

## PROCEDURAL TECHNICALITIES: FILING SUIT AND DISCOVERY

William F. Horsley  
Greensboro, North Carolina

### A. Applicable Statutes and Case Law

A medical malpractice complaint must conform to the requirements of the Rules of Civil Procedure. Rule 8, Rules of Civil Procedure. North Carolina utilizes “notice” pleading and the rules encourage brevity. However, there is no direct prohibition against lengthy and verbose complaints, if that is what you like to do.

In part, Rule 8 provides that the complaint should contain:

- (a) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief; . . .

Subsection (b) governs the prayer for relief. In negligence actions (which includes medical malpractice claims) if the amount in controversy exceeds \$10,000, “the pleading shall not state the demand for relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000). . . .” Upon written request of the defendant, the plaintiff shall, within thirty days of service of the request, provide a written statement of the monetary relief sought. This statement is not filed with the court until the matter has been called for trial. The statement may be amended in accordance with the provisions of Rule 15.

Rule 9(j) has been discussed previously in this manuscript. Compliance with this rule is mandatory and the failure to do so shall lead to dismissal of the action.<sup>1</sup> It is suggested that the prudent plaintiff’s counsel should include in the Rule 9(j) certification

---

<sup>1</sup> The statute mandates dismissal of the action for failure to comply, but it does not specify whether the dismissal shall be with, or without, prejudice. Arguably, then, the court has discretion to enter a dismissal without prejudice. See, *Keith v. Northern Hospital*, 129 N.C. App. 402, 499 S.E.2d 200 (1998), footnote 3.

an attack on the Rule's constitutionality.

The rule affords some relief to situations in which there simply isn't enough time to get everything together within the statute of limitations. Rule 9(j)(3) allows plaintiff, prior to the expiration of the statute of limitations, to apply for an extension of the statute of limitations up to 120 days. Originally, the rule required the application to be made to the resident superior court judge in a district in which venue "is appropriate under G.S. 1-82." Unfortunately, some resident judges were loathe to allow these extensions. In *Best v. Wayne Memorial Hospital*, 147 N.C. App. 628, 556 S.E.2d 629 (2001), plaintiff obtained an extension, but not from a resident judge. The only resident Superior Court judge was unavailable for two reasons: 1) he was on vacation, and 2) even if he had been available he refused any involvement in medical malpractice cases involving health care providers in his home county. Plaintiff then approached another judge, who was holding court in Wayne County, and that judge signed the order. The complaint was subsequently filed with the required certification whereupon defendants moved to dismiss on the grounds that the order extending the limitations period was not signed by a resident superior court judge. The trial court granted the motion and dismissed the action. While the action was on appeal, The Court of Appeals ruling in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001) came down, finding Rule 9(j) to be unconstitutional.<sup>2</sup> Defendants then argued that if the statute requiring the certification, and allowing the extension of the statute of limitations, was invalid, then the extension was without effect and the claim was barred by the statute of limitations. The ultimate result in *Best* was that plaintiff was allowed to file the complaint. The General Assembly subsequently amended the rule to allow any Superior Court judge holding court in that district to sign the order if the resident judge was unavailable or unwilling to do so.

So it would seem that these are the general rules presently applicable to the 120-day extension rule:

1. Potential defendants do not have to be served with the motion and

---

2

The holding was reversed in *Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002)

order for an extension of the statute of limitations. *Timour v. Pitt County Mem. Hospital*, 131 N.C. App. 548, 508 S.E.2d 329 (1998), *aff'd* 351 N.C. 47, 519 S.E.2d 316 (1999);

2. If there are defendants in multiple counties, the extension motion need be filed only in the county where the claim arose. The order will be effective, even as to defendants who are not resident within that county. *Stewart v. Southeastern Reg. Medical Center, et al.*, 142 N.C. App. 456, 543 S.E.2d 517 (2001).

Plaintiffs need not be terribly concerned about what would happen to a suit filed using the 120-day extension in the event Rule 9(j) is ultimately declared unconstitutional. The *Best* case affords relief in that instance.

It was previously thought that plaintiffs could utilize the right to amend under Rule 15 or the right to a voluntary dismissal without prejudice under Rule 41 (a) to cure a failure to include the certification. However, in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002) the court imposed limits. In *Thigpen* plaintiff filed a complaint on the very last day of a 120-day extension and did not include the certification in her complaint. Six days later, plaintiff filed an amended complaint, ostensibly as a matter of right under rule 15, with certification. The trial court granted defendants' motion to dismiss, and this was reversed by the Court of Appeals. 143 N.C. App. 209, 545 S.E.2d 477 (2001). The Supreme Court reversed the Court of Appeals, affirming the dismissal by the trial court. The court held that "once a party receives and *exhausts* the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend . . . to include expert certification." [emphasis added] The court also made it clear that the expert review must occur prior to the filing of the complaint.

It would appear, from the court's language in *Thigpen* that, had plaintiff filed the complaint and amended it *before* the expiration of the limitations period, it would have been acceptable.

In *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000), the plaintiffs were not deprived of the one-year extension afforded by a voluntary dismissal without prejudice

pursuant to Rule 41(a) because they failed to include the required certification in the original complaint, and the original complaint was not filed in bad faith.

In summary, if plaintiff fails to include the required certification in the complaint, he/she may amend as a matter of right, before any responsive pleading is filed, to include the certification. However, this may be done only if the statute of limitations has not expired. Plaintiff may also dismiss pursuant to Rule 41(a)(1) and re-file the action within one year from the date of dismissal, including the certification, if the original action was not filed in good faith.

The certification is not required as to a defendant whose sole liability in the matter is predicated upon *respondeat superior* or corporate negligence. *Estate of Waters v. Jarman*, 144 N.C. App. 98, 547 S.E.2d 142 (2001).

The rule allows the defense an opportunity to test compliance with the rule. “The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection.” These interrogatories are not counted against the limit provided in Rule 33. It would seem reasonable to assume that the defense is allowed *only* questions necessary to establish that the witness qualifies under Rule 702, Rules of Evidence, that the witness either reviewed the plaintiff’s medical records or that the witness was given sufficient facts about the questioned health care to form an opinion,<sup>3</sup> and that the review took place prior to the filing of the complaint and certification. There is no provision in the rule requiring plaintiff to produce any documents.

## **B. Developing New Theories/Causes of Action Regarding Existing and New Defendants**

---

<sup>3</sup> Rule 9(j) requires plaintiff to plead that the questionable medical care has been reviewed by a person reasonably expected to qualify as an expert under Rule 702, NCRE. It does not require an actual review of records. See *Hylton v. Koontz*, 138 N.C. App. 511, 530 S.E.2d 108, *rev. denied*, 353 N.C. 264, 546 S.E.2d 98 (2000), in which the court held that a review of “hypothetical” medical facts, presented over the telephone by plaintiff’s attorney, by a qualified expert, constitutes a sufficient review under Rule 9(j).

No matter how much pre-filing investigation and workup is done, as the case develops there will be new facts which may give rise to claims against additional defendants, or new claims against existing defendants. Only in the rarest circumstance will one defendant implead another health care provider or overtly “point fingers” at another health care provider regarding any liability. It often occurs, however, that discovery may disclose additional theories of liability against one or more existing defendants.

If the lawyer wants to introduce evidence of a newly discovered liability theory, he/she should, as soon as practicable after the evidence is developed, move to amend the complaint. While the rules provide that a complaint can be amended during, or even after, trial to conform to the evidence, the alert practitioner should take steps early to make sure the evidence will be admitted, and that an appropriate instruction can be given to the jury. Additionally, the development of a new theory of liability may have an impact on the opinions held by experts on both sides of the case.

The discovery of a possibly “new” defendant can be somewhat more problematic. If the statute of limitations or statute of repose bars assertion of a claim against the newly found defendant, existing defendants may be more aggressive in “suggesting” that all the fault lies with the non-party culpable provider. If the claim is not time-barred, the failure to amend to add the additional party may make settlement more difficult. Notwithstanding the law of joint and several liability, defendants who are parties to a law suit will not happily pay full price to settle, if there is another party and its carrier which might be called upon to contribute.

Always keep in mind the possibility that evidence may arise implicating other health care providers who treated plaintiff. In *Creech v. Melnick*, 347 N.C. 520, 495 S.E.2d 907 (1998), plaintiff’s counsel contacted one of the minor plaintiff’s physicians, a neonatologist, prior to filing suit. Counsel was focused on the possible liability of the nurse midwife who delivered the child and so, during his meeting with defendant he told her that he had no reason to consider her a potential defendant in the case. She then cooperated with him by discussing the records in the case. She made statements critical of

the pediatric care the child received following delivery, apparently under the mistaken belief that she was referring to another physician when, in fact, the care she criticized was her own! She got sued. She then moved for summary judgment on the grounds of breach of contract not to sue and equitable estoppel. The trial court granted the motion and was affirmed by the Court of Appeals. *124 N.C. App. 502, 477 S.E.2d 680 (1996)*. Because of the confused nature and mutual mistakes of fact, the Supreme Court found that there were sufficient issues of material fact and equitable estoppel and reversed, remanding the case for trial.

### **C. Direction, Scope and Extent of Discovery**

For the most part, the discovery rules apply to malpractice cases in the same way as in other civil actions. However, there are some rules that are unique to malpractice claims and there are considerations applicable to malpractice claims that are not present in other personal injury or wrongful death claims.

Rule 26(f1) mandates a discovery conference in medical malpractice cases. The purpose of this conference is the development of a Discovery Scheduling Order (DSO) establishing the schedule for expert witness designation and a discovery schedule. The judge “shall, within 30 days” of the case coming to issue (filing an answer), a motion requiring determination by the court, or the filing of any other responsive pleading “direct the attorneys for the parties to appear for a discovery conference. . . .” Typically, counsel for the parties work out a mutually acceptable DSO and it is presented to the court for entry. However, there is a growing trend toward having the court enter the order.

The rule envisions completion of all discovery within 150 days of the issuance of the order.

The failure to timely designate experts “*shall* [result in] an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial.” [emphasis added]. The parties may, with leave of court, agree to such amendments of the DSO as the exigencies of the case require.

The extent of disclosure required is governed by Rule 26 (b)(4)a1:

“A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.”

The DSO will always require production of the witness' *curriculum vitae* and any reports prepared by the witness. The witness's CV is usually incorporated by reference to establish the witness's qualifications.

The question arises whether to list treating physicians in the expert witness designation required by the DSO. When a treating physician is called to testify, not about the applicable standard of care but about the plaintiff's medical condition and treatment, he/she is not an expert witness.<sup>4</sup> *Prince v. Duke University, et al.*, 326 N.C. 787, 392 S.E.2d 388 (1990). In *Prince*, the hospital defendant did not include the name of a neuropathologist with the identification of expert witnesses because it considered him to be a treating witness. However, as a pathologist he provided no medical care to the patient and did nothing until after the patient's death. The court reasoned that treatment ends with the patient's death and therefore the neuropathologist, who never saw the patient alive, was not involved in the patient's treatment and was not, therefore, a "treating physician" and his identity as an expert witness should have been disclosed. Interrogatory responses noting that various treating physicians might be called to testify were insufficient identification of this witness.

Of course, treating physicians will still offer opinion relevant to the issues in the case, including a prognosis or an opinion on causation. The discovery conference mandated by Rule 26(f1), by which DSO's are governed, requires only designation of

---

<sup>4</sup> The official Comment to Rule 26(b)(4) notes that "the subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to the transactions or occurrences that are part of the lawsuit. *Such an expert should be treated as an ordinary witness* [emphasis added]. See also, *Turner v. Duke University, et al.*, 325 N.C. 152, 381 S.E.2d 706 (1989).

*expert* witnesses, which would seem to exclude naming treating physicians, who will not testify on standard of care issues, in the DSO. Nevertheless, I suggest there is a good reason for identifying at least some treating physicians as expert witnesses. In *Crist v. Moffatt*, 326 N.C. 326, \*389S.E.2d \*41(1990) the Supreme Court forbade *ex parte* communications between defense counsel and a non-party treating witness. Subsequent, the State Bar decided that defense counsel may ethically communicate with the non-party treating witness “in order to arrange the party’s appearance at trial as a witness” including communicating in writing the questions the attorney expects to pose to the witness at trial. RPC 162. Wily defense counsel have begun pushing the envelope provided by this opinion by sending the treating physician “selected” portions of the medical record (conveniently highlighted), copies of the complaint, and even a copy of the Statement of Monetary Relief Sought. Arguably, such contacts would be prohibited if the physician involved was designated as an expert.

The DSO should also deal with timing matters. It should set out a schedule for completing discovery depositions of both fact and expert witnesses. Some flexibility is needed since this involves conflicting schedules of all of the lawyers and the witnesses. The DSO typically provides for the manner of payment of experts. In the event of any dispute over an expert’s fees, the court will, upon motion, determine a reasonable fee for the expert. Usually, the party taking the deposition will pay for the expert’s time in the deposition only, with the party proffering the expert bearing the expense of preparation.

The better practice is to provide that discovery depositions may not be used in lieu of a court appearance. If a party wants to take a *de bene esse* deposition, the rules allow it, but the DSO will usually provide that it not be taken until the opposing party has had a reasonable opportunity to take a discovery deposition.

The DSO will also contain a provision for the completion of all discovery, including a deadline for responses and provisions regarding supplementation. Discovery should be completed in such a way as to allow adequate time for trial preparation without interruption.

There are some problems that are likely to be encountered in discovery in

malpractice cases.

A set of typical interrogatories and requests for production are attached as an Appendix to this manuscript.

Sometimes, the defense will designate **an overabundance of experts**. The reasoning is, I suspect, for intimidation. The message seems to be that the defense has all these experts, therefore the defense case must be strong. Too, plaintiff's counsel is going to have to spend a lot of money on deposing these witnesses. There are three ways to handle this:

- 1) Move for an order limiting the number of experts (this can also be negotiated as part of the DSO). You will not get much relief this way, since management of witnesses is within the purview of the trial court and no other judge is going to enter such an order. Once, however, I was able to get an order to the effect that, if the defense didn't call all of these witnesses at trial, it would have to reimburse plaintiff the cost of their depositions, including travel expense, regardless of the outcome of the trial. The number was pared down.
- 2) Move to amend your expert witness designation to add an equivalent number of experts to "even things up."
- 3) Suck it up and take the depositions.

Hospitals will respond to many discovery requests with an objection on the grounds that the information sought is **privileged** or **confidential** or **peer review**. There is actually very little hospital information immune from discovery and plaintiff's counsel should not give up without a fight (if the information sought is relevant and important to the case). N.C.G.S. §131E-95 affords immunity from discovery of "proceedings of a medical review committee, the records and materials it produces and the materials it considers." A "medical review committee" is a committee of a State or local professional society, of a medical staff of a licensed hospital or a committee of a peer review corporation or organization formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing. N.C.G.S. §131E-

76(5).<sup>5</sup>

Neither the hospital Board of Trustees nor the Risk Management Department is a hospital medical review committee. The committee must be comprised only of the hospital's medical staff, i.e., a committee of physicians. The hospital Medical Staff Bylaws will list the various medical staff committees. If the objection is raised, request identification of the persons who comprise the committee which supposedly generated the materials for which production is opposed. If the committee is not one specified in the Bylaws, or created pursuant to the Bylaws, it should not qualify for the privilege.

Information from original sources is not made immune simply because it may have been given to a medical review committee. For example, data from quality assurance screening may be used by a medical review committee proceeding against a physician, but the initial data was compiled by hospital employees as part of the facilities ongoing quality assurance program. Likewise, complaints by patients or staff against a physician are discoverable (although the treatment of the complaints by a committee would not be discoverable). The seminal case in this area is *Shelton v. Morehead Mem. Hospital*, 318 N.C. 76, 347 S.E.2d 824 (1986).

There is also the **impaired provider immunity** established by N.C.G.S. §90-21.22 which sets up a framework for agreements among the N.C. Medical Board, N.C. Medical Society and the N.C. Academy of Physician Assistants providing peer review services incident to programs for impaired physicians and physician assistants. "Any confidential patient information and other nonpublic information acquired, created or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case." This is a broader privilege than that provided by N.C.G.S. §131-E-95 in that this language from that statute, "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of a committee" does not

---

<sup>5</sup> Similar statutes exist for other health care providers. N.C.G.S. §90-48.10 (dental review committees), N.C.G.S. §130A-45.7 (public health authority), N.C.G.S. §122C-30 (mental health facility peer review committees).

appear in §§90-21.22, 90-48.2 or 90-85.41 which all deal with impaired practitioners. *Sharpe v. Worley*, \*\* N.C. App. \*\*, 527 S.E.2d 75 (2000).

There are other records which are **confidential** under some statutes. The hospital may object to production of **personnel records**, citing N.C.G.S. §131E-97.1. This section simply says personnel records of a public hospital are not public records. The statute says nothing about their discoverability. Most hospitals today do not qualify as “public hospitals.”

The **privacy of hospital employee personnel records** is covered by N.C.G.S. §131E-257.2 and, again, applies only to “public hospitals.” This statute affords no immunity from discovery.

Objections to production of **credentialing information** are often based on N.C.G.S. §§131E-97.2 and/or 131E-95. The former again simply says that information acquired by a hospital “in connection with the credentialing and peer review of persons having or applying for privileges to practice in the hospital is confidential and is not a public record. . . .” The statute says nothing about immunity from discovery. However, the latter statute may apply because credentialing ultimately involves one or more medical staff committees. In *Whisenhunt v. Zammit*, 86 N.C. App. 425, 358 S.E.2d 114 (1987) the Court of Appeals affirmed a lower court order quashing a subpoena for “the credentialing records of [defendant] in their entirety.” Recall that in *Shelton* the court said the statute “offers no protection to the records and documents furnished by the individual physicians in their applications for hospital privileges.” Therefore, a request for the defendant’s application for privileges is not objectionable. Requests for other credentialing information must be carefully drafted so as to seek production only of non-privileged information.

Credentialing claims are discussed in more detail in the program materials on Hospital Corporate Liability and Institutional Negligence.

The Joint Commission on Accreditation of Healthcare Organizations (**JCAHO**) periodically inspects hospitals. These inspections result in detailed reports, which are sent to the hospital, outlining any deficiencies. The hospital must correct any deficiencies

within a specified time or risk losing accreditation. These reports, and the hospital's responses, can be a good source of relevant information in cases in which an uncorrected deficiency led to the plaintiff's injury.

A "sentinel event" is one which results in unanticipated death or major permanent injury (unrelated to the natural course of the patient's condition) or is one of the following:

- patient suicide in a setting where the patient receives around the clock care,
- infant abduction or discharge to the wrong family
- rape
- hemolytic transfusion reaction involving administration of blood
- surgery on the wrong patient or wrong body part.

JCAHO requires such events to be reported within five business days of the event, and followed up within 45 days by a Root Cause Analysis and Action Plan. JCAHO contends these documents are privileged. It does not appear that any of the myriad hospital-related statutes speaks to either the inspection reports, the sentinel event reports or the Root Cause Analysis and Action Plan. N.C.G.S. §131E-95 (c) is often cited in opposition to producing these documents.

- (c) Information that is confidential and is not subject to discovery or use in civil actions under subsection (b) of this section may be released to a professional standards review organization that performs any accreditation or certification function. Information released under this subdivision shall be limited to that which is reasonably necessary and relevant to the standards review organization's determination to grant or continue accreditation or certification. Information released under this subdivision retains its confidentiality and is not subject to discovery or use in any civil actions as provided under subsection (b) of this section, and the standards review organization shall keep the information confidential subject to that subsection.

Remember that Sentinel Event Reports are not generated or created by a medical review committee. It is unlikely that the hospital's bylaws will be written to require that a Sentinel Event Report be created only by a medical review committee and it is equally unlikely that a committee of doctors will take the time to prepare a Root Cause Analysis.

The Health Care Quality Improvement Act, 42 U.S.C. §11101-52 created the

**National Practitioner Data Bank** in an effort to stop medical licensing boards to act to weed out problem or incompetent doctors. The Act was intended to restrict “the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician’s previous damaging or incompetent performance.” 42 U.S.C. §11101(2). The purpose of the Data Bank is to accumulate and store in readily accessible fashion facts about physicians who have been sued for malpractice and had either directly or through their insurance carriers paid the claim, either by settlement or by judgment. The Act provides that payment of a settlement or judgment creates no presumption that malpractice occurred. The Data Bank must pass this information along to hospitals whenever a physician applies for privileges. Lawyers can get Data Bank information on a defendant doctor *only* if the claim is asserted against a hospital and a physician and there is an allegation that the hospital failed to seek information on the doctor from the Data Bank before granting privileges to the doctor. 45 C.F.R. §60.11(5).

**D. Avoiding the “Shotgun” and Focusing Issues / The “Too Many Defendants Problem**

Too many defendants, like too many cooks, may spoil the broth of the malpractice claim. Generally, plaintiff is much better served keeping the case as simple as possible with regard to both the number of defendants and the number of issues involved.

More defendants means more defense lawyers and more defense experts. This will mean more depositions and more expense. It will allow for more opportunities for obfuscation and delay. It may also make it more difficult for the plaintiff to prevail if the defense can point to all the other providers in the case and wonder out loud, “What are the odds that ALL these providers were negligent?” An illusion of reasonableness develops that will be difficult to expose.

Obviously, for each defendant named, you will need one or more experts on the question of that defendant’s liability. If you encounter difficulty finding an expert who will testify that the defendant in question was negligent, that should be taken as a strong clue that the case against that defendant is weak.

Avoid the temptation, encountered frequently when the statute of limitations is approaching, to simply sue everybody possible with the idea that you can dismiss those less culpable defendants later, as evidence develops during discovery. Having an expert will probably protect the lawyer from a Rule 11 motion for sanctions, but if the expert is the least bit equivocal in his/her opinion, the court may still impose sanctions.

On the other hand, clearly culpable persons must be made parties, if possible. Sometimes, the decision of whom to include as a defendant is like eating prunes, you never really know if two will be enough, or if three will be too many.

Keeping the issues focused and simple is also a necessity. The more complex the case appears to a jury the less likely it will be that plaintiff can prevail. If there are too many issues for the jury to resolve, they will be more forgiving of the doctor. It is probably a good idea, once the complaint is drafted with allegations of negligence, to have your reviewing expert take a look at the complaint to make sure he/she can support the allegations of negligence. This will avoid having to deal later with allegations which are inaccurate and not supported by appropriate testimony. If the expert expresses some doubt about an allegation, it can be fine tuned or even eliminated.

#### **E. Summary Judgment/Affidavits and Their Role in Malpractice Cases**

It is difficult to imagine a case in which plaintiff would file a motion for summary judgment in a malpractice case with any reasonable expectation of success. For that reason, we will focus here on contesting a defense motion for summary judgment. Remember that Rule 56 of the Rules of Civil Procedure applies to a malpractice case.

The most likely scenario for a defense motion for summary judgment arises when plaintiff's expert does not give some testimony crucial to the case. This may be the fault of the witness, or the fault of the lawyer if the witness wasn't adequately prepared. At any rate, the gaffe may be cleaned up by affidavit in response to defendant's summary judgment motion. Suppose a witness makes reference to a "national" standard of care without mention of the community in which the claim arose. In *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 564 S.E.2d 883 (2002), a shoulder dystocia case, plaintiff's expert,

licensed in South Carolina and Alabama, practiced in Greenville, South Carolina and had practiced in communities in Alabama and Mississippi which were similar in size to Asheville, North Carolina (where the case was tried). He specifically testified that “Asheville and other communities that size practice in the same national standards” with respect to the management of shoulder dystocia. The court found that he made the statutorily required connection to the community where the malpractice occurred or to a similarly situated community and could therefore testify. Thus, the fact that the expert believes a national standard exists does not necessarily exclude his/her testimony. It will be received as long as the expert can make the required connection to the community in question, or similar communities. Using *Leatherwood* as your guide, the witness’s affidavit can be used to make the necessary connection and clean up the mess.

The affidavit should address the specific issues raised by the motion. If the motion is predicated upon a lack of evidence as to a breach of the standard of care, the responsive affidavit of the plaintiff’s expert should thoroughly describe what the standard of care requires to be done, and what defendant failed to do, and how that resulted in the patient’s injury or death. A mere allegation that defendant’s conduct is a breach of the standard of care is insufficient. See, *Evans v. Appert*, \*\* N.C. App. \*\*, 372 S.E.2d 94 (1988).

For a case in which plaintiff’s affidavits were found sufficient, read *Rouse v. Pitt County Mem. Hospital*, 343 N.C. 186, 470 S.E.2d 44 (1996). This was a case in which two on-call physicians were defendants. Part of their duties included oversight of resident physicians. Plaintiff’s affidavits detailed the applicable standard of care which required on-call physicians to know the competency level of the residents under their supervision. The court ruled that these affidavits raised genuine issues of material fact as to whether defendants breached the standard of care. Another issue in the case was whether defendants could be vicariously liable for the negligence of the residents, who worked directly for the hospital. Defendants worked for an independent practice. However, there was a contract between the hospital and the practice in which the hospital delegated responsibility for supervision and control of residents to the physicians on staff. Since the hospital had delegated this duty, the negligence of the residents could be imputed to the

defendant physicians.

## **F. Communicating with Your Experts**

Understand from the outset that all contact between the lawyer and the expert is generally discoverable. For that reason, correspondence between the two should be somewhat formal and not on a first-name basis, and familiarity in written context should be avoided.

If possible, meet with the expert personally. This will allow assessment of his/her deportment and appearance, nonverbal communication skills or defects, rapidity of thought and other attributes that can only be recognized “face to face.”

Your interaction with the expert will go more smoothly if you have previously researched the relevant medical issues and have some degree of familiarity with them. The expert can nevertheless suggest additional sources for study.

Once you are satisfied that this person is “the” expert you need, firm up the financial arrangements. Establish the fees and if possible establish a budget for the expert. If you are going to ask the expert to do some medical research, be prepared and willing to pay. On the other hand, you don’t want to pay for medical research you don’t need. At the outset, ask about fees. Ask the expert to let you know if costs are exceeding a certain amount, so you can discuss it with him/her.

The expert should be provided with all relevant medical and other data. Whether he/she uses it or not, the entire record should be provided, so that he/she will not be embarrassed on cross examination about a lack of awareness or the full medical picture of the patient. This includes x-rays, MRIs, ultrasounds or any other documentary evidence available.

Since North Carolina adheres to the “locality rule” in establishing the standard of care, the expert should be given information about the locality in question. This information should be given to the expert as early as possible, and certainly prior to his/her expression of any opinions in the case. Counsel must make sure the expert is aware of the significance of this material and the necessity of his/her framing any opinions within the

context of what is known about the particular community.

Here are some suggestions of the type of materials furnished to an expert to educate him/her on the standards of medical practice in the community:

- A copy of the pattern jury instruction in which the standard of care is described.
- A copy of the most recent applications for license renewal by local hospitals. This can be obtained from the Division of Facilities Services in Raleigh. You may request it over the internet at [www.facility-services.state.nc.us](http://www.facility-services.state.nc.us).
- A copy of regional or county health statistics from Shep's Center at the University of North Carolina. You can find this a [www.shepscenter.unc.edu/data/nchpds/](http://www.shepscenter.unc.edu/data/nchpds/).
- Print out information from the local hospital web site. This will contain information about the number of beds in the hospital, the level of care the hospital is capable of providing, the medical specialties on staff. Hospitals are aggressively marketing themselves and there may be some very useful descriptive statements on the site.
- The local Chamber of Commerce web site will have information on the demographics of the area, as will the U. S. Bureau of Labor Statistics.
- Photocopy, if possible, yellow pages from the local telephone book covering the physicians practicing in the area, including specialties.
- Since the expert will need some knowledge on the level of defendant's knowledge and training, print defendant's information from the N.C. Medical Board, found at [www.ncmedboard.org](http://www.ncmedboard.org). You can link to the N.C. Medical Board and other state medical boards at AIM Doc Finder, [www.docboard.org](http://www.docboard.org). There may also be information on the Doctor Find section of the American Medical Association website, [www.ama-assn.org/aps/amahg.htm](http://www.ama-assn.org/aps/amahg.htm).
- Certainly, if the defendant doctor or his practice maintains a website,

download and print it for your expert.

- If the defendants are residents, get information about the hospital's residency program. Many medical centers have detailed descriptions of these programs on their web sites.
- If your expert practices in a community similar in size to that where the claim arose, get comparable demographic information.
- There are four medical schools in North Carolina. Make sure the witness is aware of how near one or more of them is to the locality.
- It may even be a good idea to prepare a reference document for the witness to refer to during his/her deposition.

Remember, it is not necessary that the expert have any direct experience with the community in question. What is essential is that he/she have enough information about that community to be familiar with the medical resources available in that community and is familiar with the standard of care in other communities having access to similar resources. *Barham v. Hawk, 600 S.E.2d 1 (N.C. App. 2004).*

Supplement the materials for the expert as discovery progresses. Once you have them, send:

- The defendant's deposition (in which you will have asked questions about the medical resources available in the community; the defendant's education, training and experience; a description of the defendant's practice and demographics; and if he/she would have practiced any differently if he/she had been in some other area of the country);
- Applicable policies and procedures from defendant hospital (if the hospital is a defendant).

Encourage your expert to explain medical terms simply and clearly. The expert will have to be a teacher, and it is important to "put the jam on the bottom shelf so little folks can reach it."

Don't hesitate to give the expert tips. For example, make sure he/she knows that the length of the deposition increases exponentially if opposing counsel thinks the witness

will change his/her opinions under pressure.

If possible, familiarize the expert with trial exhibits to be used during his/her testimony. Most exhibits can now be digitalized and e-mailed for comment and follow up.

Explain the definition of standard of care in North Carolina. Make sure the expert can deal with the common defense of “professional judgment.” Remind the expert that each opinion should be one that to a reasonable degree of medical certainty he/she believes is more likely than not the case. Explain the burden of proof, including warning the expert that to say something is a judgment call does not carry the burden of proof. Alert the expert that the defense will try to make every deviation a judgment call. Explain “more likely than not.” The expert should never say that the procedure in question “is a controversy.”

Be sure the expert’s files are organized and suitable for production as an exhibit.

Before an expert testifies, bring him/her up to date on the progress of the case. Advise him/her about what to expect from opposing lawyers based on their theory of the case. Debrief the expert after his/her testimony to ascertain his/her perception of how things went and the strength of his/her testimony. If things didn’t go as well as hoped, find out why. Find out from the expert what can be done to salvage or modify your future course of argument. Whatever the outcome, try to wrap up your relationship on a positive note. You may want to use him/her again.

There are lawyers who don’t believe in “woodshedding” their witnesses. We call those lawyers appellants.

(2143)

NORTH CAROLINA  
ROCKINGHAM COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

File No.

Betty C. Hildebrandt and husband,

)

William Hildebrandt,

)

)

Plaintiffs,

)

)

v.

) **PLAINTIFFS' INTERROGATORIES**

) **TO DEFENDANT - First Set**

Thomas M. Yarnell,

)

)

Defendant.

)

These interrogatories are served on Defendant pursuant to the provisions of Rules 26 and 33, Rules of Civil Procedure. Defendant is required to answer these interrogatories separately and fully, in writing and under oath, and to serve a copy of his answers on the undersigned within 45 days after service of summons and complaint. THESE INTERROGATORIES ARE CONTINUING IN NATURE UNTIL THE DATE OF TRIAL, AND DEFENDANT IS REQUIRED TO SERVE SUPPLEMENTAL ANSWERS AS ADDITIONAL INFORMATION MAY BECOME AVAILABLE TO IT AS REQUIRED BY RULE 26, RULES OF CIVIL PROCEDURE.

**INSTRUCTIONS AND DEFINITIONS**

A. The terms "defendant," "you," and "your" mean the defendant Thomas M.

Yarnell and any and all of his employees, agents, attorneys, investigators, independent contractors or other representatives or entities of each defendant.

B. In responding to these interrogatories, you are requested to provide all information, including hearsay, in your possession.

C. Response to one interrogatory or part of an interrogatory may be adopted or incorporated by reference in response to other interrogatories or parts of interrogatories.

D. To "identify" a natural person means to state his or her full name, current or last known address and telephone number. If that person is an employee or agent of either defendant Thomas M. Yarnell, include his or her job title.

E. To "identify" an entity other than a natural person means to state the full name, current or last known address and telephone number of the entity, and the type of entity (e.g., corporation, partnership, etc.).

F. to "identify" a document means to state the date of the document, the author(s) of the document, the type of document (e.g., memorandum, minutes, e-mail, computer record, video tape, etc.), the present location of the document and the name and address of the person or entity having present custody of the document.

G. The term "document" or "documents" means, without limitation, the following categories, whether printed or recorded or reproduced by any other mechanical or electronic process, or written or produced by hand: communications, reports, correspondence, telegrams, electronic mail (E-mail), memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, graphs, reports, notebooks, note charts, plans, drawings, sketches, maps, summaries or records of meetings or conferences, summaries or reports of investigations or negotiations, opinions or reports of consultants, photographs, brochures,

movies, video tapes, pamphlets, advertisements, circulars, press releases, drafts, letters, any marginal comments or notations appearing on any document.

Further, the term "document" or "documents" shall include all tangible things by which human communications are transmitted or stored. Designated documents include all attachments, enclosures or other documents that are attached to, or relate to, or refer to such designated documents (whether referred to in the document, or not).

H. Unless otherwise specified, these interrogatories relate or apply to the period of time beginning with the first date plaintiff Betty C. Hildebrandt was examined or treated by these defendants to the present.

### **Interrogatories**

1. Identify each and every document known to you, and within your possession, custody or control, which contains facts or opinions relating to the care and treatment of plaintiff Betty C. Hildebrandt, or the claim asserted in the complaint (other than documents prepared in anticipation of litigation), stating, for each:

- a. the date of the document and the name and address of each person involved in making it
- b. the title and a brief description of the document sufficient to identify its contents
- c. the person having present custody or control of the document

**ANSWER:**

2. Have you ever had a medical license suspended, revoked or terminated in any state or country? If so, for each such license, state:

- a. the state or authority granting it
- b. whether it was suspended, revoked, terminated or otherwise restricted or limited, indicating which
- c. the date of suspension, revocation, termination or restriction or limitation
- d. the reason therefor

**ANSWER:**

3. Has any hospital ever suspended, revoked, terminated, restricted or limited your staff privileges? If so, for each hospital, state:

- a. its name and address
- b. a description of the privileges defendant Miller had at such hospital
- c. date of suspension, revocation, termination, restriction or limitation

- d. the reason therefor
- e. the name of the disciplinary body which took the action suspending, revoking, terminating, restricting or limiting the staff privileges
- f. whether any hearing or other proceeding preceded the suspension, revocation, termination, restriction or limitation

**ANSWER:**

4. If you have ever written, co-authored or otherwise contributed to a medical paper or article printed in a medical journal or publication, for each such paper or article, state:

- a. its title and subject matter
- b. date and place (name of journal or publication) of each publication
- c. name and last known address of each other person who contributed to it
- d. if defendant Howard E. Miller was a co-author, a description of the portion of the paper or article contributed by him
- e. whether the paper or article was "peer reviewed"

**ANSWER:**

5. Other than the instant case, has anyone ever made claim against you for damages for professional negligence arising out of your medical practice? If so, for each such occasion, state:

- a. the date and place of the claim
- b. the name and address of the person making the claim
- c. the alleged basis of the claim, indicating the type and extent of each injury claimed
- d. the outcome of the claim
- e. if suit was filed, the name and address of plaintiff's counsel

**ANSWER:**

6. If you are covered under a policy of medical liability insurance in this matter, provide the following information concerning each such policy:

- a. the name and address of each insurance company providing coverage, including so-called "excess insurers"
- b. the maximum liability insurance coverage provided by each such policy
- c. whether you are being defended in this action by any such insurer under a "reservation of rights" and, if so, state fully and with particularity the basis for the "reservation of rights" defense

**ANSWER:**

7. Identify each and every article, paper and textbook you may use during the trial of this case.

**ANSWER:**

8. Identify each and every rule, regulation, by-law, or other document of any association, licensing authority, accrediting authority, inspecting or reviewing authority, or other private or public body you may use during the trial of this case.

**ANSWER:**

9. For each and every affirmative defense raised in your Answer to this lawsuit, set forth all facts known to you, your agents and/or representatives, upon which each and every affirmative defense is based.

**ANSWER:**

10. During the period from November 1, 1995 to December 31, 1997, were you associated or in partnership with any other medical practitioner? If so, for each such practitioner, state:

- a. his or her name, last known address, and medical specialty
- b. the nature of your business relationship with each person named
- c. the inclusive dates during which the relationship lasted
- d. the reason or reasons the relationship was terminated

**ANSWER:**

11. Describe fully and with particularity your relationship with Annie Penn Memorial Hospital in Reidsville, North Carolina.

**ANSWER:**

Dated: July 20, 199

---

William F. Horsley  
Attorney for Plaintiff

For the Firm:

William F. Horsley, P.A.  
701 Green Valley Road, Suite 304  
Greensboro, NC 27408

(336) 691-0077

(2143)

NORTH CAROLINA  
ROCKINGHAM COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

File No.

Betty C. Hildebrandt and husband,

)

William Hildebrandt,

)

)

Plaintiffs,

)

)

v.

)

***PLAINTIFFS' REQUEST FOR***

)

***PRODUCTION TO DEFENDANT***

Thomas M. Yarnell,

)

)

Defendant.

)

This Request for Production of Documents or other tangible things in the possession, custody or control of defendant is served on you pursuant to the provisions of Rules 26 and 34, Rules of Civil Procedure. The items requested herein to be produced shall be produced at the Law Offices of William F. Horsley, P.A., 701 Green Valley Road, Suite 304, Greensboro, NC 27408 within 45 days after service of summons and complaint. You may comply with this request by mailing photocopies of the requested items (with the exception of photographs) to the above address within the time allowed by the Rules.

**DEFINITIONS AND INSTRUCTIONS**

1. Defendant is requested to produce the requested documents as they are kept in the usual course of business and to organize and label or otherwise adequately

identify the documents produced to correspond with the categories in the request.

2. This request is intended to cover all documents in the possession, custody or control of defendant or subject to the control of defendant, regardless of the location of the requested documents.

3. This request is intended to include documents within the possession, custody or control, or subject to the control, of all employees, agents, attorneys, affiliates, subsidiaries, representatives or other persons acting or purporting to act for defendant.

4. The term "document" or "documents" means, without limitation, the following categories, whether printed or recorded or reproduced by any other mechanical or electronic process, or written or produced by hand: communications, reports, correspondence, telegrams, electronic mail (E-mail), memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, graphs, reports, notebooks, note charts, plans, drawings, sketches, maps, summaries or records of meetings or conferences, summaries or reports of investigations or negotiations, opinions or reports of consultants, photographs, brochures, movies, video tapes, pamphlets, advertisements, circulars, press releases, drafts, letters, any marginal comments or notations appearing on any document.

Further, the term "document" or "documents" shall include all tangible things by which human communications are transmitted or stored. Designated documents include all attachments, enclosures or other documents that are attached to, or relate to, or refer to such designated documents (whether referred to in the document, or not).

5. Unless otherwise specified, this request relates or applies to the period of time from the first date plaintiff Betty C. Hildebrandt was examined or treated by these defendant to the present.

6. All documents herein requested as to which defendant claims a privilege or statutory authority as a ground for non-production shall be listed or identified as follows:

(a) date of document, (b) title or other identification of document, (c) type of document (e.g., memorandum, correspondence, e-mail, etc.), (d) subject matter (without revealing the information to which privilege or statutory authority for non-production is claimed), and (e) factual and legal basis for the claim, privilege or specific statutory or regulatory authority providing the basis for the claimed ground for non-production.

7. The terms "defendant," "you" and/or "your" refers to defendant and all his or its agents, insurers, attorneys, employees or other representatives.

Produce the Following:

1. Each and every document on which you relied or from which you derived information used in the preparation of your answers to interrogatories served on you with the complaint in this action.

**RESPONSE:**

2. Any and all insurance policies which cover this claim or which protect you from liability, whether or not you are a named insured in the policy.

**RESPONSE:**

3. All documents kept or maintained in any file or chart in your possession,

custody or control on Betty C. Hildebrandt.

**RESPONSE:**

4. Any other document, not already produced in response to this Request for Production, which you contend is relevant in any way to this proceeding.

**RESPONSE:**

5. Your Curriculum Vitae.

**RESPONSE:**

Dated: July 20, 1999

---

William F. Horsley  
Attorney for Plaintiffs

William F. Horsley, P.A.  
701 Green Valley Road, Suite 304

Greensboro, NC 27408

(336) 691-0077









