



GENERAL MEMBERSHIP MEETING

THE LEE COUNTY MEDICAL SOCIETY

THURSDAY, JANUARY 16, 2003

SPEAKER: JOHN W. FRYMOYER, MD
Past Dean of the University of Vermont College
of Medicine and Founding Editor of the Journal
of the American Academy of Orthopaedic
Surgeons

PHYSICIAN-PATIENT
COMMUNICATION: A LOST ART

INSTALLATION OF OFFICERS

Royal Palm Yacht Club
2360 West First Street
6:30 p.m. - Social Time
7 p.m. - Program

RSVP: LCMS, PO Box 60041, Ft Myers, FL 33906
Tel: 239-936-1645 Fax: 239-936-0533

2003 LCMS MEETINGS

| Board of Governors | General Membership |
|---------------------------|-----------------------|
| 7:00 PM | 6:30 PM |
| Society Conference Room | Royal Palm Yacht Club |
| 2nd Tuesday of each month | |
| January 14, 2003 | January 16, 2003 |
| February 11, 2003 | ----- |
| March 11, 2003 | March 20, 2003 |
| April 8, 2003 | ----- |
| May 13, 2003 | May 15, 2003 |
| June 10, 2003 | ----- |
| September 9, 2003 | September 18, 2003 |
| October 14, 2003 | ----- |
| November 11, 2003 | November 20, 2003 |
| December 9, 2003 | December (HOLIDAY) |

Inserts

- 1 JANUARY MEETING NOTICE
- 2 2003 LIST OF LEGISLATORS
- 3 LCMS ALLIANCE GALA & FUNDRAISER
- 4 LEGISLATIVE BROCHURES

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President's Message

THE BIG PICTURE

Ralph Gregg, M.D.



What a year to start as President of the LCMS. It seems that all of those problems we have seen looming on the horizon are finally here; another round of Medicare cuts, the Trauma Center turmoil, a true malpractice crisis, and physicians leaving the state in record numbers. If we don't make progress on these and many other issues, soon there won't be enough physicians left to take care of the patients in Lee County.

As we plan how to approach these many issues this year, I have found it helpful to start by remembering why we are in this situation. As it stands now, physicians are practicing in a contradictory system that is rigged to fail. Our government, businesses and patients have made clear their demands for reductions in escalating medical costs. They have acted on this by reducing reimbursement, under-funding government programs, and accepting poor quality medical plans. Paradoxically, these same groups are placing upward pressure on medical costs at the same time. Governments are demanding more administrative overhead for physician's practices with Medicare compliance and HIPAA regulations. Medical malpractice-related costs continue to escalate. This results in increased insurance costs to physicians and increased costs to the patients due to defensive medical practice. Lastly, Americans are not yet willing to accept reductions in the quality of their medical care. In fact, they understandably expect medical care to be on an ever-improving trajectory. These opposing sets of demands have probably always been present in our medical system to some

extent. Unfortunately, over the past ten years, the situation has escalated to the point where our current medical system is in jeopardy.

Therefore, in broad terms, how do we approach this situation as a County Medical Society? First, I feel, we need to consider the physicians who are caught in this system. We need to assist them in making the difficult decisions our current system has forced on them. Should I drop Medicare and how? Should I limit Medicare, self-pay, and Workmen's Comp? Should I go bare? To sustain their practices, physicians are having to ask these questions. The Society is here to provide helpful technical information and ethical guidance when appropriate. Second, as always, we need to focus on public policy. We must continue to support candidates and lobby Tallahassee and Washington. Unfortunately, our elected officials have often been slow to respond to medical issues. How long have we been asking for Tort Reform? I feel it is only when the average constituent (patient) feels that he or she may not be able to find a doctor that things can quickly change. No legislator will be more motivated than when his constituents call him to ask why they cannot obtain care and what is he going to do about it. We need to make our patients understand that our problems are their problems because when we are gone, it will be too late.

That's the big picture for this year as I see it. Help the physicians because times are tough, and work to educate the public. They must understand that losing the Trauma Center could just be the beginning.

MEMORIAM

ROBERT E. GERSON, M.D.

12/11/1940 - 12/9/2002

Bob Gerson was my cousin. Growing up in Dayton, Ohio I felt like Bob was also my brother and certainly my best friend. His encouragement led to my decision to locate my medical practice in Ft. Myers and we both arrived here in 1974. Bob and his wife, Nancy, and Judi and I settled into practice and life in Ft. Myers and shared regular holidays and family occasions thereafter. Subsequently, we were joined by Bob's brother Don and his wife Sylvia as well as other family members and many close friends, including Joan and Rich Davis.

Bob's accomplishments are many including leadership roles in our Medical Society, Lee Memorial Hospital, and his Radiology group. However, his accomplishments are minimal compared to the type of person Bob was and the example he set for us all. Bob was a kind, gentle person always with a smile on his face, a joke to tell and an upbeat attitude. He loved his sweets, a family trait, at times with a little guilt. He was always encouraging and never comfortable with harsh words or condescending remarks to his employees or associates. I cannot remember Bob being angry or ever raising his voice. While Bob always enjoyed his work as a radiologist and director of his group, his greatest love was his family. Nancy and Bob seemed to

have a perfect marriage and were to celebrate 40 years together. They always seemed to have common interests and enjoyed life's rewards together. Bob and Nancy were blessed by two children; Debby and her husband Chris, and David and his wife Deb. I know how proud Bob was of their accomplishments and how Bob looked forward to Debby's upcoming graduation from Florida Gulfcoast University and also to David's Medical School graduation from Tufts University this year. How proud Bob was of David's recent marriage to Deb, also a medical student, and David's plan to follow his Dad's path into radiology. Debby's three children, Dylan, Emily, and Jake were the joy of Bob's life. Bob's brother Don loved him as only a brother could, and in addition they shared their lives professionally on a daily basis.

Bob is an irreplaceable loss to me and to all his family and friends, and an inspiration to better our lives in his memory. Nancy's generosity in directing donations to the Lee Memorial Trauma Center is an example of such a quality. We, and the entire community, will miss him dearly.

Rick

Richard H. Davis, M.D.

As I Recall...

TRILOGY

Roger D. Scott, M.D.

Over the years, certain patients by actions, words, or problems are outstanding in my memory, and I would like to share three of these with you in this article.

About five years ago, a rather large woman was sitting on the end of the examining table, and as I approached her, she said, "you don't recognize me do you?" and in all sincerity, I had to admit the lack of remembrance. "I was the first patient you ever treated at Lee Memorial Hospital", and then I vividly recalled my first hospital case in private practice. It was August 1958 and the hospital board was meeting to decide whether I would be allowed on the staff. Fort Myers had the reputation as a place to stay away from for doctors, as it was practically impossible to get on the staff of the hospital. Before applying for privileges, one had to physically reside in Ft. Myers, open an office and run an announcement of the opening in the *News Press* for one week. (Of course, the Board strictly dictated the size and content of the announcement.) Dr. Joseph Selden (Ob-Gyn) was on ER call and had me on standby to take over if I got on the staff. During the board meeting, Dr. Selden ran out to my car, which was at the far end of the parking lot (I was supposed to be invisible as far as the hospital was concerned) and said, "You're on! Now take care of a patient in the emergency room for me." The patient was a six or seven year old chunky female with a fracture of both bones of the mid shaft of the forearm. Now those of you not familiar with orthopedics may not realize that this is a very difficult fracture to repair and to keep in position due to instability and especially so in a heavy arm. In the early days about 40% of my practice was orthopedics, and open reductions (inserting a plate or nail), which are now common, were not done in children. In the course of the six to eight weeks required for healing, it was necessary to give her three general anesthetics and re-reductions before it would finally stay reduced. I went back and checked her charge card for the three reductions, the several cast changes in my office, and the difficult follow-up and the charge was \$75 (and I didn't get paid!).

Patient No. 2: About 10 years ago, I was examining a patient's thyroid gland and was called to the telephone to speak to another doctor. I asked the patient to excuse me, as it was necessary for me to leave and speak to the doctor in private and that I would be back shortly. In my private office, I smoked a cigarette while speaking with the doctor on the phone, and used breath spray (not alcoholic) before returning to my patient. After completion of the examination and a long discussion with the patient regarding the need for a thyroidectomy, she agreed to being scheduled for the surgery. She later called and said she preferred to have a different surgeon. What went wrong? After several days of strong mental deliberation, I called her referring physician and asked him if he knew why she had discharged me. He said that she had decided that she "did not want to use a surgeon who had to go out of the room to get a drink of whiskey in the middle of her examination". I was livid, as I never partake of alcoholic beverages and this was exacerbated by the fact that she selected a surgeon who was indeed a heavy drinker! I wrote a letter to this patient advising her that I was a

See AS I RECALL, page 3

**LEE COUNTY MEDICAL SOCIETY
BULLETIN**

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The editors welcome contributions from members. Opinions expressed in the *Bulletin* are those of the individual authors and do not necessarily reflect policies of the Society.

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**LEE COUNTY MEDICAL SOCIETY ALLIANCE
FOUNDATION NEWS**

Respectfully Submitted, Ann Shah, PhD, Corresponding Secretary

On May 3, 2003, the Lee County Medical Society Alliance Foundation will be hosting a major fundraising event.

"The Best of Times" Gala, 2003 will begin at 6:30 pm with cocktails and continue with dinner, dancing, raffle and auction until 11:00 pm. A vintage theme has been chosen due to the historic "nature" of the event location — the lush, tropical grounds of the Henry Ford Winter Estate! Gala attire is semi-formal and seating is limited to 300 guests for this unique one-evening affair. Afterward, guests may continue their merriment in historic downtown Fort Myers — transported there by horse and carriage!

As in years past, all proceeds from this event will be used to fund our Foundation's health-related programs and other charitable endeavors in Lee County. The Foundation is also an important source of funding for local charities striving to meet the diverse needs of our growing community.

Since 1945, the Lee County Medical Society Alliance has played an active role in improving the health and well-being of the people who live here. Although fundraising is just one of the many services our 200 plus members provide, we are proud to say that more than \$1,000,000 has been raised for local health charities through our annual fundraisers over the last 20 years. We could not have reached this meaningful milestone without the support of the Southwest Florida community!

To help this year's fundraising effort, we invite you or your company to become a *Gala SPONSOR* by purchasing space in our *Souvenir Program* for your business promotion, special announcement, or personal message. You'll receive special acknowledgements and other valuable benefits depending on the Sponsorship Level you choose. (Detailed information is enclosed. Please respond by March 15, 2003.) Your donation is fully tax-deductible and will go directly toward the health-related needs of our community.

For questions regarding your Sponsorship Donation, call Glynn Garramone at 938-0231. We hope you will help make "The Best of Times" Gala, 2003 a successful and memorable fundraising event.

**FINANCIAL RESPONSIBILITY LAWS: WHAT IT
MEANS TO GO "BARE"**

Mike Segal and Andrew Shamp

With the cost of medical malpractice insurance skyrocketing and in some cases becoming unobtainable, many physicians are considering, or have determined, not to continue to purchase medical malpractice insurance. This is commonly called "going bare". The purpose of this article is to describe briefly how the Florida financial responsibility laws for physicians operate, and some of the principal consequences involved in ceasing to contract for malpractice insurance. The financial responsibility laws for physicians, Florida Statute 458-320, require every physician to demonstrate to the satisfaction of the Board of Medicine ("Board") and the Department of Health ("Department") that he or she has the financial ability to pay malpractice claims. Essentially, an active practicing physician may meet those requirements by either (a) setting aside monies or buying medical malpractice insurance, or (b) "going bare", but promising to pay certain amounts in the event of an adverse judgment and notifying patients that he or she carries no malpractice insurance.

If the physician does not choose to "go bare" (or is not allowed to do so by the Department), in order to be able to practice medicine in Florida he or she must either:

- establish and maintain an escrow account with cash or eligible assets to satisfy claims;
- obtain and maintain an irrevocable letter of credit to satisfy claims; or
- obtain and maintain professional liability insurance.

The escrow, letter of credit or insurance to be maintained is \$100,000 per claim and \$300,000 in the aggregate, except that if the physician is on a hospital medical staff (as most are) the numbers are \$250,000/\$750,000.

To "go bare," a physician must complete a form supplying information required by the Department, and the Department must then agree to allow such physician to do so. So, for example, if the physician has had large judgments against him or her in the past, or has filed for bankruptcy, the Department might deny the physician's request.

In submitting the form, the physician must agree that, if a final judgment for a medical malpractice claim is entered against the physician, he or she will pay the judgment creditor the lesser of (a) the entire amount of the judgment with all accrued interest, or (b) \$100,000 (\$250,000 if a physician maintains hospital staff privileges), within 60 days after the date such judgment becomes final and subject to execution.

There is no aggregate limit to such potential payments. If the physician does not pay the claim timely, the Department will immediately suspend the physician's license, and then have the ability to take other actions if necessary or reinstate the license after acceptable payment terms have been negotiated.

If the physician "goes bare," he or she must also prominently display a sign in the reception of his or her medical office, or provide a written statement to any person to whom medical services are being provided, which states:

"Under Florida law, physicians are generally required to carry medical malpractice insurance or otherwise demonstrate financial responsibility to cover potential claims for medical malpractice. YOUR DOCTOR HAS DECIDED NOT TO CARRY MEDICAL MALPRACTICE INSURANCE. This is permitted under Florida law, subject to certain conditions. Florida law imposes penalties against non-insured physicians who fail to satisfy adverse judgment arising from claims of medical malpractice. This notice is provided pursuant to Florida law."

There are many other considerations in making a decision to cancel one's malpractice insurance, such as contractual obligations to carry such insurance (e.g., managed care contracts and hospital staff by-laws) and the costs of defending a claim. If you need more advice regarding this very difficult decision, we are available to assist you.

Mike Segal is Managing Partner of Broad and Cassel, Attorneys at Law's Miami office and can be reached at (305) 373-9430 or by email at msegal@broadandcassel.com. Andrew Shamp is an Associate in the Fort Lauderdale office of Broad and Cassel and can be reached at (954) 745-5254 or by email at ashamp@broadandcassel.com.

**LEE COUNTY HEALTH DEPARTMENT
DIABETES SELF MANAGEMENT COURSE**

The Lee County Health Department is partnering with the Lee County Extension Service to provide a 9 week class on diabetes self-management education to take place every Wednesday at 2:00-4:00 p.m. from January 8 to March 5, 2003. Cost is \$10.00. Participants may bring a friend or family member free of charge. Scholarships are available. For more information, please call 461-7523.

**MEDICAID PROVIDERS FACE
RE-ENROLLMENT DEADLINE**

The Florida Medicaid Program is urging active Medicaid providers (Medicaid Provider Type 25 – Individual Physicians) in 64 counties to re-enroll; the deadline to do so has been extended until December 31st. Providers or staff who need a re-enrollment packet or have questions about the process are urged to contact ACS State Healthcare, the Medicaid fiscal agent at 1-800-377-8216 or contact your area Medicaid office.

Area 8, Charlotte, Collier, DeSoto, Glades, Hendry, Lee, and Sarasota Counties – Call 800-226-6735.

Those who do not re-enroll face termination from Medicaid, which may affect the program's ability to serve beneficiaries, including low-income women and children, the elderly and the disabled. According to the Agency for Health Care Administration (AHCA), approximately 30 percent haven't responded to the re-enrollment requests. For more information contact Pat Glynn at 813-871-7600 ext 162 or by email at glynn@fdhc.state.fl.us.



MEDICAID HIPAA SCAM

The Centers for Medicare and Medicaid Services (CMS) has contacted the FMA to provide information about a Medicaid HIPAA scam that is targeting the Southeast. A company that goes by the name of US Seminars is contacting Legacy physicians and clinical staff with a scam that leverages the new HIPAA regulations. They ask for a person by name, advise that person that a HIPAA seminar is taking place at a certain hotel in or near their area. They are very aggressive and assert that the physician or clinician must attend this HIPAA seminar, that attendance is mandatory and that they will be breaking the law if they do not attend. The fee is \$200 if they provide a credit card number right away, but is \$400 if they want to pay at the door. They exert a lot of pressure to use the credit card number. CMS is taking immediate action to ensure that this company stops these tactics, and suggests that until they do so that physicians should not engage this company in discussions. They state that the seminar may be real, but the tactics to secure registration fees and attendance are at least unethical if not illegal, and it is **NOT** mandatory for providers to attend. For more information, contact Cathy Kasriel at CMS at 404/562-7411.

MEMBERSHIP ACTIVITY

MOVED FROM AREA

May Foo, M.D.
Radiation Oncology

Robert Forsythe, M.D.
Internal Medicine

RELOCATED

Lawrence Antonucci, M.D.
1265 Viscaya Parkway
Cape Coral, FL 33990
(239) 574-2229 (O)
(239) 574-2762 (F)

Jodi Grosflam, M.D.
15740 New Hampshire Court
Fort Myers, FL 33908
(239) 415-1100 (O)
(239) 415-1102 (F)

RETIRED

Michael Murray, M.D.

LCMS STATS

November 18, 2002-December 11, 2002

| | Current | YTD |
|--|------------|-------------|
| PHONE CALLS RECEIVED | 526 | 6391 |
| From Physicians and Office Staff | 127 | 1405 |
| For Referrals | 187 | 2167 |
| For Background Checks | 22 | 319 |
| Filing Complaints | 3 | 57 |
| Regarding Non-Members | 28 | 207 |
| Regarding Alliance | 15 | 98 |
| Regarding CMS, FMA, and AMA | 10 | 279 |
| Miscellaneous Calls | 134 | 1859 |
| APPLICATIONS SENT TO PHYSICIANS | 7 | 240 |
| MEETINGS | 5 | 96 |
| Attended on behalf of LCMS | 4 | 69 |
| Society Meetings | 1 | 35 |
| DIRECTORIES DISTRIBUTED | 18 | 710 |

R_x

TRACKING OUTCOMES

100

24.8%

0 1 2 3 4 5 6 7 8 9 10 11 12

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THERE'S SOME HOPE IN WASHINGTON

Ronald Castellanos, M.D.

Member, Practicing Physicians Advisory Council*

At the Monday, December 16th meeting of the Practicing Physicians Advisory Council (PPAC) we had the opportunity to sit down with Tom Scully, head of the Center for Medicaid and Medicare Services (CMS). This is the first time that I have heard a positive note from CMS concerning physicians' reimbursement.

Tom's comment right off the bat was that this administration i.e., President Bush, etc., is 100% behind fixing the problem. In the next 6 months Congress needs to fix this situation. The Administration is concerned over further decreasing physician reimbursement, as this will directly affect beneficiary access. In Florida 60% of the primary care physicians are 60 years old or older, and any further decrease will significantly affect their participation.

This was a real positive discussion we had with Tom Scully, and I truly believe he really wants to do something positive with respect to physician reimbursement. Unfortunately, Congress needs to act in our behalf. It is going to be very important for all of us to let our congressmen and senators know of this very pressing problem. So, please do not complain among yourselves, the real way for there to be any changes is for us to contact our legislators and to let our patients know about the situation and have them contact our congressmen and senators, so we can get some legislation passed.

**(The practicing Physicians Advisory Council is a congressional mandated Committee that advises CMS (Centers for Medicare/Medicaid Services) on physician reimbursement and physician issues. Dr. Castellanos has been appointed to serve for a four (4) year term. He has consented to keep us apprised of their activities.)*

SMALLPOX VACCINATION BECOMING A
LEE COUNTY REALITY

By Michael Barnaby, Public Information Officer
Lee County Health Department

Vaccinate Florida (VaxFL) is Florida's response to the Federal initiative aimed at providing smallpox vaccinations in Florida. Part of a national and state public health preparedness effort, VaxFL will be implemented in three phases, with timelines developed based on federal guidance.

Phase I
Approximately 40,000 persons throughout Florida are presently being selected for voluntary vaccination; these include members of public health and hospital-based healthcare response teams.

Phase II
In Phase II approximately 400,000 persons statewide who are identified as first responders and providers of healthcare services will be offered the vaccine. They most likely will include law enforcement personnel, EMS and firefighters, and others who are considered to be essential infrastructure support personnel.

Phase III
Will include 4,000,000 residents of the state. As yet undetermined number of the population will be ineligible to receive the vaccine due to pregnancy, eczema, and various other contraindications.

Phase I may begin in early 2003. In this phase, selected ER physicians and staff at each of the county's hospitals, along with "smallpox treatment teams", will be the first to be offered the vaccine. Additionally, it will be offered to those physicians specializing in infectious disease and dermatology. Selected members of the health department response team will be offered vaccine as well. In Lee County, the total number of selected physicians and staff vaccinated is expected to be between 700 and 800.

Phase I will take about a month to complete. Phase II is expected to follow shortly after Phase I. Phase III, the voluntary vaccination of all of Florida's citizens, could possibly begin in 2004, with or without a precipitating event.

Lee County Health Department vaccination teams will be responsible for vaccinating volunteers in Phases I and II. More information can be found at the CDC's bioterrorism preparedness website at www.bt.cdc.gov/agent/smallpox/reference/resource-kit.asp.

AS I RECALL from page 1

teetotaler, and that I had used spray to hide my smoker's breath. The lady, she is no "Lady", the woman never had the courtesy to reply. Moral of this story is that, regardless of how hard you try to please, you cannot please everyone.

Patient No. 3: About five or six years ago an 85 year-old gentleman (Florida Cracker) came to see me for a large skin cancer on his left face. After examining him, I advised him that it was most likely a skin cancer, and it would be necessary to biopsy it, and it would probably require a radical removal with a skin graft. His response was "your daddy did the same thing to me about 35 years ago and I did well". He was extremely surprised when told that it wasn't my daddy, but that it was I who removed his previous cancer! After his surgery he was extremely pleased and stated that I did just as well as my "Daddy" did.

The return of an old patient for a new problem is always a joy and one of the satisfactions in the practice of medicine — even if they think you are your father.

Many thanks to Eliot for your leadership in 2002. It is indeed a pleasure to welcome Dr. Ralph Gregg as our new 2003 President. Hope you can keep smiling all year long on the front page.

We are saddened by the untimely death of Bob Gerson. Bob was always such a pleasant and accommodating person and will be sorely missed.

Have A Happy, Healthy,
and Prosperous New Year

A Medical Legal Perspective

PERENNIAL PROBLEM: CONSENT VS. INFORMED CONSENT

Frank C. Bozeman

Carl, the plaintiff, was an artist. While riding as a passenger in his girlfriend's van after an evening of celebrating her birthday with drugs and alcohol, his right hand was crushed during a collision with another vehicle. Carl was right handed.

At the hospital emergency room a nurse at the emergency physician's request notified the surgeon on call, Dr. Phillips. The nurse then explained to Carl that he had to sign a pre-printed consent form and the surgeon would talk to him when he arrived to explain the procedures. Carl signed the consent form with his left hand approximately 40 minutes before the surgeon arrived.

Carl remembers telling the surgeon, "I'm an artist. You need to save my fingers." The surgeon's written orders indicate after he arrived at the hospital he ordered the nurse to add to the already signed consent form the words "possible amputation of fingers right hand." When surgery was performed, Carl's fingers were amputated, which significantly diminished his former artistic abilities. Carl contends that the surgeon said nothing to him about what kind of surgery was contemplated, and never mentioned the possibility of amputation.

Carl sued Dr. Phillips, and his lawsuit alleged that Dr. Phillips negligently performed the surgery. In addition he alleged that Dr. Phillips did not disclose to him that amputation was a possibility and amputated his fingers without his "full and informed" consent. Carl also alleged that because he was intoxicated when he signed the form and when Dr. Phillips later sought his consent for the surgery or, if medically necessary, obtained consent in some other unexplained way.

At trial Carl's expert was Dr. Garrod. Since Dr. Garrod was listed as an expert witness for the plaintiff, Dr. Phillip's attorney took his deposition before trial. In the deposition the defense attorney asked Dr. Garrod whether he had looked at the informed consent issue, to which Dr. Garrod replied in the negative. Moreover, Dr. Garrod testified that he was not going to express any opinions "regarding the informed consent issue" because he had no opinions on that issue.

Later at trial Carl's attorney sought to obtain testimony from Dr. Garrod as to whether consent could, or should, be obtained from a person under the influence of alcohol or drugs. Dr. Phillip's attorney moved to exclude this testimony, arguing that during his pre-trial deposition Dr. Garrod had disclaimed any opinion regarding "informed consent." In response, Carl's attorney sought to distinguish the present line of questioning from Dr. Garrod's earlier deposition testimony, arguing that the purpose now during the trial was to elicit an opinion as to the proper standard for obtaining any consent from a patient demonstrably under the influence of alcohol or drugs. That broad question had never been asked of Dr. Garrod during his pre-trial deposition, and Carl's attorney had made no attempt in the deposition to indicate that Dr. Garrod had an opinion on whether consent should have been attempted under the circumstances.

The court granted Dr. Phillips' motion to exclude Dr. Garrod's opinions on the informed consent issue because Dr. Garrod had previously testified he had no opinions on that issue. Had he been allowed to testify, Dr. Garrod would have testified that it is not appropriate to attempt to obtain the consent from a person whose judgment is impaired by alcohol and drugs. On the consent issue the court directed the jury to find in favor of Dr. Phillips because of the absence of expert testimony since Dr. Garrod's opinion was not admitted into evidence. The case then went to the jury on the sole issue of whether Dr. Phillips was negligent in performing the surgery. The jury returned a verdict in favor of Dr. Phillips.

Carl appealed, and the Florida appellate court in West Palm Beach recently reversed the defense verdict and judgment and ordered a new trial. The appellate decision pointed out that both lawyers and the trial judge, by calling all consent issues "informed consent," confused the issue of whether a consent was given at all to the procedure which was performed with the separate issue of whether Dr. Phillips' disclosure to Carl was sufficient. The appellate court held that expert testimony was necessary only to supply the informed aspect when the patient admits signing a consent form but the physician's judgment about what should have been disclosed is challenged. Since Carl contended that no consent at all was given to a procedure which involved amputation of his fingers, the appellate court concluded that no expert medical testimony was required to sustain a claim of performing surgery without a patient's consent.

The case is very troubling, from both medical and legal viewpoints. Leaving aside the question of whether Dr. Phillips could have saved Carl's fingers or whether medical necessity required amputation, there was a serious error when the consent of an incompetent, or at least impaired, patient was attempted. No attempt should have been made to obtain any type of consent from a person in Carl's inebriated condition. Only a consent by a competent person is valid; Carl was probably not competent. Moreover, Carl should not have been asked to sign a consent form before he even met the surgeon. Consent forms universally recite that the physician has discussed the requisite information and that the patient "being fully informed" has consented to the proposed procedure.

Despite the clear provisions of Florida's medical consent law some surgeons still adhere to the paternalistic and discredited notion that informed consent is only a bothersome technicality which hospitals impose by requiring a piece of paper to be signed before surgery may begin. Florida law provides that in order for a patient's consent to be "informed," it is a physician's or surgeon's duty to impart to the patient information which gives him a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedure. Moreover, adding "possible amputation" to the form at an unknown later time to the already signed form was highly questionable.

Legally, it is simply too bad that the lawyers for the parties never had a clear grasp of or could not articulate the real issues, and never defined what they meant by the term "informed consent." Dr. Garrod, the plaintiff's expert, also had such a muddled concept that he was unable to distinguish between lack of consent and actual consent which was not informed. Obviously Dr. Garrod was not adequately briefed on the real consent issues before his deposition was taken. He testified in his deposition that he had no opinions on the "informed consent issue," when in fact he was retained primarily to testify that Dr. Phillips and the hospital nursing staff should never have attempted any kind of consent conversation with or to obtain the signature form a person whose mental capacity was impaired by alcohol and drugs. The appellate court correctly pointed out that "a failure to communicate created the quagmire in which we now find ourselves."

Too many questions surrounding the first trial were left unanswered by the appellate decision. Perhaps at the second trial ordered by the appellate court the nurse witness to the premature signing of the consent form will testify, as may other nurses in the emergency department who heard conversations and can testify to Carl's condition. The nurses might even be able to explain why the usual checks and balances governing patient consent did not work. Hopefully at any second trial the jury will have an opportunity to decide the credibility issue between Carl and Dr. Phillips of who said what to whom. That issue was removed from jury consideration in the first trial.

At the very least the case can be used as a learning experience for lawyers, doctors and nurses. Patients must be competent and fully informed before they are asked to consent to procedures and before their consent is documented by a signed form. Thereafter, no modifications should be made on the form without the patient's clear and documented authorization. Otherwise, bad outcomes, even if unavoidable, are only too likely to result in malpractice suits.

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MEETING OF THE FMA BOARD OF GOVERNORS
NOVEMBER 22, 2002

Steven R. West MD

FMA Board of Governors

Serving as your District E Representative to the FMA Board of Governors I attended the meeting of the Board this weekend in Tampa. I will try to review with you the highlights of the meeting. Please feel free to contact me with any questions or comments you might have regarding the meeting and the Florida Medical Association.

Tort reform is the main focus of the organization. The FMA, working with the Florida Hospital Association (FHA), is successfully putting together a coalition of the state's top health care and business groups. The alliance is **The Coalition to Heal Health Care in Florida**. The coalition includes the Florida Chamber of Commerce, the Florida Nurses Association, Associated Industries of Florida and the National Federation of Independent Businesses. The group is working closely with Governor Jeb Bush's office supporting the Governor's efforts to repair the liability system. The FMA's President Bob Cline, The FMA Secretary Dennis Agliano the Chair of the FMA Tort Reform Task Force and FMA council Jeff Scott have testified before and are actively involved with the Governor's Blue Ribbon Task Force studying the medical malpractice crisis. The Secretary of the Department of Health, Dr. John Agwunobi, serves on the FMA Board of Governors. The Department of Health is providing the staff support for the Governor's Task Force For Medical Liability Reform. Dr. Agwunobi is very impressed with the academic and intellectual qualities of the task force members and is quite optimistic that the task force will make recommendations that will solve the medical malpractice crisis. Barry Richards, the lawyer who successfully argued before the Florida Supreme Court on behalf of President Bush during the 2000 presidential election, is the coalition's attorney to make certain that any tort reform legislation passed by the Florida legislature is constitutional.

The FHA is spending over \$1 million dollars on a public relations campaign hiring the firm Hill & Knowlton. The FHA assessed each member hospital \$70.00 per bed to raise this money. We heard a presentation from Hill & Knowlton reviewing the results of their polling data and focus groups. There is a need for a public relations campaign to inform the public that there is a crisis. The public understands that the health care system needs fixing. They are aware of increased cost of health care. The challenge is to educate the public that to fix or heal the health care system the justice system needs fixing. There is no public consensus at this time regarding the solution to the problem. The public as a whole is anti-insurance companies and feels that both doctors and lawyers serve an important role or function in society. The lawyer's strategy to blame the insurance industry for the crisis is sound. The public or patients can identify with the problem if we educate them to the fact that the current tort system is costing them money raising their cost for their health care. The decreased access to health care currently is a less credible argument among the public. Public perception is that the emergency room, hospitals and doctors will be available. The argument that excessive jury awards are driving up the cost of health care is, at the current time according to Hill & Knowlton, the winning argument and is the one that needs to be stressed.

The FMA's recent election successes resulted in the best possible legislature and Governor to achieve meaningful civil justice reform. Physicians joining and supporting FLAMPAC and the 1000 Club achieve these electoral successes. Physicians must stay involved helping with this effort by faxing, writing, e-mailing, calling or visiting your state legislators. Our legislators must be encouraged to support tort reform. Physicians will have the opportunities to participate in Public awareness programs about the need for medical liability reform. Talk to your patients in your office and distribute the educational materials provided by the FMA to your patients. Encourage your patients to contact their legislators regarding the rising cost of their health care due to the excesses of the lavish civil justice system. Lobbying power is going to be critical in this fight for tort reform. Lobbying power is based on FMA financial strength. Membership determines FMA financial strength and lobbying power. We need to retain and recruit more FMA members. Please join the FMA now for next year and encourage your colleagues to join.

Citizens for Tort Reform has collected close to \$1 million dollars for a constitutional initiative to place a cap on non-economic damages in medical liability cases. This effort to be successful will require a \$25 million dollar effort. It has been recommended that during the 2003 legislative session that the FMA should be prepared to run television and radio ads especially in the Tallahassee market, to counter the anticipated Trial Lawyer's issue advocacy efforts. Those of you that have contributed to Citizens For Tort Reform may be asked to allow this money to be used for Issue Advocacy/ Public Relations Campaign during the upcoming legislative session. Please think about this and let me know if you feel this is an acceptable use of your money contributed to Citizens for Tort Reform.

On March 27th in Tallahassee during the Alliance Days of the Capitol, a rally is being planned in front of the Capitol to highlight the need for tort reform. Those of you that have expressed a desire to

become active should mark your calendars and plan to participate in this event. The organizers want as many physicians as possible at this demonstration.

The FMA is sponsoring regional workshops for FMA members to provide professional advice from attorneys and financial planners on how to **self-insure**. The FMA will also provide physicians with information on how to enter into **arbitration agreements** with their patients avoiding the tort system.

The Council on Ethical and Judicial Affairs (CEJA) now is comprised of an **Expert Witness Committee**. This committee will investigate complaints filed against physicians who are alleged to have rendered false, fraudulent or unsupported testimony in a medical liability case. The FMA is working to compile a database of all physicians who have provided testimony in a medical liability case.

National tort reform legislation passed the House of Representatives this year that would have created a MICRA type system placing a cap of \$250,000 dollars on non-economic damages. Unfortunately, the Senate did not support this legislation. Both Florida Senators oppose this legislation. Please contact Senators Graham and Nelson asking them to support this important legislation.

Many other issues were discussed at the meeting of the Board of Governors. I have tried to highlight the information regarding tort reform which is the most important medical issue facing our state. I look forward to you contacting me regarding tort reform or other issues of concern.

UPDATE ON THE GOVERNOR'S TASK FORCE ON
PROFESSIONAL LIABILITY HEALTH CARE INSURANCE
- TUESDAY, DECEMBER 3.

Taken from Monday Morning Report

Robert E. Cline, M.D.

President, Florida Medical Association

I was able to attend the final hearing of the Governor's Task Force on Professional Liability Health Care Insurance on Tuesday. There were presentations on changing contingency fees, periodic payment of damage awards, Neurological Injury Compensation Act, and most importantly, the constitutionality of a cap on non-economic damages. The discussion on caps was opened by Steven Grimes, JD, former Justice of the Florida Supreme Court who provided the specific requirements that must be met by legislation in order to withstand the Florida Supreme challenge on constitutionality. The discussion was continued by another outstanding constitutional law attorney, Barry Richards, JD, who further supported the constitutionality of a cap on non-economic damages if structured properly by the legislators. A dissenting position was offered by a trial attorney from Miami, Joel Perwin, JD, who argued that a cap probably would not withstand the Supreme Court challenge in Florida. This discussion was followed by an absolutely outstanding presentation by Robert White, CEO of FPIC, who argued very effectively for the merits of a cap on non-economic damages in terms of resolving the liability crisis in Florida. These presentations were briefly interrupted by a visit from Governor Jeb Bush who spoke briefly to the task force and stated his concern about the crisis and indicated that a resolution would be a top priority for the 2003 legislative session. Afterward, in a conversation with the news media outside of the hearing room, Governor Bush further supported the establishment of caps on non-economic damages and continued to voice strong support for our legislative agenda. The entire day of testimony was well received and generally supportive of the FMA position.



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