

# How are you going to get me out of this case?

by Thomas O'Neil

*This is a question that defense lawyers hear on an almost daily basis from clients. In defending physicians in malpractice actions, this question has a particular urgency as physicians are concerned about the effect a case may have upon their insurability, hospital privileges and standing before the Medical Board.*

While lawyers are familiar with the methods by which a physician defendant can be extricated from a case, the legal machinations are undoubtedly a mystery to the physician. This article will describe the more common methods, voluntary and involuntary, that lawyers may employ to extricate their clients from lawsuits.

Involuntary dismissals occur when the court grants a motion made by the defense under statutory provisions that may attack the pleadings, the merits of the plaintiff's case, or even the jury's verdict.

A Demurrer is a vehicle to attack the legal sufficiency of the Complaint to state a cause of action. Under Code of Civil Procedure Section 430.10, et seq., a defendant may file a Demurrer to challenge all or any part of the plaintiff's Complaint. In cases involving allegations against physicians, or other health care providers, a Demurrer is most often used to attack causes of action for intentional conduct allegations of elder abuse, or causes of action seeking punitive damages. Plaintiffs frequently attempt to use these causes of action to get around the limitations in damages and attorney fees provided by MICRA (applicable in malpractice actions). A Demurrer can be a very effective tool in eliminating such causes of action.

A popular method to try to extricate a defendant from a case is to file a Motion for Summary Judgment. Pursuant to Code of Civil Procedure Section 437c, a party may bring such a motion if it is contended that the action has no merit. Unlike a Demurrer which attacks the legal sufficiency of the Complaint and is limited to matters contained in the four corners of the document itself, a Motion for Summary Judgment allows the court to look at the facts and the evidence supporting the allegations.

*"The methods that defense lawyers use to try to achieve a successful outcome for their clients differ from case to case, and there are legal, strategic and practical reasons to be considered."*

Motions for Summary Judgment typically are addressed to issues such as the statute of limitations, if the defendant physician violated the standard of care and whether such violation was the cause of injury to the plaintiff. Frequently, the defense will file a Motion for Summary Judgment supported by an expert declaration that the care rendered by the defendant physician complied with the standard of care, and was not causally related to any injury. Unfortunately, the court cannot grant a Motion for Summary Judgment if there are material disputes of fact between the competing declarations or evidence.

Motions for Summary Judgment are most effective when plaintiffs are making a spurious claim that cannot be supported by an expert witness.

Another vehicle for achieving a dismissal is a Motion for Judgment on the Pleadings brought under Code of Civil Procedure Section 438. A Motion for Judgment on the Pleadings is similar to a Demurrer, and attacks the Complaint on the ground that the Complaint states facts sufficient to constitute a cause of action against the defendant.

Once trial has commenced, there are also vehicles by which a defendant can seek dismissal from the court. After the plaintiff has completed opening statement, or after the presentation of the plaintiff's case, a defendant under Code of Civil Procedure Section 581(c), may make a motion for nonsuit. This motion challenges the sufficiency of plaintiff's evidence to prove a prima facie case.

Following the presentation of all the evidence, the defense may make a motion under Code of Civil Procedure Section 630(a) for a directed verdict. This motion challenges the legal sufficiency of the plaintiff's evidence.

If the case ultimately goes to jury, the best resolution for the physician is a defense verdict. However, in the event of an adverse verdict, the defense may make a motion

under Code of Civil Procedure Section 629 for a judgment notwithstanding the verdict (JNOV). The JNOV motion challenges the legal sufficiency of the evidence to support the jury's verdict.

If these motions are ultimately unsuccessful, the defense may still pursue its right to appeal.

A voluntary dismissal occurs when the parties reach an agreement and the plaintiff agrees to dismiss the defendant. A voluntary dismissal can occur at any time from the filing of the Complaint, through trial or even during the appeal process. One of the more frequent causes of a voluntary dismissal is a monetary settlement. However, voluntary dismissals can occur even when no money has changed hands. There are many times

throughout the course of litigation when a plaintiff may elect to voluntarily dismiss a defendant physician from a case. It may be that the case is not as strong as originally thought when filed. It may be that the cost of litigation is so high and the potential reward so low that it does not justify going forward. Or it may be that the plaintiff sued a number of defendants and is now looking to "thin the herd" and focus on the target defendants.

The methods that defense lawyers use to try to achieve a successful outcome for their clients differ from case to case, and there are legal, strategic and practical reasons to be considered. In conjunction with their clients, lawyers will devise a strategy that may include one or more of these methods. ■

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