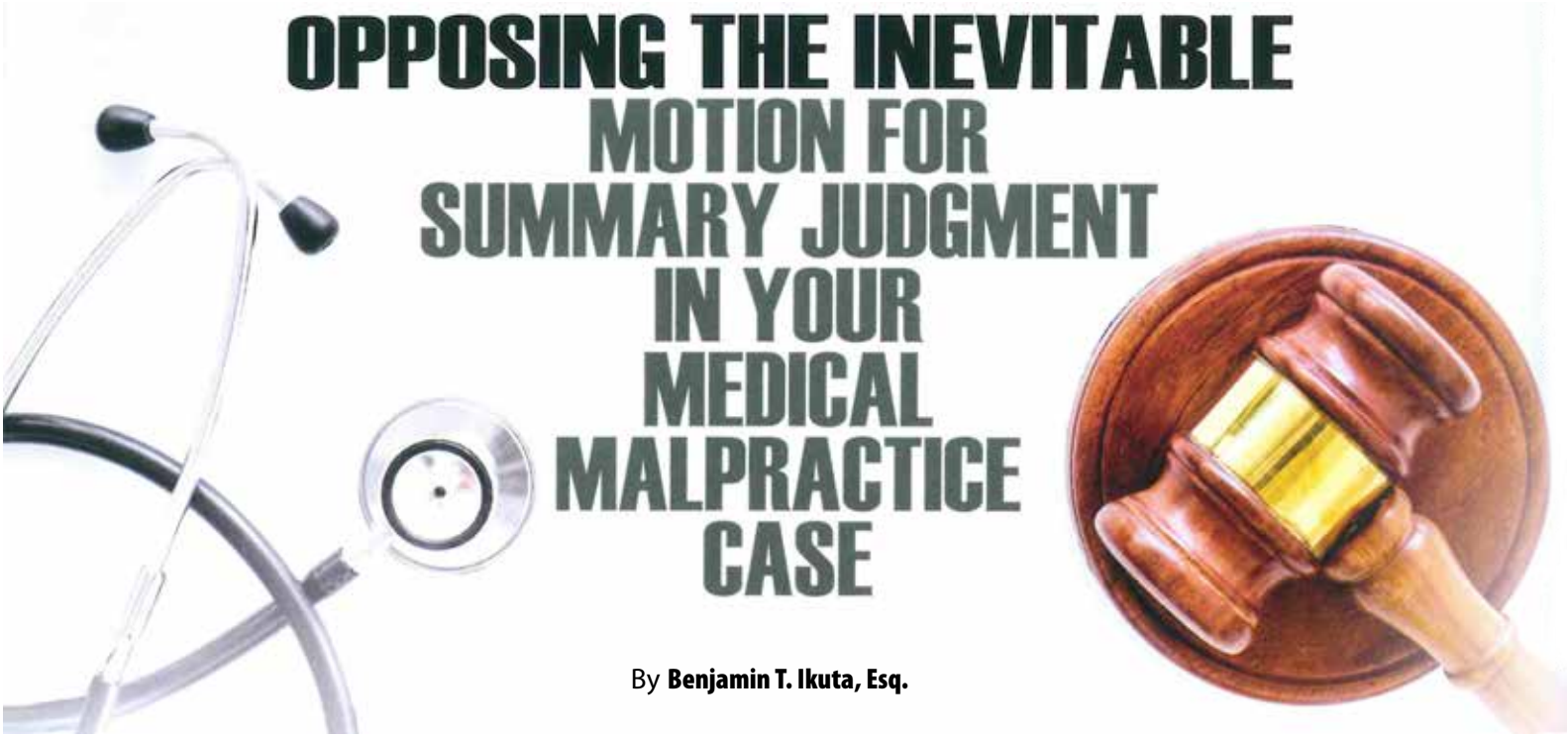
OPPOSING THE INEVITABLE MOTION FOR SUMMARY JUDGMENT IN YOUR MEDICAL MALPRACTICE CASE



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Opposing the Inevitable Motion for Summary Judgment in your Medical Malpractice Case

"Opposing the Med Mal MSJ." It may not be the sexiest topic. However, if you decide to foray into medical malpractice, you need to know this: It is coming.

No matter how clear the malpractice or how strong the plaintiff's case appears, the defense will file a motion for summary judgment in that medical malpractice case you decided to take. The vast majority of doctors and hospitals are covered by the same small handful of medical malpractice insurance companies. These insurance companies often ***mandate*** a summary judgment against plaintiff firms who do not specialize in medical malpractice. The defense firms, hungry for easy billable hours, are happy to oblige. There is an endless list of defense hired-gun experts with impressive CVs that are willing to sign any declaration put in front of them. The cases rarely settle before expert depositions and almost never before a summary judgment hearing. You are going to have to pony up and pay your experts for declarations to oppose the motion.

I have seen motions filed in a case where a family physician did not tell the patient of a test showing cancer, resulting in a delay of diagnosis for over three years. I have seen motions filed on cases where the surgeon operated on the wrong leg. I have seen motions on cases where there was a retained sponge after an appendectomy.

But why? Why would the insurance companies pay exorbitant suns to defense firms and hired guns to file a motion even faced with the most egregious malpractice? At best, particularly against law firms that do not specialize in medical malpractice and do not use the required language or attach the correct records, the defense hopes to win on a technicality. At worst, the insurance companies and defense firms are able to flush out the plaintiff's experts prior to expert designation. I have even heard some insurance carriers explain that they simply want to force that plaintiff's firm to spend money on experts to oppose the motion to dissuade them from taking future costly medical malpractice cases.

Opposing the Motion Starts Prior to Filing

Opposing the motion starts before you file the lawsuit. Before you decide to venture into a medical malpractice case, be ***extremely*** careful. Not only does medical malpractice require specialized knowledge, but the med mal defense firms and carriers simply treat general personal injuries far differently than firms that specialize in medical malpractice. As every element in a medical malpractice case requires expert testimony, taking the wrong case can be devastating financially.

No matter how clear you think the malpractice is, retain your experts ***before*** you file. Make sure that that expert is eminently qualified against the wrongdoing healthcare provider. For example, do not hire a diagnostic radiologist if the case involves interventional radiology issues. Do not hire a general surgeon if the case is against a pediatric surgeon. Do a careful background check of your

expert both with litigation history and with the California medical board. Do not hire retired physicians.

An expert is competent to testify only "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code § 720(a).) Therefore, "a person must have enough knowledge, learning and skill with the relevant subject to speak with authority, and he or she must be familiar with the standard of care to which the defendant was held." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) A witness who is eminently qualified to express an opinion in a particular field may be unqualified to express an opinion in some other related field. (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1080-81.) Specifically against emergency room physicians, your expert is not qualified as a matter of law unless she has "substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department." (Health & Saf. Code, § 1799.110.)

Hiring the right experts is critical. "Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims." (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.) Dumping money into the wrong experts is a death sentence for any medical malpractice case. In fact, there are some med mal insurance carriers that re-set their reserves based on the quality of Plaintiff's experts retain that are disclosed in the declarations in opposition to summary judgment.

Obtain the entirety of that expert's opinions to ensure that you are filing suit against the correct culpable healthcare provider. Meet with your experts *in person* to make sure that you have every angle of the case covered. Most importantly, make sure ***you*** understand the medicine before you decide to file the case.

Make Sure Your Expert Declaration has Enough Detail…

Preparing the opposing expert declaration with the appropriate amount of detail is an art. Put too little explanation and you risk a Court finding your expert declaration too conclusory. Put too much detail, and you risk producing damning evidence for the defense to use at expert depositions and trial.

In an opposition, "[e]xpert declarations cannot create a triable question of fact if the expert's opinion is based upon factors which are remote, speculative, or conjectural." (*Travelers Cas. v. Superior Court* (1998) 63 Cal. App.4th 1440, 1462.) In *Bushling v. Fremont Medical Center* (2004) 117 Cal. App.4th 493, the plaintiff alleged that the defendant physicians negligently caused severe damage to the plaintiff's shoulder during a laparoscopic cholecystectomy. The physicians filed motions for summary judgment, supported by their own declarations and a declaration of qualified experts. In opposition, the plaintiff submitted two separate declarations from an expert anesthesiologist and orthopedic surgeon, who both opined that the plaintiff's injury "occurred more probably than not from either a traumatic injury such as dropping the patient or from improper positioning of the patient or stretching of the extremity and but for the negligence of one of his care providers this injury would not have occurred." The trial court granted summary judgment.

The Court of Appeal affirmed, holding that "an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." In that case, the court noted that there was "no evidence that plaintiff was dropped, that he was improperly positioned, or that his arm was stretched during the procedure or recovery." As such, despite the plaintiffs' experts' conclusion, "that conclusion is no more than speculation if there is no factual basis of those events." Therefore, the declarations in opposition "were of no evidentiary value" and the motion for summary judgment was granted.

The expert declaration needs to have enough explanation and foundation to create a triable issue of fact. A bare-boned declaration that simply states that the healthcare provider fell below the standard of care is simply not enough.

…. But Not Too Much Detail

At trial, the med mal defense lawyers are trained to purposely make the medical issues as complicated and as convoluted as possible. Knowing that the plaintiff has the burden of proof, the more complex and confusing the medicine, the more likely the jury will be unable to decide between the two competing experts. In addition, making the medicine more complicated allows the defense to argue that the physician was exercising his or her medical discretion in making a judgment call when faced with a difficult, complex decision. When used in conjunction with the extremely defense-friendly CACI 505 titled "Success Not Required", this can be difficult to overcome at trial.

An overly complicated and unnecessarily thorough expert declaration is an evidentiary gift for the defense lawyer to use as cross examination at deposition and trial. When I was practicing on the dark side, a well-known plaintiff general practitioner decided to venture in a medical malpractice case with clear wrongdoing. The plaintiff was a

lovely, unmarried woman in her mid-40s. She had presented to my client, a family practitioner, with complaints of severe one-sided leg swelling, pain, and discomfort after taking a long flight. As should have been obvious to any first-year medical student, she was suffering from a deep vein thrombosis (blood clot) and required anticoagulants (blood thinners). Instead, she was sent home. One week later, she suffered from devastating and life-threatening pulmonary emboli, where the untreated blood clots travelled to her lungs and decreased cardiopulmonary blood flow. The plaintiff almost died after a month-long hospitalization. After discharge, the patient suffered from life-long post-thrombotic syndrome and permanent valve damage in her leg.

I am ashamed to admit that, per the insurance carrier guidelines and requirements, I obtained an expert declaration from a hired gun who would sign almost anything after ***three*** previous experts were critical of my client and refused to sign an expert declaration. However, even this expert had to rely on the physician's self-serving deposition testimony where he filled in factual gaps about the plaintiff's symptoms and reported history from his sparse and substandard charting. These facts were heavily disputed in the case and were alone sufficient to defeat summary judgment. In fact, the expert warned me that while he was willing to sign an expert declaration, he would have a difficulty testifying at deposition and trial.

The plaintiff's opposing expert declaration from a well-qualified board-certified family practitioner was 23 pages long. The expert declaration was extremely detailed and thorough, citing to numerous publications, articles, and studies. One part of the declaration criticized the physician for failing to abide by a publication known by the "Wells Criteria" in identifying and/or eliminating a DVT in the practitioner's differential diagnosis.

However, at his videotaped expert deposition, the plaintiff's expert's credibility was irreparably damaged solely through examination of the overly complex declaration. The plaintiff's expert, despite calling the Wells Criteria the "gold standard" in his declaration, admitted that he did not have a copy of the Wells publication in his office nor did he actually refer to it when treating patients. He was also unable to correctly name the seven criteria contained in the Wells Criteria. I was able to destroy his credibility by going through each line of the declaration. At a minimum, I achieved my goal of complicating the (what should have been) simple issues underlying the case.

The overly complex and detailed declaration ended up dooming the plaintiff's case. The day after the plaintiff's expert was deposed, and before the deposition of a single defense expert, the parties agreed to a five-figure settlement which, according to the patient's lawyer, did not even cover litigation costs.

Don't Forget About Causation

It is surprising how many plaintiff-side attorneys believe that opposing standard of care alone is enough to create a "triable issue of fact" and thus defeat the motion. This is not the law. Instead, a plaintiff must also create a triable issue of fact regarding causation when it is addressed in the opening papers.

As explained in *Bromme v. Pavitt* (1992) 5 Cal. App.4th 1487, 1492, a plaintiff who files a cause of action for "medical negligence must prove by reasonable medical probability based on competent expert testimony that a defendant's acts or omissions were a substantial factor in bringing about the [plaintiff's injuries.]" (See also *Dumas v. Cooney* (1991) 235 Cal. App.3d 1593, 1603 ["Causation must be proven within a reasonable medical probability based upon competent expert testimony."])

Specifically, "causation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a 50-50 possibility." (*Bromme, supra*, 5 Cal.App.4th at p. 1504; see also Sim*mons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 701 ["A less than 50-50 possibility that defendant's omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause."])

It is extremely important to use the correct language when addressing causation. Do not use words such as "could" or "may" or "possibility." In the very recent case of *Fernandez v. Alexander* (2019) 31 Cal.App.5th 770, the plaintiff fractured her wrist and her surgeon failed to perform surgery, instead ordering a cast. The defendant's supportive expert stated "It is my opinion that nothing defendant id or failed to do caused plaintiff any harm or injury. The callous formation and dorsal angulation of the patient's hand seen on imaging on 12-8-14 was a potential outcome of both casting and/or surgical intervention." This rather conclusory statement was sufficient to shift the burden.

The plaintiff's expert declared that the "failure to discuss surgical treatment options was a breach of the standard of care" and that to "a reasonable degree of medical probability" the care provided to plaintiff breached the standard of care. The trial court granted summary judgment and the Second District Affirmed. The Court of Appeal explained that "the plaintiff must offer an expert opinion that contains a reasoned explanation

illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* the negligent act was a cause-in-fact of the plaintiff's injury." (emphasis in original.) Since the opposing expert did not include the "more probable than not" language, summary judgment was granted.

Challenge the Opposing Expert's Declarations

Often times, the defense expert will rely on the defendant's self-serving deposition testimony or make inferences in the defendant's favor in order to sign the declaration. These assumed and disputed facts often are not articulated or addressed in the declaration. The defense lawyers are trained to insert other hyper-technical and complicated medical terminology and explanations to hide these assumptions.

If there is a legitimate foundational question or disputed fact underlying the defense expert's declaration, notice that expert's deposition even prior to expert designation. As explained in *St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1540, "under the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert."

If you are able to establish that the expert is relying on a disputed fact and that that same expert would not have the same opinion if presented with the plaintiff's version of the facts, that alone is enough to overcome summary judgment.

At a minimum, object. As explained in the *Fernandez* case above, if a plaintiff fails to object to the defendant's expert declaration, the objections are waived. It is crucial to object to the defendant's declaration, especially when that declaration is conclusory or fails to provide a sufficient explanation.

Just as an opposing declaration needs sufficient explanation to carry evidentiary value, so does the defendant's expert declaration. For example, in *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 521, the patient sued an on-call doctor who encouraged that the patient see his primary care physician when the physician returned in three to four days in response to arm pain. The delay in treatment caused the loss of treatment in his arm. (The on-call doctor moved for summary judgment and filed a 3-paragraph declaration from an expert physician who, in a conclusory fashion, stated that the on-call doctor met the standard of care. The trial court granted the motion for summary judgment.

The Court of Appeal reversed, holding that "a defendant doctor is not entitled to obtain summary judgment based on a conclusory expert declaration which states the opinion that no malpractice has occurred, but does not explain the basis for the opinion." As such, "[w]ithout illuminating explanation, it was insufficient to carry [the on-call doctor's] burden in moving for summary judgment." In short, a defendant's "standard is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation."

This all may sound obvious. However, be aware of the following sneaky trick used by defense in relation to causation. When the defense does not truly have a valid causation defense, the defense attorneys are trained to assert the following argument: "[Insert healthcare provider] met the applicable standard of care as a [specialty] and therefore, because she at all times met the standard of care, she did not cause plaintiff any injury." This is ***not*** a causation argument. Stating that a healthcare provider met the standard of care and therefore did not cause the plaintiff's injuries is not a causation argument but rather simply another standard of care argument. A valid causation argument would have to establish that even had a different course been taken, the plaintiff's course and injuries would have been the same.

This is often used at a minimum to flush out the plaintiff's causation expert. On some occasions, it is even enough to trick a trial court into granting summary judgment. The plaintiff must object to this argument as an improper causation argument.

Attach the Records

I just send the entire motion and all of the opposition for my expert to review. I know this is often expensive, but it satisfies two goals: 1) it eliminates any defense argument that my expert did not review adequate records to formulate an opinion; and 2) it obviates the need for me to attach the same records to the opposition. (*Shugart v. Regents of University of Cal.* (2011) 199 Cal.App.4th 499, 506.)

If your expert reviews and relies on documents that are in addition to or not clearly the same as those reviewed by the defense experts, you must attach those records to the opposition for the court's review. It is not enough to just state in a expert declaration that the expert reviewed them without actually attaching the records. In *Garibay v. Hemmat* (2008) 161 Cal. App.4th 735, 742 the Appellate Court recognized that "[a]lthough hospital and medical records are hearsay, they can be admitted under the business records exception to the hearsay rule." However, the records still have to be attached to the opposition. In striking

the expert declaration, the Court held: "[w]ithout those hospital records, and without testimony providing for authentication of such records, [the] declaration ***had no evidentiary basis.***"

Be Careful when Corresponding with an Expert

Obviously, all communications between an attorney and an expert are discoverable and must be produced three days prior to that expert's deposition under Code of Civil Procedure section 2034.415. However, a common issue that rises in medical malpractice cases is the plaintiff's expert going through several drafts before finally signing the final product in opposition to summary judgment. All of these drafts (and the communications accompanying them) are gold to a defense attorney for cross-examination at trial. Going through the specific reasons why large sections were deleted and/or included can be extremely damaging to your client's case.

The multiple drafts are often due to the attorney not fully understanding the medicine and/or the expert's opinions when drafting the first version of the expert declaration. Pick up the phone and call your expert before preparing the first draft of the declaration. Make sure you understand all of the medical issues underlying the case before drafting that declaration.

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