Interview with Barry D. Goldberg—Medical malpractice

Barry D. Goldberg of Goldberg & Goldberg Chicago, is a specialist in civil trial, negligence and tort litigation with emphasis in the area of medical malpractice and products liability. A graduate of the University of Miami (B.B.A., LL.B.) he is a member of the Illinois, California and Florida Bar Associations as well as the American College of Legal Medicine, the American Academy of Forensic Sciences and the Board of Directors of the Illinois Trial Lawyers Association. Mr. Goldberg is also a chapter author for various IICLE handbooks and has had 83 articles published in various journals and legal publications and is a columnist for the Chicago Daily Law Bulletin and Co-Editor of the Illinois Trial Law Journal. He is a former Professor of Law at the John Marshall Law School and presently teaches medical malpractice, products liability and torts at the IIT/Chicago-Kent College of Law.
TDJ: What type of medical malpractice case is the most difficult to try?

BDG: All medical malpractice cases are difficult to try. There is no such thing as an “easy” case. The most difficult, I suppose are those in which a question of fact will be determined by the credibility of the witnesses; the credibility of the patient versus the doctor. Who will the jury believe?

I do believe that doctors carry with them into court the presumption that they are more believable than the lay person. There is that carry-over that doctors are omniscient, clairvoyant, Godlike in all respects and revered. Even in 1985, that impression remains in society’s mind. So doctors still have that advantage and, perhaps, rightfully so. There are many doctors who could be considered in that light. Unfortunately, there are many who shouldn’t be.

TDJ: Could we go through the typical malpractice case from beginning to verdict?

BDG: The one caveat in any malpractice case is that the case must be reviewed by a medical expert from the outset. My philosophical approach to medical malpractice is that the lawyer has a duty to the client (patient), to the medical profession and to the legal profession to investigate every single case. There are, of course, a few rare exceptions to this, such as a physician cutting off the wrong leg or leaving a sponge in the patient’s abdomen. Those cases need not be reviewed.

Typically, when a client comes into your office they are disgruntled and have serious questions about the medical care they have received. They want the lawyer to supply the answers. Many clients with non-meritorious cases end up in the lawyer’s office because there has been a breakdown in communication between the medical providers and the patient. This could be either the doctor, the nurses or the hospital administration. Possibly no one would answer the client’s questions, so he turns to a lawyer for the answers.

The lawyer’s first step is to obtain all the medical records including X-rays, and a complete statement of the facts from the client. The lawyer should have some working knowledge of the medical issues involved in order to determine whether the records are complete and the type of expert needed to review them. In any event, all of the records must be sent to a consultant for review. I use the term “consultant” in its broad sense because, over the years in my practice, I have accumulated over 2,000 physicians and other specialists from all over the country whom I work with from time to time and are available to me. So regardless what state I am in or where I may try the case, the records are sent to the proper specialist who then becomes my consulting expert.

When that consultant gives me the light that says “Go,” and there is no doubt about it, I file the lawsuit. Usually, however, I have two consultants review the case to give me a perspective from allied fields. For example, if the claim is a neurosurgical case, I will send the records both to a neurosurgeon and a neurologist. That’s because a neurosurgeon may not be totally objective when confronted with a situation he recognizes might have happened to him. He is, therefore, uncomfortable passing judgment on a colleague. It’s not a matter of dishonesty, but rather an unconscious sense of professional compassion or sympathy. The neurologist, on the other hand, will not hesitate to say “No, this should have been done.”

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If, after consulting with two experts, I am told there is no evidence of malpractice, then I bring the client in and explain this. I will answer all of their questions and then close the file. The clients are generally satisfied. They have their answers and explanations and that’s where it should end.

Once the lawyer makes the decision to file suit, he or she must have a total commitment to the prosecution of the case. Malpractice cases are the most heatedly debated, hard-fought cases imaginable because the issues involve the professional reputation and egos of the defendants. When tried, they are fought tooth and nail. Medical malpractice cases are also very expensive to handle in that they require substantial expenditures of money for costs and a vast amount of highly skilled lawyers’ time.

Moreover, I have found that across the country, the medical malpractice defense bar comprises the best, most experienced and aggressive litigators. The Plaintiff’s lawyer, thus, finds himself in an arena pitted against the best of the lot in trial litigation. These Defense lawyers normally have unlimited funds and unlimited access to qualified doctors who are willing to testify in behalf of their clients.

I recently tried a case in which the Defendants retained eleven experts, including nine doctors. The Defense experts consolidated their efforts to achieve a unified approach. The case involved a baby who was severely brain damaged. In this very complex case I was fortunate to have my own very honest and extremely capable expert physicians to assist me in evaluating the case as a whole to discern its strengths and weaknesses. I had six such experts from different specialties working with me on this case. In malpractice cases a lawyer will find himself fighting on more than one battlefield. This case involved a neonatologist, an obstetrician-gynecologist, a pediatric neurologist and other highly specialized experts.

The Plaintiff’s lawyer must seek out not only very qualified doctors, but confident doctors who have the strength and courage to stand up and be heard. The Conspiracy of Silence is as much alive today as it ever has been. The pressure that’s brought to bear on doctors not to testify against other doctors, some of it subtle, some very direct, lives on. So my advice would be: Get good experts, be prepared, know your medical terms, know the law and then be prepared to argue to the wire. The only way I’ve achieved what success I’ve been fortunate to garner, has been to work very hard and prepare well. And the emphasis is on preparation. My last case involved over 20,000 pages of deposition testimony and countless hours of time over a five and a half month period, solid. I had eight lawyers assisting me on the case.

TDJ: Could we talk about jurors?

BDG: Jurors are very sophisticated. Regardless of background, education, race, color or creed, all of which has no bearing, they expect you to prove your case. Jurors want you to be candid with them; they appreciate preparedness. I never cease to be amazed how well they follow demonstrative evidence.

Demonstrative evidence is a very important tool. I do believe in spoon-feeding the Jury. You must educate the Jury so that they can understand everything in great detail. Malpractice cases tend to be lengthy. It is not unusual for the trial to last four to ten weeks, depending on the
complexity of the issues and the number of parties and witnesses involved. You want a jury that is willing to give you the time and attention that is necessary.

Whether or not you will be able to voir dire the jury is up to the judge. If voir dire is permitted, you must tell the jury that this will be a long trial and it may take a long time to cross-examine the defendants. You should get a commitment from the jury that they will give you the opportunity to present your case and not hold it against you that it takes a long time to do so.

At trial, it's not important to impress the jury with your knowledge of medical terms or legalities. It's better to express yourself clearly so the jury can understand the issues. If you talk over their heads, or they can't grasp what you are saying, it's lost. You can't talk to the jury as if they are the appellate court; you can't assume they know anything. Jurors appreciate it when you force a witness to reduce something complex to lay terms that they can follow.

It's equally important for the lawyer to tactfully educate the judge on the complex medico-legal aspects of the case so that he or she can follow the intricacies of the examinations and correctly apply the case law that's involved.

The admissibility of certain medical evidence is based upon the rules of evidence as applied by the judge. For example, if you want to use a particular treatise, published after the incident in question, as a leading authoritative work, its admissibility will turn on whether the subject matter was common knowledge at the time. The date of publication then would have no bearing. If the judge is made to understand this, and many judges do, there is no problem. In some instances the judge doesn't understand the medical terminology used in cross-examination. He or she may rule against you if you haven't taken time to clarify all terms so everyone in the courtroom can follow all the testimony.

This communication is still a major problem with lawyers. The best solution to the problem is the use of visual aids—a blackboard, a videotape, a Day-in-the-Life film or blow-ups of the medical chart. I also recommend using models of the anatomy involved. The more you can visually demonstrate by use of these aids and then fill in with testimony of the doctors, defendants and experts, the better off you will be.

It is not unusual to use two or three hundred exhibits in a medical malpractice trial.

It may be necessary, with the judge's approval, to bring the jury to the site. If the case involves a piece of equipment that is too large or too complex to bring to the courtroom, and you can't get proper photographs, it's helpful and can have tremendous impact to take the jury to the scene.

**TDJ:** Do you bring your client into the courtroom?

**BDG:** I have no hard and fast rule. The option is to use a Day-in-the-Life film or photographs. I believe, except in very rare cases, that my client should be present when I pick the jury. If not the client, then the parents or guardian. If the client is severely disfigured or is, perhaps, a brain damaged child, it is sometimes a matter of courtesy and fairness to the jury to look at this too long. It is painful. You may also lose impact. Jurors, like anyone else, get used to a disability. You have to be careful about this.

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**TDJ:** How do you determine damages and when do you present them to the jury?

**BDG:** The evaluation of damages should begin with the initial interview with the client. Now, that's not to suggest that damages can't increase or decrease over time.

With an infant who suffers trauma at birth, it is frequently impossible to fully evaluate the extent of brain damage and central nervous system dysfunction until they are older. You can only presume that the child may have a certain clinical picture and damages. Therefore, I'm not one who believes in bringing a case immediately to trial when a minor is involved.

At the appropriate time, you can determine the extent of the damages by having the child medically evaluated by a pediatric neurologist and psychologist who conduct a battery of sophisticated tests. Subtle problems can be detected which may not be obvious to the naked eye or even to the parents. Parents generally deny what may be present anyway, and hope the problems will go away.

With the medical reports in hand, you can then fashion a complete analysis of the effect of these disabilities on the child's entire life. Not only the damages the child has now and has had, but how this individual will be affected for the rest of his or her life. What type of care can be provided? How much will it cost? The damages sought should not be the minimum to allow your client to "just get by." (That's what the defense argues, "This amount is enough to take care of the patient.") Well, the difference between "taking care" and "taking care of properly" is a matter of degree. But the distinction is an important one.

If your client's damages are such that a lifetime of round-the-clock care is required, the question whether that care should be provided by a registered nurse or by a licensed practical nurse or by a nurse's aide could mean a difference of millions of dollars over the lifetime of the client. Those costs, reduced to present cash value, could well be one or two million dollars.

You can see why it is so important to review the broad picture of damages with your medical experts. How much physical damage is there? How much physical therapy will be needed? How much medical care? Hospital care? Will a nursing home be needed? Unfortunately, this type of care in the last ten years has seen double-digit inflation.

An actuary and an economist must be called to testify in a complex case. I believe this emphatically. You must determine the present cash value of the damages in these cases. Without the aid of an expert, it is extremely difficult to determine what interest rates to use. Interest rates in the past seven or eight years have significantly deviated from what historically has been the case. What will history repeat itself, or, have we transcended to a new era? The answers to these questions are best answered by experts in the actuarial and economic sciences.

The lawyer has a duty to employ the armamentarium of available expertise on behalf of the client. I frequently consult a physical therapist, psychiatrist, actuary, economist and other experts to put together a picture of the probable medical, clinical and financial needs of my client.

**TDJ:** Are structured settlements more advantageous or do you try for a lump sum settlement?

**BDG:** Whether a structured or a cash settlement is more advantageous to the client is a difficult question and should be
taken on an ad hoc basis. The risk is certainly there and should be made known to the client or his Guardian.

Recently, there have been questions whether structured settlements are going to stand under the new tax code.

All that the lawyer can do is educate himself and the client as to what the future most likely will hold and then let the client decide what he wants to do on that basis. A structured settlement, in the appropriate case, takes a great deal of time to evaluate. One can determine the market value of the proposed structured settlement and then decide whether it is reasonable by comparing it to the probable return of a cash settlement.

The advantages of a client accepting a structured settlement are many. It relieves the parent or Guardian of the worry about how to invest a cash settlement. It provides reassurance that a certain amount of money will be available in the future to care for the disabled person. That's been a comfort to the clients I have worked with. Parents do worry about what will happen and who will care for their child when they die.

If the structure is done properly, and an inflationary rider is built-in, the settlement can compare favorably to a return on money invested from a cash settlement. The effect of the monthly income and the inflationary rider can be very profound, depending on the amount, frequency and duration of the payout. The biggest single advantage of the structured settlement is that the income paid out (monthly, semi-annually or however it is set up) at the current time is tax-free.

If, on the other hand, your client accepts a cash settlement of two million dollars and invests it in the bank or in treasury bills, the income derived from that, let's say ten percent or two hundred thousand dollars per year, would be subject to taxes. The client could be conservative and invest in tax-free municipal bonds, but those bonds aren't very liquid. If the client needs cash immediately, he or she would have to sell at a discount and take a substantial loss.

So you have to evaluate the choice of structure versus cash settlement pragmatically, taking into consideration the probable needs of your client.

Another important factor to be considered: In a structured settlement, if the client dies, there will not be a lump sum cash pay-out to the survivors. The periodic payments, if guaranteed for a fixed number of years (say 20 or 30 years) will continue, but there will never be a return of the initial cash invested in the annuity purchased under the structured settlement. So, if the client dies sooner than expected, a structured settlement may be worth less to the survivors than a cash settlement would have been worth.

The question of inheritance has been the subject of a major philosophical dispute between the Plaintiffs and Defendants in medical malpractice. The Defendants argue, "Why should the family receive a large amount of money when the child dies?" They consider it a windfall. Currently, the law governing the issue is fairly uniform throughout the jurisdictions. When the client dies, these monies pass, as part of the estate, according to the law of descent and distribution; or, if there is a will, according to the terms of the will.

Some parents are very sophisticated and believe that they can reinvest a cash settlement, with the help of a financial advisor, and get almost the same return as they would in a structured settlement and still have that lump sum available. That was the case with a family I represented who received a five million dollar settlement, and the judge felt it was appropriate.

The lawyer's duty, however, is to the client, not to the parents. There are some instances where I consider the Guardian or parents to be too unsophisticated to handle the sums, or in rare instances, where their greed and avarice may cause them to consider the money their own. In such cases I will go into court and do everything possible to make sure the money won't be available to them but will be supervised by the Probate Court in the proper fashion.

TDJ: The loss of society of a loved one in a death case was not considered valid in Illinois and in some other states until recently. It is still not considered valid in some jurisdictions. How can the law catch up to where society is today?

BDG: Sophisticated and creative lawyers can indirectly bring about changes in the law. The concepts we use must be fresh and up-to-date so that society's evolving values are brought home in our message. It's true that in medical malpractice and other types of injury cases the law often lags behind these societal changes. A lawyer must be aware of trends in society and the law and be versatile enough to meet that opportunity and mold the changes to the client's individual needs to make the most of it.

TDJ: In the line of changes, what would you like to see changed in the courtroom setting?
medical records and texts to be used as direct evidence, as it is in appropriate instances under the Federal rules.

The Courts and the Legislatures must give a soul-searching examination of the ends they are seeking and are desirous of attaining in the name of reform. Obviously, the medical profession and hospitals must be protected in a realistic way. The priority, however, must be to protect the public-at-large and to give the individual the opportunity to be heard and to get justice. That includes the right to be represented by a qualified attorney—even the best attorney, if such an individual is available to handle the case. That lawyer must be willing to protect the client’s interest and, in return, is entitled to make a living at his or her profession. There should be no restrictions on a good job, well done, for a client who appreciates it.

TDJ: Does the “new” young lawyer have to join a large law firm in order to survive?

BDG: Here’s an admonition to anyone thinking about taking a malpractice case: One must have sufficient knowledge or be willing to get it; have access to medical personnel; and have the money and time to prepare the case properly and to make the type of presentation required. If one can’t do all of that, the case should be referred to someone who can. I’m suggesting there is a reality to be considered and that is that the interest of the client must be served. One can never allow the desire for a fee to get in the way of that obligation.

Unless a lawyer is confident he has the time, capacity and experience to deal with these complex issues, he should work with another lawyer who can help him gain what he needs. Never learn and suffer your lumps at the expense of your client on a major matter.

In this day and age on major matters—Death, brain damage, quadriplegia, protracted illness—the Defense bar will spend any amount of money to win. They will assign whatever number of lawyers it takes to explore every avenue of defense. The Plaintiff’s lawyer must be able to compete with and combat that, particularly when the case is being worked up and when you are on trial.

Our firm consists of 23 lawyers available to work with me on various matters. We have a staff of over 50 people: paralegals, secretaries, accountants, nurse-lawyers, pharmacist-lawyers, and a doctor-lawyer. Today you find many individuals with multiple disciplines working in the field. That team has to be able to work and function well together. It’s a wonderful tool and a luxury to have that kind of team working with me. I know when I go to court and need a point of law researched immediately, I have someone who can get it done.

The trial is a difficult, tormenting situation which can also be exciting and fun. The battlefield is always changing so the lawyer must be willing to study and learn constantly. It is reassuring to know I have people to back me up when I go into that arena. My cases involve serious injuries and millions of dollars so I know it will be a challenge every step of the way. They will fight to the end.

TDJ: Obviously, this all affects your personal life and your health. How do you handle burn-out?

BDG: I jog and exercise regularly. I try to get as much sleep as possible. When I am on trial I sometimes can’t sleep through the night. If a second trial comes on the heels of the first, I can easily feel exhausted. It can’t be prevented. This is an exacting profession. There is stress and it does affect one’s family life. There are untold disadvantages. The trial lawyer in medical malpractice or personal injury is always on call and must be willing to dedicate his or her life to the client. They expect it of you. This takes its toll on your loved ones and friends. Divorce is high among trial lawyers.

As you achieve more success it is easier to forget the reasons you started in the first place. Reaching a high level of competence and success is one reason, of course, but you should also enjoy life.

TDJ: What is the key to success?

BDG: In litigation, the key to success is preparedness. I have learned to deal with my personality so that my offensive habits or traits (which I do demonstrate outside the courtroom) don’t interfere with my trial work. I have learned to control myself in the Courtroom, keep myself in check and talk to the Jury. I talk to them from my heart in a way that gives them the feeling that I am confident and prepared, not arrogant or egotistical. I present myself in a way that the Jury believes that I am a winner, my cause is just and we are on the right road.

Most importantly, I strive at all times to maintain my credibility with the Jury. Credibility, with preparedness, is the key.

The probate contest—An interview with Bernard H. Greene

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You’ve got to get your experts lined up and you’ve got to know what your theory is and what your expert testimony is going to be as you’re deposing the accounting party, if you can possibly put it all together, because then you’ll know what questions to ask and you’ll know the traps to lay. It is not hard to do because most of the time the accounting fiduciary isn’t going to know as much as you know. He’s either going to confess to lack of attention, lack of knowledge and some carelessness, or to having done things for the sake of somebody other than the beneficiary.

TDJ: What’s the lawyer’s demeanor like during the course of the trial?

BG: When you get into the courtroom to try these cases, it’s low key. The judge is not impressed with histrionics. The judge wants the nitty gritty. The judge will enforce the rules of relevance and keep you under control. You’ve done all of your acting in the pre-trial stage. Unlike the probate contest where you save it all up for the crash to the jury. In the pre-trial, having made your record, having psyched your opponent, having laid your foundation, you then do it all over again until the judge tells you (for God’s sake!) to stop. But if you go all the way, you’ve got to have all the nuts and bolts in order and essentially, and most importantly, you’ve got to establish where the hostility came from. The judge is going to look for that. Even the most sophisticated judges do look at that. Judges don’t like beneficiaries who make nuisances of themselves and upset the tranquil conduct of this kind of business simply because they are unhappy or don’t like what somebody did. Judges must be persuaded of more than that before they will find against a fiduciary and if the accounting fiduciary has laid his foundation properly, judges will begin with a presumption in favor of the accounting fiduciary. Unless they are hit between the eyes with something egregiously wrong. So the contestant can’t just be unhappy or pouting or angry. He has to have something to start with. If he has that, and has a hostile fiduciary on top of that, he’s going to get good results.