AMCNO Addresses Legal Issues of Importance to Physicians

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The Academy of Medicine of Cleveland & Northern Ohio (AMCNO) has been very active furthering its members' and all physicians' interests in the legal arena in the last several months.

Comment letters submitted

The AMCNO Medical Legal Liaison Committee prepared two comment letters directed to the Supreme Court of Ohio on changes proposed to certain rules governing courts in Ohio. The first letter made the Academy's thoughts known about a change proposed to a rule of evidence that would have allowed a published medical textbook or periodical—known as a "learned treatise" under Ohio Rule of Evidence 803(18)—to be admitted into evidence as an exhibit, and, therefore, available to the jury during its deliberations. In its unamended form, the rule allows statements from a learned treatise discussed with or relied upon by an expert witness to be read into evidence but not admitted as an exhibit, and, therefore, not available to the jury during its deliberations. Dr. Bruce Cameron, as AMCNO Immediate Past President, drafted a very enlightening letter to the Supreme Court that explained how physicians are taught to critically review medical research, whether contained in a textbook or a periodical, and yet, even within the medical community, there often is "controversy in the interpretation of conclusions within the literature." He continued, that to ask "a jury to interpret medical literature" only "increases the potential for confusion, misinterpretation, and misapplication" and is the equivalent of

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"[a]sking the juror to become both an expert witness and a juror," placing the juror "in a confounded position."

The AMCNO's opposition was not the only opposition to this proposed rule change. But its voice joined with others opposing the rule change and the rule never passed the comment stage. As of this writing, no further change to the rule is proposed or recommended.

AMCNO's sentiments about a proposed rule change to another court rule had the same impact. The Supreme Court had proposed a rule change shortening the time for parties to seek an extension to file a brief in the Supreme Court by stipulation. The AMCNO often files "friend of the court" briefs—known as "amicus curiae" briefs—that support a party before the court facing an issue important to physicians. Shortening the time for it to do so would negatively impact its ability to participate at the amicus level. As with the proposed change to the learned-treatise rule, the Court received many comment letters opposing the rule change and ultimately decided not to amend the rule.

Your voice counts. Making the AMCNO's interests known to rules-governing bodies not only furthers interests important to physicians, but promotes justice for all parties.

Amicus briefs in the works

Recently, the Supreme Court of Ohio accepted two cases for review that have the potential to impact physicians.

Madora Jones v. Cleveland Clinic

In this case, the Eighth District Court of Appeals, which covers Cuyahoga County, reversed a defense verdict in favor of the Clinic in a case where a patient died of a heart attack a few weeks after visiting a Clinic-affiliated emergency room. A lawsuit followed and the case proceeded to a jury trial. When it came time for the jury to deliberate, it could not reach a verdict despite deliberating for hours. The court told the jury a few times to keep deliberating but it continued to be deadlocked. Because of the late hour, the jury was told to go home and come back the next court day. Instead, the jury deliberated again and shortly thereafter reached a 6-2 defense verdict.

The plaintiff moved for a mistrial. Just after briefing closed on the mistrial motion, a juror wrote a letter to the court saying that the juror felt pressured to change his/her vote, that jury members were tired, and that the jury thought it would have to stay beyond the next court day if they returned. The juror said that had he/she known they would have had to return only for one more day, the juror could have "kept my integrity and [plaintiff] vote intact."

After holding a hearing on the motion for mistrial, the trial court denied it. The Eighth District reversed, finding that the trial court abused its discretion denying the motion "given the totality of the circumstance surrounding the jury deliberations." The court said the jury's multiple communications that it was deadlocked supported granting, not denying, the motion. There were some evidentiary issues the appellate court resolved as well, but the crux of the opinion is the jury-deliberations/mistrial issue.

The Supreme Court accepted two issues for review that deal with the integrity of a jury's verdict and whether a certain rule of evidence applies to juror's communications.

Malieka Evans v. Akron General Hospital

In this case, the plaintiff claims she was sexually assaulted by a physician employed by the medical group General Emergency Medical Specialists, which provided emergency medical services at Akron General. She sued Akron General for negligent hiring and, in an amended complaint, later added General Emergency in place of a previously named John Doe. General Emergency gets out on summary judgment because the plaintiff did not comply with the John Doe rules, making the claims against that party untimely. Akron General argued that because plaintiff's negligent hiring claim is dependent on a finding of liability on the doctor's part, and since the statute of limitations for assault and battery against the doctor had expired and he was not sued, her claim for negligent hiring failed as a matter of law. Although the trial court agreed, the appellate court did not. The Ninth District Court of Appeals, which covers Lorain, Medina, Summit, and Wayne counties, said that because a claim for negligent hiring is an independent claim, plaintiff need only allege a wrong recognized as a tort or a crime within the statute of limitations for negligent hiring to be actionable. In other words, the liability for the underlying conduct giving rise to the negligent-hiring claim is not considered.

Because the court's conclusion directly conflicts with an opinion from another appellate district, the Supreme Court agreed to hear the case. The Court will determine whether a claim for negligent hiring is actionable if there is no actionable claim for the underlying conduct giving rise to the negligent-hiring claim.

While this case presents a physician as an employee, there may be other cases where the physician or physician's medical group is the employer. General Emergency got out of this case because plaintiff did not comply with the civil rules, but it could have been in the case if there had been compliance. The rule of law set forth by the Ninth District goes against Ohio law and needs review by the Supreme Court.

The AMCNO Medical Liaison Committee voted to approve participating as amicus in both cases, and the AMCNO physician leadership agreed with this decision. The cases will likely be heard late this year or early next year. As always, we will keep you updated on the progress of these cases. ■

Editor's Note: *Ms. Susan Audey is a longstanding member of the AMCNO Medical Legal Liaison Committee.*

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