was entertaining and educational.

Mr. Hirsch’s presentation was followed by Ervin Gonzalez (with the Coral Gables firm of Colson Hicks Edison and member of the Code and Rules of Evidence Committee), stepped in to present on expert witnesses. Mr. Gonzalez is not only a polished presenter, but a great teacher! He gave seasoned practitioners very useful tips on how to effectively deal with experts, who know a lot more about their field than the attorneys hiring them or challenging them. Mr. Gonzalez’s theme was clear, “simplify your message so that it is easily digestible for the jury.” Mr. Gonzalez utilized video footage from some of his trials. The attendees had an overwhelmingly positive response to his use of the video clips; which gave them both ideas and good examples for engaging and challenging experts.

Our next speaker was introduced by every other speaker as the man who guided their legal careers in terms of evidence, Professor Charles Ehrhardt, Florida State University. We were so thrilled and proud to have Prof. Ehrhardt on our panel. He presented on hearsay exceptions, and taught even the judges in our audience a thing or two that I am sure they are putting to good use this morning. Prof. Ehrhardt was, as always, simply wonderful. He received a standing ovation after his lecture.

We closed the day with a presentation from Christian Searcy of the West Palm Beach firm Searcy Denney Scarola Bernhardt & Shipley. Mr. Searcy presented on cross examination. Mr. Searcy also utilized video to demonstrate how one can ask the very same question on cross examination, but based on delivery, be much more effective. Mr. Searcy gave seminar participants real world examples from his cases on how he has used cross examination to win his cases in the past.

As you can see, we had an all star cast. One seminar attendee referred to the program as “a first class seminar;” another said said that she, “would pay again and again to see these speakers.” I can honestly say that it was the most informative, engaging and experienced group of presenters that I have ever had the pleasure of watching.

Thank you again to everyone who contributed to making this seminar a success! We already have a date slated for next year, March 4, 2010. I don’t know how we can possibly top this year’s cast of presenters, but we have a year to make it happen.

This seminar earns 7.0 general credits and 1.0 ethics, as well as 5.5 certification credits in both criminal trial and civil trial. If you missed the live or webcast seminar this year, it is available by Audio and DVD. Please review the brochure that is enclosed in this newsletter and make sure to order your copy. It is well worth it!
Since August of 2000, The Florida Bar has been offering quality CLE programs as online, on-demand seminars through their partnership with LegalSpan. The popularity of this type of education delivery method has been growing exponentially ever since.

With increasingly hectic schedules and the rising cost of travel, attorneys are turning to the internet to satisfy their educational needs. Online CLE programs offer the flexibility of viewing programs at your own pace, anytime, anywhere.

Whether a first time or net savvy user, Florida attorneys are finding that online CLE programs are time saving and easy to use.

“I am very pleased to be able to have these seminars made available to members of The Florida Bar in the format that you have provided. With the format you have provided, I feel that I am at the seminar and I have the materials which I can download and save for future reference. Thanks for a great product well presented and technically friendly!” — Andrew, Live Oak

“I found this online seminar to be convenient, understandable, and user-friendly. I will use this method more in the future. Thank you for this informational and convenient seminar” — Gerald, West Palm Beach

“Excellent resource. A very convenient way to engage in continuing education that has high quality speakers and content” — Bruce, Miami Beach

“This is the greatest thing ever invented. I can now complete my CLE requirements at home. Everything was so easy. Thank you.” — Sheila, Largo

“Terrific site and material. It makes it much easier to get CLE credit, and makes the materials much more useful since they can be viewed multiple times.” — Thomas, Brandon

With the explosion of MP3 players and iPods in the market, LegalSpan developed the technology to enable The Florida Bar to introduce Downloadable Audio versions of their CLE programs. Since it’s inception in March of 2006, the Downloadable versions of The Florida Bar’s CLE programs have become as popular a method of obtaining education as Online CLE. “We want to foster greater collaboration among members and a more vibrant educational dialogue. Attorneys learn best at their own pace, in their own way, in a comfortable environment. Our online options give members educational content when and where they want it” said Programs Division Director Terry Hill.

The Florida Bar’s catalog of online and downloadable programs is robust, offering over 200 programs, covering all practice areas. Attorneys are able to enjoy the time and money savings without sacrificing content, by participating in these types of programs. The complete catalog of Florida Bar CLE courses can be viewed at www.floridabar.org/cle by accessing the LegalSpan link under Online Courses.
The Florida Bar Continuing Legal Education Committee and the Criminal Law Section, Trial Lawyers Section and the Code & Rules of Evidence Committee present

Topics in Evidence

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

“One of the best courses I’ve seen this year...”

Course No. 0713R

CRIMINAL LAW SECTION
Larry D. Murrell, Jr., West Palm Beach — Chair
Carolyn M. Snurkowski, Tallahassee — Chair-elect
H. Scott Fingerhut, Miami — CLE Chair

TRIAL LAWYERS SECTION
Frank M. Bedell, Orlando — Chair
Glenn M. Burton, Tampa — Chair-elect
Timon V. Sullivan, Tampa — CLE Chair

CODE & RULES OF EVIDENCE COMMITTEE
Dominic C. MacKenzie, Jacksonville — Chair
Robert M. Eschenfelder, St. Petersburg — Vice Chair
Caroline M. Iovino, Miami — Vice Chair

CLE COMMITTEE
Patrick L. Imhof, Tallahassee, Chair
Terry L. Hill, Director, Programs Division

FACULTY & STEERING COMMITTEE
Caroline M. Iovino, Miami — Program Chair
Professor Charles W. Ehrhardt, Tallahassee
Milton Hirsch, Miami
Christian D. Searcy, West Palm Beach
Honorable Charles E. Williams, Sarasota
Jeannine S. Williams, St. Petersburg

9:00 a.m. - 9:45 a.m.
Late Registration

9:45 a.m. - 10:45 a.m.
Exploring the Attorney/Client Privilege
Jeannine S. Williams, St. Petersburg

10:45 a.m. - 11:45 a.m.
Presentation of Evidence: A Judicial Perspective
Hon. Charles E. Williams, Sarasota

11:45 a.m. – 12:15 p.m.
Lunch (included in registration fee)

12:15 p.m. - 1:15 p.m.
Confronting Scientific Evidence at Trial
Milton Hirsch, Miami

1:15 p.m. - 2:15 p.m.
Expert Witnesses
Ervin A. Gonzalez, Coral Gables

2:15 p.m. - 2:30 p.m.
Break

2:30 p.m. - 3:30 p.m.
Recent Hearsay Developments
Prof. Charles W. Ehrhardt, Tallahassee

3:30 p.m. - 4:30 p.m.
Effective Cross Examination
Christian D. Searcy, West Palm Beach

CLE CREDITS

CLER PROGRAM
(Max. Credit: 7.0 hours)
General: 7.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 5.5 hours)
Criminal Trial: 5.5 hours
Civil Trial: 5.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

HOW TO REGISTER

ON-LINE: www.floridabar.org/CLE
MAIL: Completed form w/check
FAX: 850/561-5816 Form w/credit card info.
REFUND POLICY: Requests for refund or credit toward the purchase of the CD, DVD, or course books for this program must be in writing and postmarked. A $25 service fee applies to refund requests.

“Topics in Evidence” Seminar

TO ORDER AUDIO CD, DVD, OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name__________________________________________ Florida Bar # ______________________________

Address ____________________________________________________________________________________

City/State/Zip ____________________________ Phone # ______________________________

WPG: Course No. 0713R

METHOD OF PAYMENT (CHECK ONE):

☐ Check enclosed made payable to The Florida Bar

☐ Credit Card (Fax to 850/561-5816.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: _____/____ (MO./YR.)

Signature: __________________________________________________________________________________

Name on Card: ____________________________ Billing Zip Code: ____________________________

Card No. _______________________________ CVV# ________________ *

(* To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.)

COURSE BOOK — AUDIO CD — DVD

Delivery time is 2 to 4 weeks. TO ORDER AUDIO CD, DVD, OR COURSE BOOKS, fill out the order form above, including a street address for delivery. Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

☐ COURSE BOOK ONLY Cost $50 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)

TOTAL $ _______

☐ AUDIO CD (includes course book)
$125 plus tax (section member)
$150 plus tax (non-section member)

TOTAL $ _______

☐ DVD (includes course book)
$250 plus tax (section member)
$275 plus tax (non-section member)

TOTAL $ _______

ON-LINE PROGRAMS! To view and/or listen to this and other courses on-line, or to download to your computer as a “CLEtoGo,” go to www.legalspan.com/TFB/catalog.asp

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog. Click on “Jurisdictions,” then “Florida” for titles.
THE LAW
from page 3

apologize, and offer restitution. Only in this way—and by having the above list of preventive measures in place already—can you mitigate the possibility of your patient suing you.

Disclosure is definitely something you should be doing. It’s clearly outlined in the AMA’s Code of Medical Ethics. In a few states—Florida, New Jersey, Nevada, Pennsylvania, and Vermont—it’s the law (with more states climbing onto that wagon soon).

But as for saying you’re sorry, that’s akin to slipping a noose around your own neck. Right? Wrong. Today, at least 34 states have some form of an “Apology” law, which essentially makes a physician’s apology to a patient for negative treatment outcome inadmissible as evidence in a court of law.

This theoretically offers you some legal protection, although “it’s always been good to say sorry,” says Doug Wojcieszak, founder of the Sorry Works! Coalition, which trains physicians and hospitals on how to disclose medical errors, apologize appropriately, and, when necessary, offer up front compensation.

But why, exactly, would you be saying you’re sorry? Are you apologizing for committing a medical error, and therefore malpractice? Or are you offering comfort to a fellow human being who is suffering? The difference is critical. The first is an admission of guilt while the second is an expression of remorse.

Apologizing might still result in you being sued, although only about one-eighth of patients injured annually actually do sue. Again, a positive relationship with your patient—or lack thereof—will play into your patient’s decisions.

Merely expressing sympathy, without accepting blame, reveals your ability to sense another’s suffering. Feeling and communicating true remorse is critical, regardless of guilt, because it shows your patient that you feel terrible that she is in pain. Choosing this path, though, may ring hollow, if, in fact, you are to blame. Regardless, remorse is essential to give closure to both you and your patient.

As to the effectiveness of “Apology” laws, Wojcieszak knows defense lawyers who say they’d never invoke an “Apology Law” to protect their clients. Makes sense. After all, the impression given by a contrite physician doesn’t exactly help a plaintiff’s case in terms of the size of the award.

“How do you make a guy look bad who just apologized and is trying to do the right thing?” asks Wojcieszak. Jurors will likely react with sympathy for a remorseful, humble human being, as opposed to condemnation for a silent, self-righteous schmuck.”

Not sure how to go about developing this “sorry” skill? Get some training. You’ll find one such venue is on the Sorry Works! Coalition website. If you’re concerned your apology to a patient may go awry and get ugly, consider securing the services of a mediator or even an arbitrator. The National Arbitration Forum can help you determine a course of action.

Many major hospitals are also starting to institute “I’m Sorry” programs, including Harvard Medical School; Johns Hopkins Medicine; Allina Hospitals & Clinics; Veterans Affairs Medical Center in Lexington, KY; and University of Michigan Health System in Ann Arbor. Get on board if your own hospital has such a program.

Don’t just say it.

The last step is to make restitution. Again, a mediator or arbitrator can help you with this, if need be. However, if you choose to do it, “make every effort to make things right,” says Grossman. “Offer to operate for free,” if that makes sense. Again, if you’ve been doing things right all along (and again, see above section) you’ll more likely find a fellow problem-solver in your patient rather than an adversary.

You’ll also find that there’s nothing like restitution to allow you to forgive yourself for making the mistake—also critically important.

Preventing trouble is preferable to resolving it. But there’s no way to remove risk completely, says Segal. “The best way to never be in a car accident is never to drive,” he says. True, a pedestrian can still get plowed by a bus. But hiding out in one’s house to avoid any injury makes for a less-than-fulfilling existence.

So practice medicine in the best way you know how, taking reasonable precautions to protect yourself against a lawsuit. Your patients will sense any paranoia you might be trying to hide, which will only serve to undermine the trusting relationship you have with them. Remember, Segal says, “Most people don’t want to sue; they want to get healed.” And you’re just the doctor to do it.


(Endnotes)
1. Shirley Grace is a senior writer for Physician’s Practice. She can be reached at sgrace@physicianspractice.com

Are drugs or alcohol causing a problem in your life? Are you overcome by depression?

Completely confidential help is available. (Ch. 397.482-486, F.S. 2002)

Call Florida Lawyers Assistance, Inc.
1-800-282-8981
The Florida Bar Continuing Legal Education Committee and the Trial Lawyers Section present

Trial Advocacy 2009

Course Classification: Advanced Level

ALL THE CLE and ETHICS HOURS YOU NEED FOR THREE FULL YEARS CERTIFICATION HOURS

May 12 – 16, 2009
University of Florida
Fredric G. Levin College of Law
Gainesville, Florida

THIS PROGRAM WILL SUBSTITUTE AS ONE OF THE TRIALS REQUIRED FOR CERTIFICATION AND RECERTIFICATION FOR CIVIL TRIAL AND WORKERS’ COMPENSATION

The Advanced Trial Advocacy Seminar is a hands-on, learning-by-doing trial skills training. It is intended for attorneys who have practiced a minimum of five years and are involved in a full time litigation practice. Jury experience is preferable, but not required.
Forty-eight (48) attorneys will be selected. Selection is based on a “first-come, first served” basis. When your application is processed, you will receive program materials in advance of the program. The case file for this program is used as a source of facts and law for the training. Following lectures, discussion and demonstration, you will learn primarily through participatory exercises. Following your performances, you will receive suggestions on how you can be more effective by experienced Florida trial lawyers. Your presentation will be videotaped and you will receive a one-on-one video performance review. Your advance preparation is critical to the success of the program and your own learning. You are expected to attend all sessions. If you cannot, please do not apply.

### SCHEDULE OF EVENTS

**Tuesday, May 12, 2009**
- 6:00 P.M. – 9:00 P.M.
  - Registration
  - Introductory Remarks
  - Demonstration of Opening Statements and Direct and Cross of an Expert

**Wednesday, May 13, 2009**
- 8:30 A.M. – 5:30 P.M.
  - Opening Statements Workshops and Case Analysis
  - Jury Selection Discussion
  - Direct and Cross of Lay Witness Workshops
- 6:30 P.M. – 9:00 P.M.
  - Welcome Reception and Tutorial of Material Science Issues at Hilton

**Thursday, May 14, 2009**
- 8:30 A.M. – 5:30 P.M.
  - Direct and Cross of Education and Material Science Expert Workshops

**Friday, May 15, 2009**
- 8:30 A.M. – 5:30 P.M.
  - Direct and Cross of Medical Experts Workshops
  - Faculty Demonstration of Closing Arguments
- 6:45 P.M. – 9:00 P.M.
  - Reception and Dinner at Hilton

**Saturday, May 16, 2009**
- 8:30 A.M. – 2:00 P.M.
  - Closing Arguments Workshop Inside the Jury Room

### CLE CREDITS

**CLER PROGRAM**
- (Max. Credit: 39.0 hours)
  - General: 39.0 hours
  - Ethics: 5.0 hours

**CERTIFICATION PROGRAM**
- (Max. Credit: 39.0 hours)
  - Business Litigation: 19.5 hours
  - Civil Trial: 39.0 hours
  - Workers Compensation: 39.0

Seminar credit may be applied to satisfy CLER/Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line,) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).
2008 Trial Advocacy Faculty Team


**Participants Evaluation Comments**

* Wonderful Program – would not change a thing!

* All of the faculty, I felt put their heart and soul into this program. They all took the time to listen, really listen and evaluate our performance. I love the video reviews; very helpful. I completely think this program was well planned/organized.

* One of the very best programs I’ve attended to learn how to be a better trial lawyer. I’ve learned things here that I don’t know when or how I would have learned without the benefit of the presentation/critique method. That the critique came from judges and experienced trial attorneys with an obvious passion for the program, made the critique wonderfully insightful and practical.

* Everything about the course was impressive. It was well organized. What was striking was the patience and enthusiasm of all of the instructors. The experience was very positive.

* By far the best program I have ever been through. One on one critique from judges and board certified attorneys is invaluable. Faculty to student ratio was outstanding. Critiques were specific and appropriate. Demonstrations and presentations were absolutely top notch. This program should be mandatory for anyone trying cases in Florida. Excellent value also.

* Excellent course: hard work, entertaining, educational and interesting. Thank you so much for all the hospitality that has been extended to me and the others of the UK contingent. We have been warmly welcomed by all and I have loved every minute of it.
**HOTEL RESERVATIONS:** A block of rooms as been reserved at the Hilton University of Florida, at the rate of $162.00 single/double occupancy. To make reservations, call the Hilton directly at (352) 371-3600. Reservations must be made by April 13, 2009 to assure the group rate and availability. After that date, the group rate will be granted on a “space available” basis.

**REFUND POLICY:** Request must be in writing. Registration fees are non-transferrable, unless to a colleague registering at the same price paid. A $50 service fee applies to refund requests. No refund will be given after April 13, 2009.

---

**REGISTRATION**

REGISTER BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 East Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have any questions, call 850/561-5831.

ONE LOCATION: (202) University of Florida, Gainesville (May 12-16, 2009)

ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _______________________________ Florida Bar # __________________

Address ____________________________________________________________________

City/State/Zip ____________________________ Phone # ______________________

REGISTRATION FEE (CHECK ONE)

- Member of the Trial Lawyers Section: $975.00
- Non-section member: $1,000

METHOD OF PAYMENT (CHECK ONE)

- Check enclosed made payable to The Florida Bar
- Credit Card (advance registration only. Fax to 850/561-5816)

❑ MASTERCARD  ❑ VISA  ❑ DISCOVER  ❑ AMEX

Signature: _______________________________________ Exp. Date _____/______ (MO/YR)

Name on Card: ____________________________ Billing ZipCode ____________________

Card No. _______________________________ CVV#_________________ *

*To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.

[ ] Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

---

THE FLORIDA BAR
651 East Jefferson Street
Tallahassee, FL 32399-2300