Collaborative Practices Work

By Kathleen Clark

This is a follow-up piece to a two-part article, which appeared on Feb. 12 and 16 of 2010, about the collaborative settlement in the James Woods medical malpractice action that arose from the wrongful death of his brother, Michael J. Woods.

Recently, James Woods and Sandy Coletta, the chief executive officer of the hospital where Michael J. Woods died, and the attorney for the Woods family, Mark Decof, spoke at the Civil Collaborative Law Symposium, "*Bringing Healing to Law and Medicine In Adverse Medical Events*," that I convened and chaired in San Francisco on April 7, 2010. (Woods and Decof spoke by live video feed from Rhode Island) The symposium was sponsored by the Dispute Resolution, Health Law, and Trial and Insurance Practices sections of the American Bar Association.

Briefly, Michael J. Woods died of a heart attack in July, 2006, at Kent Hospital in Warwick, R.I., lying on a gurney in the emergency room in his street clothes. The attending physician called James Woods within minutes and told him that his brother had died. From that time until the case was settled in November 2009, no one from Kent Hospital spoke to the Woods family. The devastated family waited for an explanation and/or apology from the hospital. When it became apparent that this wasn't going to happen, Woods decided to sue on behalf of his brother's children.

As the litigation process unfolded, the hospital was in financial trouble. In 2007, the hospital medical staff gave the Kent Hospital administration a vote of no confidence. Within a year, in October, 2008, Sandy Coletta became the new CEO of Kent Hospital. Fast forward one year to the decision to go to trial, one week before trial commenced. Coletta told legal counsel that she intended to attend at leat one day of the trial. Hospital counsel tried to talk her out of attending, telling her that that just isn't done and that her attendance might hurt the hospital's case. Coletta went anyway, realizing, as she listened to the testimony, that the hospital had clearly made a mistake, had done something wrong, and didn't deserve to win [get a defense verdict]. She talked about the culture of the hospital (and many other health care organizations, I would think) once litigation begins: the closing of ranks, the failure to listen, the lack of understanding and empathy, and the villanizing of the patient/family.

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Woods told the symposium participants of another medical error situation, 10 years before, in which the physician had admitted the error and apologized. His stepfather had undergone surgery at Mass General, which was followed by a catastrophic stroke. After the stroke, the cardiologist called Woods and apologized, saying that he had mistakenly relied on testing from another hospital and that his interpretation of those results was wrong. Woods, incredulous, asked, "Do you know that our family could sue you?" The cardiologist said, "Yes, and you probably should." Woods' mother drove every day for seven months to see her husband, and each time the cardiologist met her at her car and walked her into the hospital. The Woods family never sued the cardiologist and never sued the hospital. Woods spoke, not only to the sincerity of the apology, but to the treatment he and his mother received from the hospital and physician. Woods understood, after that experience, that many people don't sue when they are treated with sincerity, respect and dignity.

Woods spoke directly to the lawyers in the room, addressing the relevant issues that lawyers lose sight of because we get tunnel vision: this is the loss of a loved one. There are ways to settle litigation and be productive in a financial sense. He emphasized that concepts of collaborative practices have real possibilities for helping people who are "bleeding to death emotionally" in the face of "unimaginable tragedy."

Decof said focusing on collaborative efforts was important to better situations so that parties can work through medical error cases. These collaborative practices include non-adversarial approaches to medical error, which are approaches that can begin quickly after medical error, offer parties a voice in the outcome as well as an opportunity create their own outcome, and create learning opportunities for health care providers and future patients.

Coletta spoke extensively about "roadblocks" that the legal system and lawyers put in the way of resolution. Other "roadblocks" in the case included the apparent unwillingness of hospital counsel to discuss settlement at several opportunities. In addition, Decof tried to warn hospital counsel and, through them, the hospital, that the trial would not be an ordinary trial — that the hospital would look like a disaster and that the publicity, due to the notoriety of James Woods, would be devastating for the hospital, which it was. So many opportunities to resolve this case were lost, in large part because hospital counsel moved forward as litigators are trained to do: into battle, arguing, secreting information, and refusing to give an inch.

After Woods, Coletta and Decof spoke extensively about the entire process, from the death of Michael J. Woods to acknowledgement, apology, settlement, and the establishment of the Michael J. Woods Institute, I feel inclined to ask the same two questions I asked in my previous article about this case: Could attorneys,

rather than stay confined to the conventional wisdom of what litigators should do and how they should act, take the lead in facilitating non-adversarial practices in health care? Ones that allow us to practice law in a

healing, hopeful way, where future patients and our communities in general are, at least informally, parties to the process? Could we be helping, rather than roadblocking, health care providers to build, rebuild, and mend their relationships with patients and their communities?

The Woods case suggests that the answer is 'Yes.' As attorneys, we can truly be servant lawyers rather than bystanders. That would be particularly useful in health care, which is about healing rather than conflict escalation. What if attempts were made immediately after the death of Michael J. Woods to sit down with the family, apologize and offer support rather than three years later? Think of the savings in human, as well as financial, terms.

Decof said nothing should stand in the way of speedy resolution, due to the expense and emotional difficulty in the litigation process. According to him, it is never too early to acknowledge error and apologize; it is never too early to start the conversation. Cases become more and more difficult to settle as they move through the litigation process. Woods heartily agreed.

California, Home of Wage and Hour Lawsuits

By Jerold Oshinsky and Kenneth K. Lee

In recent years, companies have faced a surge of wage-and-hour class action lawsuits in California. Based on the Fair Labor Standards Act (FLSA) and the California Labor Code, these lawsuits run the gamut in challenging various employer practices and policies.

For example, in 2005, a state court jury in Oakland ordered Wal-Mart to pay $172 million in damages for failing to provide 30-minute meal breaks to its employees in accordance with California labor law. Starbucks also faced wage-and-labor class actions lawsuits from California-based store managers who claimed that the bulk of their time was involved in ministerial tasks and thus were improperly categorized as managers exempt from overtime laws. Starbucks entered into a multimillion dollar settlement, and announced as a result that it would take a three-cent per share charge. And more recently, Hooters waitresses in Northern California have filed class action lawsuits alleging that they were forced to purchase their skimpy and salacious shorts in violation of California labor law, which requires employers to provide uniforms. They also complain, among other things, that they were not given a sufficient share of the tips.

Plaintiffs' lawyers have flocked to wage-and-hour lawsuits because of the lure of lucrative settlement fees. Compared to employment discrimination lawsuits that implicate individualized facts and face class certification challenges, wage-and-hour class action suits are relatively easier to pursue because they typically involve company-wide policies affecting a large swath of employees.

California, in particular, has become a haven for plaintiffs' lawyers because the California Labor Code is much broader than the federal FLSA. For instance, the FLSA does not require that employees be provided rest or meal breaks, but the California Labor Code requires employers to provide 10-minute rest breaks for each four hours worked and 30-minute meal periods if they work five or more hours.

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As the former chairman of the National Labor Relations Board recently told the *New York Times*, "California is the most stringent and most expansive when it comes to pro-employee laws." And the numbers bear out that observation. California is the home to the most number of wage-and-hour lawsuits. And according to a 2009 report by California's Administrative Office of the Court, employment-related class action lawsuits in the Golden State skyrocketed more than 300 percent from 2000 to 2005.

These lawsuits can dent the bottom line of Fortune 500 companies and potentially cripple smaller businesses. Unlike many other regulatory workplace laws that apply only to larger businesses, wage-and-hour laws cover even most mom-and-pop shops.

Yet businesses may not have to shoulder the entire financial burden of these lawsuits. Many businesses have employment practices liability insurance policies that cover standard employment-related claims, such as racial discrimination or sexual harassment. Companies, however, often overlook that these policies may provide coverage for wage-and-labor claims.

Employment practices liability policies generally cover "losses" that may be defined broadly to include "damages, judgments, settlements, front pay awards, and back pay awards." Furthermore, these policies typically define "wrongful acts" to include "employment-related misrepresentation," which would provide coverage for claims by employees that they were improperly categorized as managerial employees exempt from wage-and-labor laws.

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Aware that these lawsuits may impose substantial liability, most insurers have carved out coverage exclusions for FLSA and so-called "similar" state, local or common law claims. Courts have generally upheld FLSA exclusions, but it is still an open question how they will address what is considered a "similar" state law for purposes of this exclusion. In other words, employment practices liability policies, despite the FLSA exclusion, may still provide coverage for state-related labor claims, depending on the specific language of the policies.

As an initial matter, companies can argue that an employment practices liability policy's "similar" state law exclusion is ambiguous and should be construed against the insurer. That is what happened in *SWH Corp. v. Select Ins. Co.*, 2006 Cal. App. Unpub. LEXIS 8694 (Cal. Ct. App. Sept. 28, 2006). A purported class of restaurant employees holding managerial titles filed suit, claiming that they were improperly characterized as exempt white-collar employees under California wage-and-labor laws. The insurer denied coverage, pointing to the exclusion for FLSA-based claims and "similar provisions of any federal, state or local statutory law or common law."

The California Court of Appeal reversed summary judgment granted in favor of the insurer, holding that the "similar" state law provision was ambiguous because it was unclear if it modified the FLSA exclusion or a different exclusion. Recognizing that insurers have the power of the pen, the court refused to let insurers retain ambiguous language in their policies in hopes of being able to argue both sides of their mouth.

Companies can also argue that provisions of the California Code of Labor are not substantively "similar" to those of the FLSA, and that therefore the "similar" state law exclusion does not apply. Ironically, California's expansive pro-employee laws can benefit companies in their coverage disputes against insurers.

The California Supreme Court has recognized that the "federal [FLSA] statutory scheme...differs substantially from the state [California Labor Code] scheme." *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 588 (2000). *See also Armenta v. Osmose Inc.*, 135 Cal.App.4th 314, 324 (California's labor laws "protect the minimum wage rights of California employees to a greater extent than federal law"); *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 796 (stating that "federal [labor] regulations...differ substantially from the [California] wage order").

Companies doing business in California face substantial exposure from wage-and-hour lawsuits, but they can potentially limit their liability by carefully reading their employment practices liability policies and zealously making their case before the courts.