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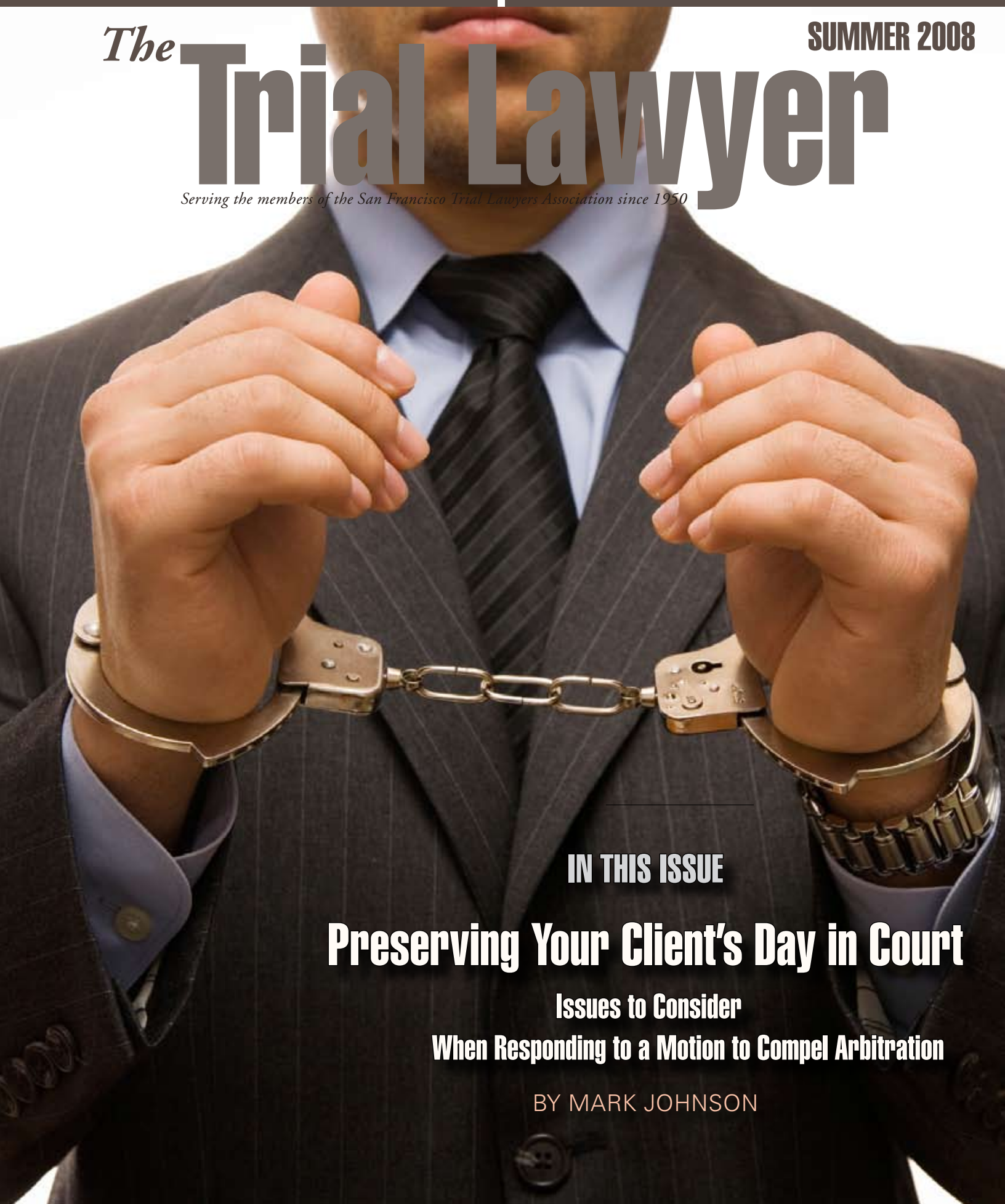

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BY MARK JOHNSON

Welcome to MICRA-world:
A Personal Essay on How MICRA Has Backfired to Hurt Patients

Chuck Geerhart is a regular contributor to The Trial Lawyer. He is a partner with Paoli and Geerhart, a San Francisco Firm specializing in personal injury.

Chuck Geerhart's MICRA-World article continues from the Spring issue of The Trial Lawyer Magazine. If you missed it you can view it online at www.sftla.org.

Interlude: Mediation

The doctor's attitude kept us from committing to mediation for several months because of Prop. 51 apportionment concerns (see Civil Code ' 1431.2). Eventually, in June 2007, we did go to mediation with the hospital and the doctor. The doctor unilaterally canceled his deposition which was supposed to occur the day before the mediation. The hospital offered serious money only for its "fair share," but not enough to settle the case without contribution from the doctor. The doctor refused to consent to any offer. The case was thus stalled and discovery proceeded.

Dr. DOE's Deposition

The doctor's deposition was fascinating, he claimed that the day after he ordered the MRI an unknown radiologist told him they had MRI-scanned her up and down, from neck to tailbone, and had seen no tumor. This story, in addition to being shaky hearsay, was highly improbable, the only MRI in Michelle's chart (indeed, the only MRI taken) was of her lumbar spine. We were convinced that Dr. DOE was lying to protect his own reputation. Still, he would not budge. Dr. DOE's neurology expert said it was not negligent for Dr. DOE to rely on an oral radiology report and not look at the written MRI report or films.

As we moved into expert discovery and intensive trial preparation, I began to see what a cynical land MICRA-world is.

Some Doctors Don't Really Care About Their Patients

Michelle had run out of money. She had liquidated her 401(k) plan. She moved back East to live with her sister and have stem cell therapy (she did have health insurance). Since it was clear that the defense would try to play games with her life expectancy (thereby limiting economic damages), I contacted her local oncologist, the esteemed Harvard-Stanford grad. I told his office I only wanted him to look at her current records and deliver the same opinions he had before about her life expectancy. After some hemming and hawing, his attorney (all doctors hire attorneys in these cases) informed me that the oncologist was too busy to get involved, but that I could subpoena him for trial. This to me was unbelievable, Michelle had really liked her oncologist, and he had seemed cooperative in his deposition.

So I tried plan B: I contacted her oncologist handling the stem cell therapy in Boston. Again, after some hemming and hawing, his staff informed me that the doctor would not get involved in litigation, even though he would not have to offer any criticism of any other doctor. I toyed with the idea of subpoenaing him for a video deposition back East, but in the interim reached a stipulation with all defendants that we could read at trial the deposition testimony from her local oncologist with the three to five year life expectancy estimate. I also planned to subpoena him.

Option C would have been to hire our own oncologist, but I decided to first see what the defense experts would say, since the literature was pretty clear on the numbers.

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Moral of the story #1: Don't count on the doctors your client likes and respects to do anything for the patient in her lawsuit.

Medical Defendants Will Spend a Fortune

In expert discovery, we learned that the hospital, which had seemed like such a stand up outfit in settlement discussions, was going to try to blame peripheral medical treaters for Michelle's paralysis. The hospital and the doctor named 10 experts each, some of them were the same names, indicating that hospital and doctor were playing ball together. There were oncologists and hematologists and radiologists, nurses, neurologists and neurosurgeons. Some of the experts were clearly duplicative (the doctor even disclosed two radiologists). All of the medical experts charged at least $500 per hour some charged $900. This in turn drives up plaintiff's costs.

Moral of the story #2: MICRA is supposed to reduce the costs of litigation, but defendants and their insurance carriers spend phenomenal sums defending cases, even clear liability cases like this one.

Medical Defendants Will Try to Blame Anyone They Can for Their Mistakes

I came to characterize this lawsuit akin to shining the light of truth into a dark room the defendants scattered like cockroaches and sought to blame anyone else they could. The hospital's radiology expert blamed Michelle's family doctor (not a defendant) for a) taking and reading his own plain x-rays on October 4; and b) failing to spot evidence of tumor invading bone that was allegedly visible on the plain film. Plaintiff's radiology expert testified that most radiologists would also have missed the tumor on plain X-rays. In any event, the family doctor did refer plaintiff to the neurologist two days later, so there was a question of whether he could have caused any harm.

The hospital also alleged that the outside radiology group (under exclusive contract with the hospital, but not a named party) was negligent for failing to take all films necessary to "rule out cord compression," as the family doctor's lumbar MRI request stated, and for failing to spot the tumor on scout or localizer films, which are low resolution films used by the MRI technician to zero in the area of the spine to be filmed. (However, the hospital radiology expert admitted later in his deposition that radiologists typically do not read scout films, he was not well-prepared for his deposition.) It was amazing to me that the hospital would try to blame radiologists with the radiology group under exclusive contact with the hospital.

This defense approach forces plaintiffs to sue everyone, even peripheral players, so as not to run into Prop. 51 empty chair problems[3]. This increases case costs dramatically for the injured patient, because once you sue the family doctor and the radiology group, you need general practice and radiology standard of care experts who are both willing to criticize another doctor for only marginal violations. (We had a radiology expert, but not to criticize other radiologists.)

Moral of the story #3: When you shine a light on the malpractice that occurred, defendants will try desperately to deflect blame to others not named in the suit.

A Surprise

One month before trial, in the thick of expert discovery, the neurologist fired his attorney, a very competent med-mal defense specialist. Our hunch, although obviously never confirmed, was that the doctor's attorney was telling him to give consent to settle the case. The doctor fired the messenger. The doctor's new attorney was also a highly competent med-mal defense lawyer.

Playing Games with Life Expectancy

The doctor's new attorney was willing to stipulate to life expectancy as stated by her oncologist. The last somewhat disillusioning tactic by the hospital occurred when its hematology expert testified that he thought Michelle would be dead in less than two years (i.e., less than three years from time of diagnosis, despite having had stem cell therapy). He added an interesting twist: that a major reason why she would die sooner was because of her paraplegia caused by the malpractice. In essence, he was opening the door to a potential wrongful death case as well, if Michelle died before her time.

While every defendant has the right to contest damages, I felt deeply that it was wrong to be playing games with a dying woman's life expectancy. I also believed that a jury would err on the side of the well-established medical averages, since Michelle was doing fine at the time of expert discovery. The defense expert's effort to minimize Michelle's life expectancy renewed my anger at her local treating oncologist for refusing to cooperate as an expert.

Moral of the story #4: The defense will try to minimize its damages even if it means burying the plaintiff before her time.

Endgame: Trial Call

Remember those people in college who studied until midnight on a weekend night when everyone else was out partying? They're doctors now, and they bring the same attitude toward apparently everything they do. Many are perfectionists who despise even the insinuation that they have erred. Dr. DOE's strategy had been all along to wait to see if the hospital would pay his freight, but the hospital was not willing to do that.

While it would be impossible for this case to have a truly happy ending, the doctor's hubris finally succumbed to reality.

The parties reported for trial in October, 2007. On the second day of a court ordered settlement conference, plaintiff entered a "Mary Carter" sliding scale settlement with the hospital with a floor of $500,000 and a ceiling of $800,000. This dashed the doctor's hope that the hospital would eventually pay the entire settlement to avoid trial. The doctor then began to crack a little, but at first he would only consent to a settlement of $29,999 (just below the $30,000 medical board reporting limit), and we were prepared to try the case against Dr. DOE alone. After two more days of court settlement conferences, Dr. DOE agreed to pay $275,000 in addition to hospital's $500,000, for a total settlement of $775,000.

It would have been wonderful for Michelle if the doctor had been able to check his ego at the door and authorized his carrier to pay a fair settlement in mediation five months earlier. This doctor would only respond to brute force, as it were. This attitude is why MICRA cases are so draining for everyone: doctor, patient, and plaintiff's attorneys. Defense counsel seem pretty content with the system, but they're billing by the hour.

Moral of the story #5: Many doctors are very proud people and have to be at trial before they will consent to a settlement.

A Silver Lining

One doctor in the case, Michelle's treating neurosurgeon, stood up to the plate. He would talk to me on the phone (once taking a call from me while he was the NCAA tournament in Oakland). He gave his deposition without an attorney, and strongly criticized the conduct of the treating neurologist. He was willing to come to trial and testify at a fair fee. Perhaps he, too, will become jaded with time. I told him, and Michelle told him, that he was a hero to her.

Conclusion

Here are some points that bear repeating:

- MICRA does not reduce litigation costs. Defendants, especially doctors, fight it out with everything they've got because of ego, hubris, or whatever you want to call it.
- MICRA, in combination with Prop. 51, encourages plaintiffs to sue as many defendants as possible, and for the defense to try to deflect fault onto unnamed parties who are not there to defend themselves
- Consent clauses in doctor's insurance policies cause litigation to drag out while the doctor waits for someone else to settle the case.
- Increased litigation costs come right out of the plaintiff's pocket.
- The medical and insurance lobbies have the system rigged well. We lose fees when we advance massive costs, plus our fees are tightly capped. This is ostensibly to put more money into the client's pocket, but obviously it does not when the defense deliberately drives up litigation costs.
- Some doctors do not want to get involved as witnesses in litigation. This also raises costs for patients because they have to hire their own experts rather than use treaters.
- This case also points up the incredible unfairness of the $250,000 MICRA cap on general damages, regardless of whether a plaintiff is paralyzed, maimed or dead.

This case was incredibly draining for us. We invested a lot of money ($84,000) on costs and expert fees, and this was a clear liability case. It's safe to assume each defendant spent at least this much too. You can imagine how much has to be spent on contested cases.

I had long phone conversations with Michelle as the case dragged on. I explained how the doctor had invented a story about an MRI that was never taken, how the hospital was blaming her family doctor and its own outside radiologists, and how they said she would be dead even sooner than her oncologist said. Through it all, she reacted with grace and humor, such as, "That Dr. DOE, he's stickin' it to me again, isn't he?" This was the great intangible reward in this case, being privileged to represent such a phenomenal woman. I can only hope I will have 10% of her grace and class when it's my time. TL

Postscript: Michelle died of complications of multiple myeloma in January, 2008, less than three months after the settlement was reached. All of the doctors were wrong on life expectancy.

Endnotes

1 The attorney fee limits are:
(a) 40% of the first $50,000.00 recovered;
(b) one-third of the next $50,000.00 recovered;
(c) 25% of the next $500,000.00 recovered; and
(d) 15% of the recovery amount above $600,000.00

2 The case was settled confidentially, hence the use of DOE.

3 It is possible to join healthcare defendants as DOE defendants despite the very favorable statute of limitations the healthcare industry has obtained for itself in CCP ' 340.5, provided plaintiff has complied with CCP ' 474 (i.e., did not have prior actual knowledge of facts suggesting liability against the DOE defendant). See McOwen v. Grossman (2007) 153 Cal.App.4th 937, 943.