HANDLING DISCOVERY CONFLICTS IN A PROFESSIONAL MANNER

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As fewer and fewer cases are tried, the battle which formerly took place in the courtroom has moved to the discovery phase of litigation. Posturing, stalling, and finessing are now where cases are won and lost. Unfortunately these tactics only ratchet up the tension between attorneys and tend to further aggravate an already contentious situation. This is the moment when one stands at the crossroads, deciding whether to give in to the emotion of the moment or be the adult in the room by acting professionally.

Ethical behavior is of course the minimum our profession demands; professionalism is what we should aspire to. Yet this often conflicts with the "bulldog" your client thought they hired. So how does one fight for the information necessary to win a lawsuit while not getting down in the mud. Rather than focusing your efforts on lambasting opposing counsel, direct that energy toward documenting in appropriate behavior, following the court rules and when necessary, seeking assistance from the court. Remember the discovery clock is ticking away and waiting too late to resolve discovery conflicts can be detrimental to your case and your client. So how does one handle these disputes and yet stay above the fray?

1. SETTING THE TONE

Whether filing the Complaint or working on an Answer, the beginning of a case is always the best time to set the tone of the discovery process. Understanding that medical malpractice cases usually involve many of the same attorneys, just as there are those with which you have good relationships, there are some that you don't. However, sometimes a bad relationship was the result of an unreasonable client or horrendous facts. The beginning of a case is an opportunity to "reset" that relationship. Make a phone call or arrange a lunch to see if you can

start the process on the right foot. Understanding it may be difficult in all situations, making the effort is never a complete waste of time. Each new case is a chance to make a fresh beginning.

2. DISCOVERY PLANS and SCHEDULING ORDERS

Decades ago "case management" was not really a term. Courts and judges had no interest in overseeing their caseload and even if they did, it was an unwieldy process. Today, technology not only makes it an easier task, but county and state agencies are actually expecting courts to actively manage their caseloads as a way to measure a court's performance. Individual courts and the State Administrative Office of the Courts (AOC) actually review case counts, closure rates, and other statistics as they are used to measure court performance and assess the need for additional judicial assistance. Point being, more and more courts are going to be managing their caseloads and expecting attorneys to move their cases.

It is also an attorney's duty to be conscious of the progress of a lawsuit. Rule 3.2 of the Georgia Rules of Professional Conduct, Expediting Litigation, states:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Although some attorneys bristle at the notion of having to adhere to the strict rigors of a scheduling order, it is hard to imagine conducting litigation without it. Litigating a medical malpractice case without a scheduling order would be like playing a baseball game and not knowing how many how innings you had or players you could substitute. Without one, it's as though you're adrift not knowing when the court might impose deadlines, when experts will be disclosed, how long you have to take depositions or file motions, etc. In many respects it provides a fair playing field where everyone is obligated to follow the same rules and guidelines.

Some courts issue scheduling orders in every case, as a matter of course. Other courts rarely issue them or have little experience with them. If the court you are in does not regularly require scheduling orders, I would suggest asking for one, or jointly submitting one with opposing counsel. It is actually the best way to hammer out the ground rules and understand the expectations as the case proceeds.

Georgia Uniform Superior Court Rule 5.4. actually provides for a planning conference and discovery plan. This rule, adopted in 2015, permits parties to request such a conference, if the judge doesn't require it. It allows for parties to plan out the discovery phase as follows:

a. Consider the nature and basis of the parties' claims and defenses and the possibilities of settling the case;
b. Resolve any issues regarding the scope of preservation of information;
c. Discuss the preparation of a discovery plan; and
d. Discuss any such issues as are relevant to the case.

It also provides for the filing of a discovery plan or scheduling order, which may include the following:

a. A statement of the issues in the case and a brief factual outline;
b. A schedule of discovery including discovery of electronically stored information;
c. A defined scope of preservation of information and appropriate conditions for terminating the duty to preserve prior to the final resolution of the case;
d. The format by which electronically stored information will be produced; and
e. Sources of any stored information that is not reasonably accessible because of undue burden or cost.

If there is a scheduling order in place, be sure to check and see if there are directives from the court regarding discovery disputes. It has become much more common for judges and staff attorneys to request an email or phone call regarding a dispute, rather than having to address a filed motion. If a motion is the course you must take be sure to follow all the court rules.

3. BOILERPLATE OBJECTIONS

Somewhere in a dark small room at the firm of Will We, Cheat'em & Howe, a first year intern sits compiling pages of boilerplate objections to discovery requests. For starters they are patently unethical[1] and unprofessional. Rule 3.1 of Georgia Rules of Professional Conduct, addressing Meritorious Claims and Contentious, states:

> In the representation of a client, a lawyer shall not:
> (a) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;
> (b) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

These types of objections are in no way useful, and only slow down the disclosure of information that will eventually be revealed. Bad facts never go away, and boilerplate objections just prolong the inevitable. Additionally, simply claiming the request is overly broad, irrelevant, constitutes work product or violates attorney-client privilege in order to avoid answering discovery, will never put you in the good graces of the court and may subject your client to an award of attorney's fees, if there is a finding that the objections lacked substantial justification and were made simply for harassment or delay.

4. PHONE CONFERENCES

If discovery has hit a wall and you can't seem to get the responses or cooperation you feel you are entitled to requesting a phone conference with the judge may quickly resolve the situation. Understanding that some judges will never entertain a phone conference, if you can at

[1] *BOILERPLATE DISCOVERY OBJECTIONS: HOW THEY ARE USED, WHY THEY ARE WRONG, AND WHAT WE CAN DO ABOUT THEM*, 61 Drake L. Rev. 913, Spring 2013.

least communicate with the staff attorney, they may assist you in getting access to the judge. The staff attorney is the one that would have to deal with any Motions to Compel, and they would much rather not write another order addressing each interrogatory and response, if a phone call will cut to the chase.

By requesting a phone conference you are actually accomplishing two things. First you are demonstrating to the court your frustration, assuming it is legitimate, and all reasonable efforts to resolve any disputes have been made. Secondly, if the opposing counsel has in fact been unreasonable, the fear of a phone conference with the judge will usually resolve most if not all the disputes. Obviously you need to know your forum and whether the judge is amenable, but often a staff attorney can offer guidance.

5. GOOD FAITH LETTERS

Superior Court Rule 6.4, *Failure to make discovery and motion to compel* is very specific and failure to comply with the rule will result in your denial of that motion. Part (B) of the rule, often referred to as the Good Faith Letter, is the prerequisite to filing a Motion to Compel and it states:

> (B) Prior to filing a motion seeking resolution of a discovery dispute, counsel for the moving party shall confer with counsel for the opposing party and any objecting person or entity in a good faith effort to resolve the matters involved. At the time of filing the motion, counsel shall also file a statement certifying that such conference has occurred and that the effort to resolve by agreement the issues raised failed. This rule also applies to motions to quash, motions for protective order and cases where no discovery has been provided.

As simple as this appears, attorneys often miss crucial parts of the rule. The rule requires a **statement** certifying that the **conference has occurred**. Although there is no clear definition of "statement" it would seem that a copy of an email where you previously asked for the information or threatened to file a Motion to Compel if the information wasn't provided, is

actually not a statement that the conference has occurred. Additionally, Rule 3.3 of the Georgia Rules of Professional Conduct, Candor Toward the Tribunal, states:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of material fact or law to a tribunal;

Filing a 6.4 Good Faith Letter when you have failed to actually have a conference, would violate this requirement.

If you anticipate asking for attorney fees, the 6.4 letter can actually be your best friend. It is your opportunity to document in detail all the efforts you have made to resolve the matter before involving the court. It can demonstrate how uncooperative opposing counsel has been and may actually further enhance your claim for fees.

Additionally, the requirement is that "**counsel** shall also file a statement…" which means the letter verifying that a good faith effort has been made, must come from the attorney, not a paralegal or administrative assistant. The attorney is the officer of the court and the duty to make the effort falls upon the attorney of record, not someone in his or her office.

Finally the spirit of the rule is that the parties make a good faith effort. What constitutes a good faith effort will be for the court to determine; however, one email probably doesn't rise to the level of demonstrating a genuine effort. The purpose of this prerequisite is to place the burden of attempting to resolve the dispute on counsel, prior to involving the court. Failure to demonstrate an actual attempt will not only result in your motion being denied, but will likely aggravate the court.

6. MOTION TO COMPEL

When all else fails, there is no choice but to file a Motion to Compel. Part (A) of the rule states that when filing a motion to compel, the motion **shall** contain the following:

(1) Quote verbatim or attach a copy as an exhibit of each interrogatory, request for admission, or request for production to which objection is taken or to which no response or insufficient response is provided;

(2) Include the specific objection or response claimed to be insufficient;

(3) Include the grounds for the objection (if not apparent from the objection); and,

(4) Include the reasons supporting the motion. Any objections shall be addressed to the specific interrogatory, request for admission, or request for production and shall not be made generally.

These are therefore necessary parts of the motion, which must be included. Again this sounds rudimentary; however, discovery disputes are usually the first time a judge becomes involved with a case. Without the actual discovery requested and the objections asserted, a judge has no context upon which to rule. The reasons supporting the motion must also be specific as they are not to be asserted or "**made generally"** Again, a letter simply stating what was requested and that it wasn't supplied, may not afford the judge the real reason the objection was made or the discovery not responded to. Failing to provide the court with these basics could result in a denial of your motion.

7. IN CAMERA INSPECTIONS

When confronted with sensitive or possibly privileged discovery requests, even if the court orders production or responses, you can always suggest that the material first be sent to the court for an in camera inspection. Most of the time when that is recommended, I will default to the request, simply to ensure myself the material is discoverable. I don't think it is ever a bad idea to suggest to the court that they do this preliminary review if you have any concerns about the content of the requested discovery.

8. DEPOSITIONS

Unfortunately I have read and/or seen too many examples of unprofessional behavior in depositions. Often it begins with an inappropriate notice of deposition or unreasonable requests or fees demanded by the deponent, such as an expert witness. Reverting back to the importance of the scheduling order, arranging expert depositions as soon as possible avoids some of these issues. As for unreasonable fee requests, I have been asked on occasion to intervene when an expert's fees for sitting for a deposition are exorbitant; however, there is little the court can do in this regard. As a courtesy, counsel on both sides should consider this when retaining experts, if at all possible. Additionally, an expert that charges rates beyond those normally expected usually comes with other issues that will often be damaging to your case.

As for unprofessional behavior in a deposition, each side has a duty to adequately prepare their witness to be responsive and cooperative. Obviously that is not always possible, but again, bad facts are bad facts, and they will not change simply because a witness doesn't want to respond. Rule 3.4 of the Georgia Rules of Professional Conduct, Fairness to Opposing Party and Counsel states:

> A lawyer shall not:
> **(a)** unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

As for attorney's behavior, it has fortunately been a long time since I got a phone call from counsel during a deposition, alleging misbehavior. The prevalence of videotaped depositions has in some ways reduced these incidents. The best approach is to document the behavior on the record and move on. Preserving unreasonable behavior by counsel or a witness

provides you with ammunition down the road to request another deposition and ask that the uncooperating party foot the bill.

CONCLUSION

I routinely tell young lawyers to remember that everyone is just trying to do their job and that acting unprofessionally will in the end only hurt your client and tarnish your reputation. One reason "a man who is his own attorney has a fool for a client," is because it is too difficult for a party not to be emotional and irrational. Besides being hired for your expertise, you are being hired to be professional. Every once in a while we need to be reminded what that entails. Below is the Lawyer's Creed and the Aspirational Statement on Professionalism, with introductory remarks from the Chief Justice's Commission on Professionalism. Take some time to remind yourself of these important principles and remember we do not just go to work, we belong to a profession.

LAWYER'S CREED AND ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Lawyer's Creed and Aspirational Statement on Professionalism were developed by the Chief Justice's Commission on Professionalism to encourage, guide and assist individual lawyers, law firms, and bar associations. These documents have been widely distributed among the lawyers and judges of Georgia through CLE programs and Commission events. A number of local bar associations have used these documents as the basis for bar pledges and creeds. Several law firms have incorporated these documents into their firm mission statements. The Commission's hope is that members of the profession will recognize the special obligations that attach to their calling and will also recognize their responsibility to serve others and not be limited to the pursuit of self-interest. The Creed and Aspirational Statement cannot be imposed

by edict because moral integrity and unselfish dedication to the welfare of others cannot be legislated. Nevertheless, a public statement of principles of ethical and professional responsibility can provide guidance for newcomers and a reminder for experienced members of the bar about the basic ethical and professional tenets of their profession. The Lawyer's Creed and Aspirational Statement on Professionalism were adopted by the Commission in 1990 and by Supreme Court order made a part of the Rules and Regulations for the Organization and Government of the State Bar of Georgia.

The Lawyer's Creed and Aspirational Statement on Professionalism have been adopted by the Chief Justice's Commission on Professionalism and incorporated into the Rules and Regulations for the Organization and Government of the State Bar of Georgia. The purpose of the Lawyer's Creed and Aspirational Statement on Professionalism is to serve as encouragement, guidance and assistance to individual lawyers, law firms, and bar associations as they recognize the special obligations that attach to their calling and their responsibility to serve others.

The Creed and Aspirational Statement cannot be imposed by edict because moral integrity and unselfish dedication to the welfare of others cannot be legislated. Nevertheless, a public statement of principles of professionalism can provide guidance for newcomers and a reminder for experienced members of the bar about the basic tenets of our profession.

A LAWYER'S CREED

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and

courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar's efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community. It is the Court's hope that Georgia's lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications of the practice of law in our society and to consider the implications of those justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.