# Legal, Practical, and Ethical Considerations of Medical Malpractice Settlements

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For a physician who has been named as a defendant in a medical malpractice lawsuit, the decision whether to settle has significant legal, practical, and ethical implications. The physician defendant typically has extremely strong feelings concerning such a decision. Emotions can range from relief and gratitude to extreme anger. Physicians sometimes oppose settlement because they believe that settling is tantamount to acknowledging that a claim has merit. This article will discuss the legal, practical, and ethical considerations of a medical malpractice settlement for the physician and the defense attorney. Hopefully, increased understanding of these important and often competing factors will lead to a more informed, and, therefore, better decision for the physician.

## The Defense Team

Typically, in a medical malpractice case, the defense team consists of the physician defendant, the defense attorney, who generally is assigned by the insurance company, and the adjuster. There are, however, some variations on the theme. In some cases, the physician retains a personal attorney to provide advice and assist the defense attorney assigned to handle the case by the insurance company. Moreover, an increasing number of uninsured physicians practice in Florida.[1] Defending the uninsured physician will present different challenges.

## The Insured Physician

Often the physician defendant is conflicted and/or confused concerning the consequences of a settlement. Just as a treating physician must obtain an informed consent from the patient, the defense lawyer is obligated to explain to a physician defendant the risks and benefits of settling the case. Pursuant to F.S. §627.4147, the doctor's wishes are not binding upon the insurance company. In the author's experience, however, most insurance companies, especially those with a large presence in Florida, give great weight to the physician's desires concerning settlement.

The defense lawyer who advises a physician defendant about settlement options must be sure to cover the following points:

1) The possibility of potential personal exposure in excess of the policy limit if the case is lost.

2) Whether the physician has effective asset protection.

3) The likely effect of a settlement, or an adverse verdict, on the future insurance premiums or insurability of the physician.

4) If the defense team puts on a summary jury trial,[2] the result?

5) The fact that a settlement does not count as a "strike";[3] where, in contrast, an adverse jury verdict upheld by the Board of Medicine does count as a strike.

6) The fact that F.S. §456.041(4) provides that settlements (or verdicts) over $100,000 are reported to the Department of Health and posted on its Web site.

### Scenario One: Both Doctor and Insurance Company Do Not Want to Settle

By far, the most common scenario is when the physician and the insurance company believe the plaintiff's case lacks merit and should be vigorously defended, including through trial, if necessary. Most Florida carriers are very aggressive about defending cases. Only 37 percent of cases closed in 2007 result in a settlement or judgment.[4] Trial results were almost identical, with defense verdicts occurring approximately 65 percent of the time.[5] This "no settlement" scenario obviously presents no conflict of interest for defense counsel, since both the physician and the insurance company desire the same outcome — a dismissal, or a trial, if dismissal is not possible.

### Scenario Two: Both Doctor and Insurance Company Desire Settlement

Sometimes, there is consensus by the defense team that a case is indefensible and should be settled for a reasonable amount. Here as well, defense counsel has no conflict of interest. The attorney's job is to try to achieve the smallest settlement possible.

It will not surprise anyone involved in litigation that, on occasion, the plaintiff's demand will not be perceived as reasonable, and the case has to be tried, despite the defense team's unified desire to settle. Also, with the prevalence of low $250,000 medical malpractice policy limits, the plaintiff's attorney may insist that the doctor or his or her professional association contribute personally toward the settlement. Nonetheless, in these situations, no conflict of interest exists for the defense attorney.

### Scenario Three: Doctor Wants to Settle, Insurance Company Does Not

Scenario three occurs occasionally, especially toward the conclusion of a case. It is not uncommon for a physician to begin the lawsuit breathing "fire and brimstone,"[6] demanding that the case be defended through trial. However, after years of stressful litigation, the physician may change his or her mind. Accordingly, it is not unusual for physicians to demand that the insurance company settle the case, particularly as the case approaches deposition or trial. Here, a personal attorney can be extremely helpful to the physician.

While the insurance company's retained defense counsel is obligated to convey the doctor's wishes for settlement to the insurance company, a demand to settle is more appropriately made by a personal attorney. The insurance company appointed defense counsel is obligated to be objective and point out the strengths as well as weaknesses of the case. The personal attorney, however, can go beyond these points and be an advocate for a settlement, focusing on the weaknesses of the case, emphasizing to the physician the possibility of personal exposure above the policy limit if settlement is not reached, and generally pointing out the insurance company's obligation to try to settle in the best interest of the insured physician.

Sometimes a personal lawyer may send a bad faith letter to the insurance company, explaining why the physician believes a refusal on the part of the insurance company to settle constitutes bad faith. Such a letter often contains a laundry list of reasons why the doctor does not want the case tried, including personal/professional inconvenience, emotional stress, lost time or income, increased premium, decreased insurability, potential for adverse media attention, etc. However, as discussed below in Freeman v. Cohen, 969 So. 2d 1150 (Fla. 4th DCA 2007), these reasons are legally insufficient.

In very rare cases, the personal attorney for the physician may attempt to enter into a consent judgment with the plaintiff agreeing to a judgment for an amount in excess of the policy limit. If such a consent judgment is effectuated, the doctor assigns his or her bad faith claim against his or her carrier to the plaintiff and obtains a release. However, such an agreement probably violates the cooperation clause of the policy and may lead to a declaration that there are no longer any insurance proceeds to collect.[7]

**Scenario Four: Doctor Does Not Want Settlement, Insurance Company Does**

This scenario presents the opposite situation, and it occurs more frequently with smaller insurance carriers which are more apt to settle for a variety of reasons.[8] Most of the larger carriers pride themselves on trying a substantial number of cases; it is the author's experience that the larger carriers rarely settle over the doctor's objection.

F.S. §624.4147(1)(b)1 authorizes Florida carriers to settle without the consent of the insured physician as long as the settlement is made in good faith and in the best interest of the physician. However, in several recent cases, Florida physicians unsuccessfully sued their medical malpractice insurance carriers for failure to defend a defensible case. The courts have held that the insurance companies' authority to settle is virtually unfettered. Two recent cases have illustrated this point.

In *Rogers v. Chicago Insurance Company*, 964 So. 2d 280 (Fla. 4th DCA 2007), Dr. Rogers, an anesthesiologist, sued Chicago Insurance Company, for failing to exercise good faith in settling a defensible medical malpractice case. The estate of a former patient had served Dr. Rogers with a notice of intent to initiate litigation. Pursuant to F.S. §766.106, Chicago had 90 days to conduct a presuit investigation of the claim. According to Dr. Rogers, Chicago did not initiate any investigation until approximately a week prior to the expiration of the period. Chicago contacted an expert to review the materials provided by the plaintiff, but did not contact Dr. Rogers or seek input from him. With time running out, Chicago elected to settle the claim instead of defending it.

Dr. Rogers sued Chicago and alleged that if Chicago had properly investigated the claim, it would have discovered that the suit was defensible. He asserted that as a result of Chicago's settlement of the claim, it refused to renew his insurance policy, causing Dr. Rogers to pay substantially more in premiums for new insurance. Chicago moved to dismiss the claim, asserting that Florida law did not provide a private right of action against the insurance company for settlement within the policy limits.

The trial court dismissed Dr. Rogers' case and the Fourth District Court of Appeal affirmed. The court noted that, as a practical matter, if physicians could successfully sue their medical malpractice insurance companies for bad faith settlements, then medical malpractice carriers would never settle cases over the objection of the physician. This would defeat the legislative purpose of F.S. §624.447(1)(b)(1), which prohibits medical malpractice insurance carriers from offering policies containing clauses giving the physician the right to veto a settlement. Judge Warren vigorously dissented, opining that the majority had judicially eliminated the good faith requirement provided in the statute by the legislature.

In *Freeman*, a physician attempted to undo a settlement entered into by his insurance company, where the malpractice insurance policy contained the following standard language: "The company is authorized to compromise any claim hereunder without the consent of the Insured, including any offers of admission of liability, arbitration, settlement and/or judgment, unless a such offer and compromise is in excess of the applicable limits of liability under this policy."[9]

After mediation, the adjuster and plaintiff's attorney entered into a settlement agreement for $335,700. The physician objected to the settlement and attempted to nullify it by filing a declaratory judgment action for bad faith against his insurer and cancelling his insurance policy. The Florida Medical Association filed an amicus curiae brief supporting the physician, arguing that the trial court improperly construed the good faith duty of the insurance company, thus, depriving the doctor of his right to a jury trial.

The Fourth District Court of Appeal agreed with the insurance company, finding the policy's purpose

to be indemnification and defense of covered claims, not the protection of the insured from increases in insurance premiums or damage to his reputation from a paid claim. Accordingly, it held that the only bad faith action available to the insured when the carrier settles a claim within policy limits is a settlement prejudicing a pending counter-claim of the insured or exposing the insured to additional damages above policy limits.

Scenario 4 is where defense counsel must be most careful to avoid a conflict of interest. Rule 4-1-8 of the Rules of Professional Conduct of The Florida Bar, provides:

Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies, your agreement is required (dental malpractice only) if you want to object or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

In other words, under this rule, defense counsel cannot participate in settlement negotiations if the physician objects.[10] Theoretically, this rule is easy for defense counsel to follow, since the insurance company is not precluded from negotiating directly with the plaintiff's attorney. However, an interesting question arises once the settlement has been reached by the insurance company over the doctor's objection. Can the defense counsel ethically prepare the closing papers (general release and stipulation of dismissal) after a settlement has been reached? The general answer is probably not, since Rule 4-1.2 provides "a lawyer should abide by a client's decision whether to settle a matter." However, it has been the author's experience that the objecting physician usually will allow his or her attorney to prepare closing papers to ensure that the physician is not exposed to additional liability.

### The Uninsured Doctor

A defendant physician who does not carry insurance will impact the settlement dynamic. The plaintiff obviously will have difficulty obtaining a substantial settlement from an uninsured physician. Moreover, co-defendant physicians may feel they are being improperly targeted because another physician who may be negligent has no insurance. Strategically, this means that it will be difficult, if not virtually impossible, for the uninsured physician to settle until all other co-defendants have resolved claims against them. From the plaintiff's perspective, it is simply too risky for the plaintiff's lawyer to settle with an uninsured physician for a modest amount because if this occurs, the co-defendants will likely amend their answer to assert the liability of the settling uninsured physician pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). The co-defendant will then blame the absent uninsured physician at trial in order to exonerate himself or herself or reduce the verdict by the uninsured physician's proportionate share of liability.

The settlement analysis for the defense team of the uninsured physician and the defense attorney is different from that of an insured physician. Most importantly, there is no insurance company that can settle or refuse to settle against the doctor's wishes. Under Florida's Physician Financial Responsibility Act,[11] physicians can comply by obtaining a letter of credit, a surety bond, having $250,000 in assets, or promising to pay a judgment up to $250,000 within 60 days of the judgment. However, some doctors do not comply with the act. Uninsured physicians need to be advised that this could lead to disciplinary action against the physician if the plaintiff's attorney files a complaint with the Board of Health. However, one solution that may be satisfactory is for the defense counsel to negotiate a payment plan agreement between the physician and the plaintiff.[12]

One advantage for an uninsured physician in settling a case on a personal basis is that there is no reporting requirement to National Practitioner Data Bank[13] (as

long as the settlement check is paid by personal check as opposed to a corporate check). The lack of reporting is a significant benefit, so that the doctor's record stays clean, or a record already marred by settlements or judgments does not contain another settlement.

Increasingly, the plaintiff's attorney will insist on financial disclosure in order to accept a settlement from an uninsured doctor. Although it is beyond the scope of this article to discuss asset protection, Florida asset protection laws are very liberal, as the general rule is that 401Ks, IRAs, homestead, and property held as tenants by the entireties are generally exempt from judgment. Physicians have also protected their accounts receivable by purchasing life insurance annuities that are funded by their accounts receivable.[14]

Another important consideration for an uninsured physician is the cost of defending the case through trial versus the cost of settlement. The cost of defending a complex medical malpractice case with numerous co-defendants can easily exceed $100,000. Thus, it may make economic sense to agree to a modest settlement to avoid future legal costs, as well as the possibility of an adverse verdict. This is another area in which the defense counsel must advise the defendant physician.

## Conclusion

The decision whether to settle a medical malpractice case can have significant impact on a physician's livelihood and reputation, including 1) future insurance rates, 2) insurability, 3) the possibility of a "strike," 4) the potential for excess exposure, 5) reports to the administrative agencies, and 6) the potential for adverse publicity. It is hoped that an enhanced understanding of these factors by the physician and the physician's attorney will lead to a well-informed decision. ■

1 Since 2003, the percentage of uninsured doctors in Florida increased from 5.4 percent to 11.8 percent; the percentage of uninsured doctors in Palm Beach County increased from 6.9 percent to 21 percent; Broward County from 8.6 percent to 24.5 percent; and Miami-Dade County from 19.3 percent to 34.8 percent. See Lamendola, Uninsured Doctors on Rise in South Florida, Sun-Sentinel, July 27, 2008, at 1, citing statistics from the Florida Department of Heath.

2 In a summary jury trial, usually two or three real juries are empanelled; they hear an elementary summary of the case by counsel, and render a nonbinding verdict.

3 See Fla. Const. Amendment 8, and Fla. Stat. §456.50.

4 See Florida Office of Insurance Regulation 2007 Annual Report Medical Malpractice Financial Closed Claim Database and Rate Filings. In 2007, the 15 largest Florida writers, comprising greater than 99 percent of Florida policies, closed 2,361 claims.

5 See 2007 Florida Jury Verdict Reporter. There were 25 plaintiffs' verdicts and 49 defense verdicts reported. (Data compiled by the author from the 2007 Florida Verdict Reporter.)

6 Psalm 11:6.

7 See generally Coblenz v. American Surety, 416 F.2d 1059 (5th Cir. 1969).

8 Id.; 2007 Annual Report. The three largest carriers settled 28.6 percent of their claims, compared to 40.5 percent for the eight smallest carriers.

9 Freeman v. Cohen, 969 So. 2d 1150 (Fla. 4th D.C.A. 2007).

10 See FL. Eth. Op. 86-6, 1987 WL 125114 (Fla. Bar).

11 Fla. Stat. §458.320(c).

12 See Fla. Stat. §458.3204, "the licensee must make payments to the judgment creditor on a schedule determined by the board to be reasonable and within the financial capability of the physician."

13 See 42 U.S.C.A. §1113; American Dental Association v. Shalala, 3 F.3d 445 (C.A.D.C. 1993).

14 See generally Kirwan, The Asset Protection Guide for Florida Physicians, available at http://www.kirwanlawfirm.com/assetprotectionguide.htm.

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