

# A View from the Shady Side

*A Defense Perspective*

Brian J. Nash

Throughout my career, I've heard people reference lawyers on one side of the issue as the 'white hats' and those on the other as 'the black hats.' Due to the fact that I am relatively new to the plaintiff side of practice, I figured I would just characterize myself as being one of the 'gray hats.'

When I began my litigation career in 1975 after completing a one year judicial clerkship, I returned to the insurance defense firm of Donahue & Ehrmantraut. Our clients were companies such as St. Paul Fire & Marine, Zurich-American, Chubb, Hartford and so on and so on. Over the years my practice was essentially and virtually exclusively (occasional dabbling on 'the other side') defense of general liability cases until the formation of NCRIC in the early 1980's. After years of doing NCRIC's defense work in medical malpractice, I then added to my favorite client list Washington Hospital Center, which some years later became a member of the MedStar Health healthcare organization.

For reasons that are beyond the scope of this article, my firm began in earnest its transition from the defense to the plaintiff side some years ago.

I provide this background for those of you who may not be familiar with me or my firm, Nash & Associates. We are one of those so-called boutique law firms specializing in medical malpractice, complex civil litigation and the much sought after "catastrophic injury" cases.

Apparently because I can spell the word 'defendant' without having my hand shake with rage and disgust, I have been asked to share with you my thoughts on "medical negligence – the defense perspective." I suspect I may be somewhat qualified to do just that – so here we go - but where to start...

In beginning this literary journey, I have wondered just how qualified emotionally I am to give you a universal sense of a defense lawyer's perspective on medical malpractice



cases. As those of you who have dealt with 'us – the defense bar - know, we come in all shapes and sizes – figuratively speaking. There are those of my former defense confreres who see plaintiff's counsel as 'bottom feeders' with no real purpose in life other than to provide a steady source of cases for their own livelihood. Most interesting to me since my epiphany some years ago is that those same former colleagues of the defense bar now see me as a 'bottom feeder' as well. It's been quite an interesting epiphany. For some defense lawyers, one size does fit all – no plaintiff lawyer is well intentioned or truly has the interests of the client at heart. This has been disconcerting to say the least.

So with this disclaimer, I proceed on to give you 'the defense perspective.'

Will I admit that when a case first arrives on a defense lawyer's desk the first thought is: "how many ways can I figure out how to defeat this bogus lawsuit?" – I did exactly that -beyond any doubt. Step One: There are standard procedural issues that every defense lawyer analyzes including the obvious: Did this plaintiff lawyer blow the statute of limitations as to any of the counts? Did the plaintiff's lawyer run amiss of the procedural labyrinth called the Health Claims Arbitration Act? When is the Certificate of Qualified Expert due and will the opposing counsel make a mistake in either a late filing or an inadequate report *attached* to the Certificate? Is there some way that I, as a defense lawyer, can challenge the statutorily mandated qualifications of the certifying expert? Note – we haven't even begun to consider the merits of the case.

After engaging in the procedural defense analysis, Step Two is to begin analyzing the substantive aspects of the medicine. Is there any doubt that a defense lawyer has an



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almost endless list of experts to engage to counter plaintiff's experts? At times it seems like they are standing by their phones waiting to help slay the Evil Dragon – no, not the plaintiff but the cur who had the audacity to question a physician's judgment and skill – yes, you!

When there are co-defendants, which is often the case, the task is all the easier since cooperation and getting the story straight is a hallmark of good defense counsel. Of course, there are those who would throw the co-defendant under the bus and are quite skilled at doing this, but we all know who they are and there are not too many of them. You are, therefore, facing a united front on the defense team. Information, records, background checks and experts at times are readily shared for the common good.

Step Three: Yes, there is also the paper war. Defense counsel loves discovery (contrary to popular belief) since time is money. I know you know that, but do you truly appreciate what that means in terms of getting your case resolved?

The one thing I have noticed since my conversion is the depth of my abject frustration when dealing with defense lawyers in trying move a case along in a timely and meaningful fashion toward resolution. Yes, I now get it – the only way to see a payday on *our* side of the courtroom is by settlement or

verdict. It seems that the only way to bring about either one of those events is to file your lawsuit. Pre-suit settlements are becoming quite the rare event.

The longer a case muddles on, the better the payday for the defense lawyer. Hopefully there are still some defense lawyers who know that early resolution really *is* in their client's best interests. I am starting to wonder, however, if those defense lawyers are becoming extinct.

What you must keep in mind as well is the fact that defense firms typically make money by dealing in volume. The more cases, the more staff, the more lawyers – the better the firm's income stream. When the top defense lawyers in the state are barely making over \$200 per hour, you need a lot of billable hours and a lot of billing people to make a decent living. Volume has its own problems. How often have you been involved with trying to get a case scheduled for trial and you are wondering if the defense lawyer has any free dates in the next millennium? Are you having a lot of fun when trying to schedule depositions? I now know the frustration of trying to practice law with civility and get my cases moving forward at other than glacial speed. Parenthetically, let me take this moment to apologize to all those out there in the plaintiff bar whom I frustrated with scheduling issues these past many years. I really was busy!

On the plaintiff's side, we all know how much time, effort and money is invested in the investigative process. The maxim of the computer world can readily be adopted – junk filed – junk result. This is where the advantage has always been known to exist for the plaintiff lawyers. A defense lawyer gets a case in at the same time he or she is working on about twenty or thirty other cases. The initial administrative activities take-up the initial phase of the case: acknowledging receipt of the file, getting it set-up in the system, doing conflicts checks. There is barely enough time to read the Statement of Claim and figure out if your client has been properly served and then engage in the procedural checklist I alluded to before. Defense lawyers do not, contrary to popular belief, have access to HIPAA protected records.

Defense lawyers are at a distinct disadvantage since they do not have all the necessary records to formulate a complete defense strategy. What may be perceived as delay for the sake of delay is really delay to try to get caught up with the plaintiff's lawyer in terms of knowledge of the facts of the case. Keep in mind, virtually every insurer is breathing down a defense lawyer's neck for the infamous 90 day report. What is this, you ask? Defense lawyers are required to unpack their crystal ball and make determinations on the case's value, the chances of winning, costs of defense, costs of experts and so on and so on. We barely have the medical records three-

hole punched in 90 days. What's the down side from your perspective? Many times case reserves and perceptions are formulated early on in a case by the insurers, and it takes an Act of God to alter those impressions and estimates. You wonder why – other than the cynical motive of 'time is money' – you can not get resolution of a case until right before trial in most instances? Defense lawyers are playing catch-up for most of the early part of a case. Sometimes early is unfortunately defined as being right-up to the courthouse steps.

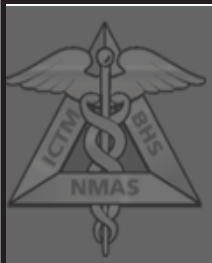
At a recent conference of the Maryland Association for Justice (MAJ), there was a fair amount of discussion about cooperation between the plaintiff and defense lawyers. Topics ranged from providing information about your client's case (e.g. damages) to working with defense counsel to establish critical lien information – particularly in the context of Medicare and Medicaid liens. While the latter makes common sense and should be the new approach to cooperation, the former is not always so obvious to plaintiff counsel.

You must keep in mind that the authority to settle cases does not come from a hidden vault just waiting to be exhausted by settlements. Insurers, whether third party insurers or self-insurers, are required by law and regulations

to establish reserves on their cases. While no lawyer fully understands the system employed by insurers when setting their reserves and while there probably is no uniform method for setting reserves, the basic concept of reserving is critical for plaintiff counsel to understand.

Simply stated, a reserve is an amount of money set aside for a particular claim. The amount of the reserve is essentially a prediction of what that claim will likely be worth in real dollars at the time of resolution. As you can see, a reserve would, therefore, take into account special damages (wage loss, medical expenses, household services, etc.) both past and future. There is also the component of pain and suffering, loss of consortium, solatium in Wrongful Death actions – the typical 'non-economic' damages. Additionally, a key component in setting a reserve is an assessment of the relative strengths and weaknesses of a given claim. This typically includes the jurisdiction where the action is being brought or will be brought, the 'attractiveness' of the claimant, the skill level of the plaintiff's attorney, the existence of co-defendants and their relative risk-sharing for the loss, and so on.

Reserves are critical to the orderly operation of any insurer. Payments 'over reserve' are to be avoided since they affect the overall profitability of an insurer or self-insured institution.



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They are set at an early point in a case. While they are subject to modification over time, those modifications are not favored if they are far in excess of the original valuation made at the case's inception. When they need to be significantly adjusted, time is a key ally to the insurer. No company likes to 'bump' a reserve significantly at any one given period of time. My experience has been that insurers would rather spread-out the adjustments so as not to have a dramatic impact at any given time on the bottom line. Again, not all companies approach the reserving process in the same manner; however, there are common issues and approaches taken regardless of the company. The initial reserve is a key time in the life of a case.

I stress this point since I truly believe that understanding the process and the psyche of adjusting reserves is critical to a successful, timely resolution of a plaintiff-client's case.

In my experience on both sides of the courtroom, I have come to believe that one of the worst mistakes made by plaintiff's counsel is not providing as much information about a case's value at a very early stage in the claim/litigation process. Too many times I have heard the mantra (and more so now in tough economic times): "I might as well file since the only way I'm going to get money is to get a court date." While I am a firm believer that this is a truism in today's litigation world, I also believe that it obscures a critical factor in achieving any form of meaningful early resolution for many cases.

There is no doubt that the economic burdens of a plaintiff's malpractice practice are tremendous. I must admit, I had no true appreciation for what those costs were – it can be and often is simply staggering. What this has led to in many instances, however, is a desire to file cases quickly before a full assessment of a case's potential value is revealed.

We are all well aware of what a life care plan can cost. As we are trying to allocate dollars for experts and deposition costs, there is a tendency to delay obtaining these reports as a cost-savings measure. I am becoming more and more convinced that obtaining documentation of your case's value through life care plans and/or economic reports in the early phase of litigation (if not before) is critical to helping establish a meaningful reserve for the insurers. When defense lawyers submit reports setting forth items of special damages and case value predictions, that section of the report is often described as 'too early to determine.' Why? If the defense lawyer is not given information of past and future special damages and the nature and extent of injury early in the process, they do not have sufficient information to report. General predictive values are then attached to a case based on a company's reserving strategy. This is where the problems associated with early resolution many times occur.

What transpires next is the seemingly endless and costly discovery process. Of course, this is many times necessary to establish the validity of your case, but it is simply a mistake to unnecessarily delay the revealing of the 'true value' of your case. You can not always control the insurer's perception of your case's validity from a liability standpoint, but you can control their assessment to some degree of risk potential by simply providing key information about exposure when you reveal early in the process the damages you will be seeking and the nature and extent of your client's injuries. Remember: reserves are initially set early in the process and insurers are reluctant to make significant alterations in a short time frame. If you provide this information early in litigation, you avoid the defense lawyer's bailout response – "too early to determine." While you do not directly participate in the setting of a case reserve, you can most assuredly affect the setting of the reserve through early disclosure of your damage claims. Simply put – if you have a significant claim, let the defense know it early.

There is no doubt that the discovery process is the bane of a plaintiff lawyer's existence in many instances. A good defense lawyer has developed methods by which to have a case progress. There is the form written discovery. I recognize that there is sheer frustration when you receive interrogatories asking about when your living client died and who is the personal representative of the estate or conversely questions about your client's current activities in a wrongful death action (when only a séance could provide those answers). However, failure to timely and completely respond to proper discovery is yet another way to further delay resolution of your case. Be aware that receipt of responses to outstanding discovery is calendared by good defense lawyers. While they may not (and often do not) respond in a timely fashion, they are primed to file the ubiquitous motion to compel when you are late. Sure – there is always the 'courteous' or 'civil' approach. "You are late so I'll be late too – no harm no foul." However, and I can not stress this enough, by you being timely and complete with your discovery responses, you are enhancing the chances that a proper reserve will be set by the insurer. Delay serves absolutely no purpose for plaintiff's counsel. While one might cynically argue that it serves the interest (i.e. monetary) of defense counsel to string-out a case, you must learn to look beyond defense counsel. They do report; they are required to do so frequently. Your discovery responses will provide new insight into the potential value that must be attached to your case. Even if defense counsel does not take the time to read your discovery (we'll put aside whether they bill for doing so) in a meaningful fashion, they are almost robotic in their practices of timely forwarding discovery responses to the insurer. It is done like clockwork in most defense law firms.

The same principles of timely and full disclosure apply to all other phases of litigation. Delaying discovery is a major problem toward early or at least timely case resolution. Aggressiveness takes many forms. If you take basic steps such as providing medical records or HIPAA forms so that defense counsel can get access to your client's subsequent medical treatment, you are solving an age-old problem of defense ignorance of the value of your case. I can not tell you how many times as a defense lawyer I had to go through the subpoena process of record custodians *after* I waited for discovery responses in order to find out what the history of care and disability was for a plaintiff. What are you gaining by not making this information known early in the process? One answer is simply the setting of a low reserve. This unequivocally translates into delays in recognition of your case's value and late resolution of valid cases. Can you control the speed with which insurers respond to your requests for resolution? Not really. However, you most assuredly can get their attention and more rational evaluation of predictive value (i.e. case reserve) early in a case.

While there are certain insurers who simply will not engage in early case resolution no matter what you do, they are becoming more the minority. On an insurer's ledger sheet is the component of defense costs – attorney's fees, expert fees, deposition costs and the like. If you can demonstrate early to an insurer that your case has validity and value – notwithstanding the delays occasioned by their counsel – they will often want to resolve your case earlier than later. It serves no purpose for the insurer to continue to pay defense costs in a case that they are ultimately going to want to settle. You need to convince them *early on* that they will want to settle and do so before costs on both sides become a contributing factor toward impeding resolution.

The adage 'the squeaky wheel gets the grease' does have validity in this context. Aggressive and thorough disclosure of your case should be your custom and practice, not the exception. Take it from one who knows – delay on the part of the plaintiff's counsel just buys time (and billing) for defense counsel. Time means money? It sure does – unfortunately it's your client's money and your fees and costs that are delayed! Even though the initial investment of costs for records and reports can diminish the bottom line of your business, they are essential in moving a case forward. Try the new approach being suggested here. The worst that can happen is that you are all the more prepared to timely and competently try your case if that turns out to be the 'resolution' the defense requires.

I have lived the life of a defense lawyer. Having done so, I know the principles of timely claims evaluation I have tried to share are time-proven and true. It is up to you, My Fellow

White Hats, to take more control of the frustrations we all encounter through timely and thorough unveiling of your next great case. As for myself and the gray hat I apparently wear for now, as Martin Luther King Jr. put it – "We may have all come on different ships, but we're in the same boat now." Let's all make this a quicker and more successful boat ride together. ■

## Biography

**Brian J. Nash** graduated from the Columbus School of Law in 1974. He served as the Law Review's Casenotes Editor. He is admitted in Washington, D.C. and Maryland. Upon graduation from law school, he clerked for the late Honorable Herbert F. Murray in the United States District Court for the District of Maryland.

He has been a partner in several law firms, most recently in the firms of Montedonico, Hamilton, Altman & Nash and Wharton, Levin, Ehrmantraut, Klein & Nash. In March 2002, he formed his current firm of Nash & Associates. He is a member of the American College of Trial Lawyers and the American Board of Trial Advocacy. His practice areas are personal injury with special expertise in the fields of medical malpractice and catastrophic injury.

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