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NEW YORK CITY BAR ASSOCIATION BRIDGE THE GAP PROGRAM 2015

MEDICAL MALPRACTICE LAW FOR THE NON-PERSONAL INJURY ATTORNEY

TRANSCRIPT...

Gerry Oginski: This morning I'm going to make it a guarantee to each one of you. You won't find any CLE speaker making a guarantee. My guarantee to you is that the information I'm going to share with you this morning is going to be useful during the course of your legal career. If you don't believe me, just pay attention for a little bit, and I promise that by the end of today's discussion, you're going to realize how useful this information is.

Now, if I were in your shoes, you're thinking, "Hey, I come to a bridge the gap. I don't care about med mal. I don't practice this. This has nothing to do with me. I'm just here for the credit." You can be on Facebook, and you can edit your documents, and you can do whatever you want, but I'm telling you, if you keep an open ear, if you pay attention, I guarantee that this information is going to arise during the course of your legal and social career.

You might be asking yourself, "How does that happen?" Let me give you a couple of illustrations that will show you why it is so critical for you to know this information and why learning about this will help you and your ideal clients because at some point during the course of your lifetime, at some point during the course of your legal career, you will encounter someone who tells you their tale of woe. They start to tell you a story about something terrible that happened to them. As you're listening to the story, all of a sudden, you begin to realize, "Maybe this is something involving improper medical care. Maybe my client or her family has a possible medical malpractice case."

The more you begin to listen to the story, the more you begin to recognize, "How can I help them solve their problem?" You may be

thinking, "I don't handle medical malpractice. I handle real estate. I handle transactions. I handle M&A. I handle everything but medical malpractice. I'll just refer that out. I don't care. Go find somebody else." I'm going to suggest to you today that if you listen to the information I'm going to share with you in just a moment, you will be able to help these people who you encounter on an everyday basis, whether it's at the grocery store or at dinner or whether a colleague is chatting with you or whether it's an opponent or an adversary.

Let me give you a great example. Let's say you handle real estate transactions, and you meet a young couple, they're buying a house for the very first time. Now, they're ready to buy the house. Two months later comes the closing. In walks Mrs. Jones. You say, "Where's your husband?" She says, "You're not going to believe this. My husband, 37 years old had a massive heart attack last week. He's in the hospital." You say, "I'm so sorry. What happened?"

Now, she begins to tell you that her husband was seeing a cardiologist for three months, and he had been complaining of massive chest pain. The doctor simply gave him some medication, told him, "Don't worry about it." He suffers a massive heart attack last week, and while in the hospital, the doctors tell her, the wife, "Why wasn't this treated earlier?" He was seeing a cardiologist, so now the wife has a suspicion that something may have been done wrong.

What are you doing? You're the real estate attorney. You're just there to do the closing. What do you care about the medical malpractice? You have an opportunity to help your client who now wants to do a real estate transaction. The question for you that I have this morning is, what are you going to do now, now that you know that information?

How about this example? Let's say you're a workers' comp attorney. You represent a gentleman who was injured in a forklift accident at work. He fractures his arm. He goes to a municipal hospital, and at the municipal hospital, they cast his arm. After four weeks, they take the cast off and it looks like this. It looks like a roller coaster. He says, "I don't understand. My arm is supposed to be straight." He says, "Don't worry. Just massage it. You'll be fine."

Now, you're listening to this client tell you the story and you're saying, "Wait a second. A fracture of the arm is not supposed to look like a roller coaster." You think in the back of your mind something may have been done wrong at the hospital. Really, the question for you is,

what can you do as the workers' comp attorney other than simply saying, "Go find a med mal attorney to try and help you."

In just a few moments, I'm going to share with you some great information that will help you understand how you can help your client. How about this scenario? You're having a problem with your computer. Your law firm hires a computer repair guy to come in. Now, during the course of fixing your computer, you start chatting with him, making small talk. You asked him how he's doing, he says, "I'm doing terrible." Of course you say, "What happened?"

Next thing you know, you learned that his dad died of a massive blood clot to his lungs. He went into the hospital in New York City for a kidney procedure that went well, but two days later, he died. Now, they learned from the autopsy his dad died from this massive blood clot. The son who's fixing your computer says to himself, "I don't understand. Dad was on blood thinners to prevent this from happening. Why did he die?"

Again, now there's a suggestion. You don't know this guy but he's fixing your computer. Now, the question ... If you do bankruptcy, transaction or whatever you do, a question should be going off in your head, "How can you possibly help this gentleman and his family?"

How about this scenario? You handle trust and estates. A client comes to you to probate the will, and you asked, "How did this person die?" The wife tells you a story about how her husband bled to death. She comes home one day from lunch. She walks into the house. She sees trails of blood leading to the bathroom. She finds her husband on the floor. There's blood on the ceilings, on the walls. You're thinking, "Oh, my God!"

She tells you they called the police. They think it's a murder scene until an autopsy is done and the medical examiner determines that the husband died because the shunt as part of his dialysis treatment ruptured, and he bled to death. Now, you're listening to the story about probating this will, and you're thinking, "Maybe there's a case against the dialysis center." What do you do?

How about this scenario? You're called to the hospital to prepare a last will and testament for someone who is dying. You arrived at the hospital and you learned that the person who's dying is a 40-year-old woman who's diagnosed with metastatic breast cancer. You're talking to her and her husband. She's got two beautiful children, and you learned that two years earlier, she had made a complaint of a lump in

her breast to her gynecologist. The gynecologist looked at it, said, "Don't worry. It's fine. It's just a cyst. We'll follow it on a yearly basis."

Now, a year goes by, they both forget about it. The lump goes down. A year passes, now the lump recurs. Now, the gynecologist sends her out for testing. Biopsy reveals metastatic breast cancer, stage four. Now, they're angry. The husband's furious. What do you do? You're there as a trust and estates attorney trying to prepare a last will and testament for some woman who's dying, and you're saying, "I don't handle medical malpractice." What can you do to help solve their problem because they've got a big problem? The reality is they may have a valid medical malpractice case for failure to diagnose breast cancer.

If you don't know the information that I'm going to share with you shortly, you're going to be at a significant disadvantage in being able to help this family and this client. I'm going to tell you right now that you don't have an ethical obligation to help these people. You don't have a moral obligation, but I'm going to suggest to you that you have a humanitarian obligation to help these people.

I will tell you that by helping these people, you are doing a great service to yourself and obviously, to your client because they are in need of help. If you have the right information to help them understand how these cases work, even though you don't do these cases, all of a sudden, you now look as the resource for this potential client, and a great resource because now, you're the one who's able to help them even though it's not your subject matter that you handle on a day-to-day basis.

Let's say you handle labor law. Now, a client comes to you and tells you that his dad fell out of bed in the hospital, hit his head, suffered a massive bleed, a subdural hematoma, lapse into a coma, died three weeks later. Can you help? What do you know about medical malpractice? What can you tell and share with this family?

Let's say you handle business transaction disputes. One of your clients tells you about his mom who went in for a hernia repair which supposed to be a routine, dies two days later not from the hernia repair but because of a bowel perforation that no one recognized. As a result, she became wildly septic and died. What do you do?

Come join me for a moment as I share with you exactly what you need to know in order to be able to help these folks. Let's start with the very basics. What is medical malpractice? It's really medical negli-

gence, medical carelessness, carelessness of a physician, of a medical professional. We like to say that there is a violation from the basic standards of medical care that results in injury or a departure from a good and accepted medical practice.

What are the three elements that we need to show in order to show that we are more likely right than wrong, that we have a valid basis for a case? The simple answer is we need to show liability, causation, and damages. Okay. That's nice and abstract. That doesn't help you. Let me give you a better understanding of what you need to show. We need to show that there was wrong doing, we need to show that the wrong doing caused injury, and we need to show that the injury is significant and or permanent. Those are the three things that we need to show in order to confirm that we have a valid basis for a case. You should know that every one of these malpractice cases must be confirmed by a medical expert who has reviewed the records, who confirms that we have each three of those elements.

I'm going to share with you now the one question I asked at the very beginning, the moment I think that a client or potential client has a valid case, and this one question will help you identify immediately within a few short moment whether or not they may have a case. It's a compound question, and it has contained within the question all three of the elements that we need to determine whether or not there's a valid case. What's the question? What do you think was done wrong and what injury did you receive as a result of that?

Now, you'll find that all of these people that you talk to, if you are to allow them to go ahead and say, "Tell me more. Tell me what happened," they're going to give you a run-on narrative that will last for an hour, guaranteed. Do yourselves a favor, don't ask that open-ended question, "What happened?" Yet, if you ask, "What do you think was done wrong and what injury did you suffer as a result of that?" All of a sudden, their brain starts to think and they get stomped. They may not know exactly what was done wrong.

They will know exactly what injuries they have, and they will also get stomped because they don't know that they have to have a connection, that causal link between the wrong doing and the injury. So they will always know, "The doctor did this, and he did this, and I suffered this, this and this?" "Really? Has any doctor confirmed your belief that something was done wrong?" They'll stop and they'll usually say no. Now, that doesn't mean they don't have a case. It just means they may not be familiar with the details of exactly what it was that caused this person harm.

One of the things that you need to keep a watch for is don't ask that open-ended question at the beginning and say, "Tell me everything," because then you'll be there for an endless amount of time, and it won't do you any good, and it won't do them any good.

Now, what do we do in order to evaluate whether or not we have a valid basis for a case? Remember in law school, when you're preparing for the bar exam, you had issue finding and fact finding. When you're listening to someone tell you a story about what was done wrong, it's the same exact thing. You're listening to the facts and trying to filter out what's the really important facts. You're trying to figure out, what are the key issues in this case? What's the wrong doing? What wrong doing occurred? Was there an act of omission where a doctor failed to do something? Was it an act of commission where they did something improperly? Those differences are really important.

As you begin to listen to someone's story, all of a sudden, you're now thinking, "All right. What are the facts in the case? What are the key issues? What was the wrong doing?" These are just some of the things that are running through your mind as you begin to listen to any type of story.

Now, before you get into the details of any type of story you hear from anybody, you have to determine this one thing. If you make the mistake of not paying attention to this at the beginning, you run the risk of having wasted all your time. That is, is your case timely? Is it timely? Because you may learn that this incident happened 10 years ago. It may have happened 20 years ago. It may have happened five years ago. You must find out whether or not their matter is within the statute of limitations.

We're going to spend a bit of time talking about the time limits that we have here in New York for medical malpractice, and you are going to see as with everything in law, there is a general rule, and then there are multiple exceptions to that rule.

Talking about the time limits, anybody here know how much time an adult has to bring a lawsuit against the private doctor or private hospital in New York? Shout it out. What was it?

Male: Two years, six months.

Gerry Oginski: Bingo! I'm going to get to that. The answer is you have typically, two and a half years from the date of the wrong doing in which to bring a lawsuit against a private physician or a private hospital here in New

York. That's the general rule for adults. It's different for children. It's different from municipal hospitals. It's different for state hospitals, and it's different for multiple series of other events that can occur.

I'm going to share with you some of the biggest ones that you need to keep in mind. We know the main one. Let's talk about what happens if you are injured in a municipal hospital within the five burrows of New York City. By the way, those municipal hospitals are owned and operated by an organization, an entity known as New York City Health and Hospitals Corporation, otherwise known as NYCHHC.

Anybody know how much time you have to file a notice of claim with that municipality? Shout it out. Don't be shy. I said don't be shy.

Male: Ninety days.

Gerry Oginski: Yes, sir. You have 90 days in which to file a notice of claim. Then you have only one year and 90 days from the day that the wrong doing in which to file a lawsuit. Very, very different. If any of you have been following the news within the past couple of weeks, you will know that there's a big change underway to try and change that time limit because of something known as a woman named Lavern, who died and was not able to timely file a lawsuit. As of right now, that data has not changed but it's underway. There's a lot of pressure to change it.

Let's talk about what happens if a family member dies in a private hospital. How much time does the family have in which to file a lawsuit? Anybody? The answer is two years from the date of death. If the person dies in a private hospital or as a result of a private doctor.

Now, let's transition into the municipal hospital. What if they die at Jacobi Hospital, at Bellevue Hospital, Elmhurst Hospital, Queens General, Kings County? How much time does the family have to file a notice of claim? The answer is 90 days. How much time do they have to file a lawsuit? One year and 90 days from the date of death. They do not get the benefit of the two years. This is critical to understand. Again, we're talking just about an adult.

Now, what happens though, you're chatting up someone at Starbucks. You see a woman with a stroller, you see the baby, beautiful baby, and you strike up a conversation. You learned by talking to this woman that she had some difficulty at the time of birth, and as a result of this difficult delivery, her child is now left with an injury to his arm and shoulder, and she tells you it's a condition known as Erb's

Palsy which is a significant nerve injury that inhibits and limits the baby's use of his arm.

Now, you're listening to the story and you learned that this happened at a private hospital here in New York City. As you're talking to her, you're wondering, "Okay. It's not an adult, it's a baby, so I know two and a half years doesn't apply." How much time does this mother have in which to file a lawsuit against the private hospital in New York for injury that occurred during the time of birth? Anyone who want to take a guess? Any guess would be fine? No guesses? Going once, twice. The answer is 10 years. The mother has 10 years from the date of birth in which to file a lawsuit on behalf of the baby.

Let's say you are at a conference and you're talking to a colleague of yours and they tell you that they just recently gave birth, but you learned from the mother that the baby was diagnosed with a condition known as Cerebral Palsy. She tells you tragically that this baby is brain impaired, brain damaged. Now, this child is going to live a life of disability. She tells you that there were complications during the course of delivery, but this happened in Bellevue Hospital.

Now, you look at the date on your watch and now, you begin thinking, "How much time do they have in which to file a suit?" Anyone want to take a guess? No? No takers? They have 90 days from the date of the wrong doing in which to file a notice of claim. Then they have one year and 90 days in which to file a lawsuit. Wildly different.

Now, let's take this other hypothetical example. What happens now if this mother is telling you the story and it's beyond the initial three-month period that they have to file a notice of claim? Is there some way that this mother can still file a claim in a timely fashion, let's say six months after her baby was born? The answer is yes, but there's an entire process involved with asking a court to give permission to file a late claim.

If you try and file a lawsuit without getting permission from the court, you will be dismissed, and you will waste your time, energy and tremendous amounts of resources prosecuting something that never should have been brought. You must always get permission.

Now, is it easy to get permission? The answer is maybe yes, maybe no. It's long, it's involved and it's difficult because here's what has to happen. We have to get all the medical records. We then have to have a medical expert review and confirm that we have a valid basis



for a case. We then have to ask the court for permission and explain why this mother was late in asking, in filing a notice of claim.

We also have to identify whether or not the doctors and the staff involved are still likely employed at the hospital. Does the hospital still maintain the records. If they don't, it's going to be very challenging to try and get the judge to give us permission to go ahead and file a late claim.

It's a difficult procedure, step-by-step has to go through in order to get permission. Once we get permission, again, we still have to file suit within the appropriate time period. Just because you get permission to file a late notice of claim doesn't mean it's going to extend the time in which you have to file a lawsuit. Make sense? Don't know the answer. It's okay.

Now, some of you may have heard about what happens in a situation where you have a foreign object left inside of you as a result of a surgical procedure. How much time does an adult have to bring a lawsuit for a foreign object that's left inside of you during the course of surgery? Anybody know? Again, wake up. It's okay. I don't mind. The answer is you have one year from the date of discovery of this foreign object within which to bring a lawsuit.

Now, before you can answer whether or not that one year time period applies, we have to ask a different question to then get back to this question of how much time you have. The question that you have to answer in your own mind is and ask the client, "Was this thing that was left inside intended to remain inside of you or was it something that was never intended to remain inside of you?"

Let me give you an example that illustrates exactly what I'm talking about. Let's say you have surgery and now, surgery goes well. Three years later, you're having a problem. Hypothetical, let's say a lap pad, a surgical lap pad is left inside of you. In that instance, you would have ... that was something that was never intended to remain inside of you. We can all understand that because these lap pads are designed to soak up blood and fluids during surgery. That's not something that's designed to be left inside. In that instance, you would have only one year from the date of discovery in which to file a lawsuit against the doctor or the hospital.

Now, this gets a little more interesting. Let's take this example. Let's say gentleman goes for hernia repair surgery. During the course of surgery, everything goes well. The doctor is closing the patient up,

and during the course of stitching the patient up, "Crack!" The needle breaks off. The tip of the needle goes into the surgical area. The surgeon is searching for this needle tip. He can't find it. He's spending 10, 15, 20 minutes looking for it. He can't find it. For whatever reason, he decides not to take an X-ray and as a bit of foreshadowing, he decides not to tell the patient about it either. So you can imagine how good that is.

Then he tells the nurses in the OR, "Listen, I don't think it's ever going to create a problem for the patient. It's a small piece of needle. Let's just leave it alone." That foreshadowing will come back to haunt him because now three years later, the patient develops significant back pain without any trauma, without any reason, goes to an orthopedist who takes an X-ray, who looks at the X-ray and says, "You've got something sharp in your back that needs to come out. I think that's your problem." He said, "Did you have surgery recently?" He said, "No, I had a hernia repair three years ago." He said, "Well, I don't know what this is but I think it's something really sharp that's causing a problem."

In that instance, we have to ask the question. Was this something that was intended to remain inside of him? The answer is no. This needle tip was not designed to remain inside of him as part of this hernia repair. How much time does he have to file a suit? One year. Now, here's a monkey wrench that I'm going to throw in. We have to remember there's a phrase that we have to add to this or when he reasonably should have been expected to discover this. That's a very key phrase, and I'll tell you how that applies in a moment.

Let's say, same scenario, patient has hernia surgery, the needle tip is left in. He now goes to the orthopedist. The orthopedist takes the X-ray and says, "You've got something in your back. You need surgery to get it out." The patient says, "You know what? I can't take time off of work. I'm going to try and live through this. I don't know what it is. I'll just try and get through the pain." He chooses not to have surgery at that time, and he tries to live with it.

He waits six months, he waits a year, and he's living through this agonizing pain. Finally after a year and a half, close to two years, he goes back to the orthopedist and says, "I can't take it anymore. You've got to take it out." Afterwards, the surgeon tells him, "Here's a needle tip. This is what was causing your problem." He says, "The only surgery I had was the hernia." Now, he wants to bring a lawsuit against the surgeon. Can he do it?

The defense will have a great argument to say, "When should he reasonably have been expected to know that he had a foreign object in his body?" "At the time that this X-ray was taken." The fact that he chose not to mitigate his damages is a separate issue. When could he reasonably have been expected to know that there was a foreign object in his body? Back two years earlier when the orthopedist took the X-ray. Is his case going to get thrown out? In all likelihood, yes, because it was not done within the one year time period from discovering or when he reasonably should have been expected to discover this foreign object. Very important.

How about this scenario? This is a very interesting one. A young couple recently married, he's 27, she's 27. They want to have kids. They're trying for months and months. They can't get pregnant. They decide to go for fertility testing. During the course of fertility testing, they learned that the wife is perfectly fine. It's the husband who's got the problem. What's the problem? The doctors realized that the tube that takes the sperm from the testicle and leads up out through the penis has been closed off.

He's asked, "Hey, did you ever have surgery before there?" He said, "Now that I think about it, I did. I had surgery when I was a young boy. I had a condition known as Testicular Torsion where the testicle twists upon itself, and the doctor was able to save the testicle, but in order to prevent this from happening again, he put a couple of stitches in to hold it up against the scrotum so this doesn't happen again.

Now, what does he do? He decides to bring a lawsuit against that surgeon from years and years earlier, 20 years earlier. We have to ask the question. You're asking in the back of your mind as you're listening to the story, you're saying, "Is his case timely? Does he have the one year from the date of discovering this in which to file a lawsuit?" We have to ask that key question. Was this something that was intended to remain inside or is this something that was never intended to remain inside?

In this gentleman's case, this was something that was intended to remain inside which means, by the way, if he were an adult, how much time would he have to bring a lawsuit at that point? Come on, you know the answer now. Two and a half years from the date of the wrong doing, but as a child who is seven, eight years old, he would have until the age of majority.

The question now is, is he timely if he files within a year after discovering this problem? The answer is no. You must always ask that question. Was this something that was intended to remain in or is this something that was never intended to remain in?

Are you beginning to get a sense of how you might be able to use this information as you're chatting with people during the course of your everyday career and meeting people everyday because you will encounter people who tell you their tales of woe, and all of a sudden, you begin to think, "Wait a second. You might have a valid basis for a case," but before I ask that open-ended question about, "Tell me everything that happened," you want to know, "Is this case timely?" If it's not timely, it doesn't matter what happened to them. It could be the most horrible egregious thing, if it's not timely, you can't help them. We can't help them. So ask those questions first.

Now, you may have heard about something called continuous treatment and how this doctrine of continuous treatment allows an injured patient to extend the time in which they have to file a lawsuit. Let me share with you how this will work and whether or not it's going to apply to the person that you're chatting with.

Let's say for example, a woman goes into her gynecologist. She has a breast lump. During the course of the exam, the doctor tells her, "Okay. We'll send you off for tests sonogram, mammogram, breast surgeon evaluation." They all come back, everything's fine. "Great. We'll follow up with each yearly visit. We'll check it to make sure everything's fine." Guess what? Over the course of the next year, that breast lump goes away, patient forgets about it. The doctor inexplicably forgets about it. The patient has other complaints in her yearly GYN visit.

The same thing happened to the following year. Patient forgot about it. It's not bothering her. The doctor again, inexplicably forgot about addressing the breast lump. Now, it's three years later. Patient now notices before her GYN visit, "I've got the breast lump in the same location that I had two and a half, three years earlier. Now, I've got a discharge around the breast area."

Now, the gynecologist immediately sends the patient out, breast sonogram, breast mammogram, breast surgeon to have a biopsy. What does it show? It shows stage 3B breast cancer with invasion into the lymph nodes. Bad news.

Now, the question becomes, "Does this woman have the ability to bring a lawsuit because now, it is two and a half years beyond the time that this improper medical care occurred? Can she still file a timely lawsuit? You begin to think, "Wait a second. This guy, Oginski told me about something called continuous treatment?" The patient went back to her gynecologist each and every year. Certainly, there must be continuous ongoing treatment.

Here's the problem with that argument. The problem is that unless the patient continued to be seen for the same condition, for the same complaint that she originally went to the gynecologist for, the law looks at it and says, "No, there is no continuous treatment." Even though from the patient's standpoint, they believe they were getting continuous care from her doctor for problems that she had relating GYN care, the law looks at it and says, "She didn't make a complaint of breast problems in the following year or even the year after that. It's only three years later that she now again make this complaint."

You argue, "Shouldn't the doctor be responsible for failing to diagnose it and recognize it? Don't we get the benefit of that?" The answer unfortunately is no. Unless the patient complains about the same condition, the same complaint, she is not going to get the benefit of continuous treatment.

What if though she went back in year one and made a complaint about her breast? Now, the doctor evaluated it, reassured her and said, "Everything's fine." What if on the following year or let's say six months later, she goes in for an unrelated complaint, and then six months after that, again makes a complaint about the breast and the doctor evaluates it? Will she get the benefit of continuous treatment to extend that time in which she has to file a lawsuit?

What do you think? By show of hands, how many think she will be able to? Come on, I know your hands are working this morning. Okay. How many think they won't be able to, she won't be able to? The answer is there is no possible way for you to know the answer to that question on the very first conversation you have with this person, impossible, and I'll tell you why.

The only way that you can know whether or not there may be a valid argument for continuous treatment is if you obtained every single one of her medical records, and you spend the time to scour each and every page of that record, and you spend a great deal of time with the patient identifying why she went in for each visit. What complaints did the patient make on each and every visit? What did the

doctor do in response to those complaints? What treatment plan did the doctor tell her he was going to do? What was he going to do? When did he tell her to return back to the office?

It's very critical to know why she returned back to the office. Was it for a routine visit? Was it for a complaint specifically relating to the breast lump? Only by knowing that detailed information and those critical factors can we come to a conclusion about whether or not there is in fact continuous treatment.

Now, some people ask, "Do you need to have a short period of time between these visits in order to take advantage of continuous treatment?" The answer is not necessarily. There are instances where there'll be gaps in time, whether it's days, weeks, months or possibly even years. What if the doctor on his own calls the patient out of the blue, and now says, "Hey, by the way, I just want to check on that breast lump that you had complained about two and a half years ago. How's everything going?"

Does that trigger the start or the continuation of course of treatment? The answer is maybe. Again, you will know the answer when you're talking to them. The only way you can formulate an answer is after reviewing all the records, having an expert review, and then making an argument that there is continuous treatment.

Now, I will tell you that the defense will oftentimes try and make motions for some re-judgment to get out of the case if it's a question of whether or not there's continuous treatment. It's a toss up in some instances. So don't be surprised if you try and bring a claim and now, the defense turns around tries and throws your case out because they're arguing legally there is no continuous treatment for the same condition and same complaint.

What are the most common three defenses that defense lawyers use in these medical malpractice cases? Anybody know? I'm sure you guys know. You're just being quiet this morning, and that's okay. The three common defenses that are often seen is, "Hey, we didn't do it." That's number one. Number two is, "Maybe we did it but you also did it." Number three is, "Okay. Maybe we did it, and you did it, but guess what? We don't think that your injuries are as valuable as you claim them to be." Those are the three common defenses. They're arguing about liability, who's responsible.

Then once you get passed who's responsible, they're now going to argue about the value of damages because even if they accept and

knowledge which doesn't happen often that they did something wrong and violated the basic standards of medical care causing the client harm, they will always in every instance fight you tooth and nail on the extent and the amount of the damages. Now, we'll talk about damages in a little bit.

Another common defense that comes up often in these cases is the doctor says, "Hey, I used my best medical judgment to decide what to do in this case. Who are you to tell me otherwise? I'm in the middle of surgery. The patient has a complication. I now decide to do the following procedure to fix this problem. Who are you to tell me otherwise?" That's why we need medical experts to tell us otherwise, to tell us why this doctor deviated and violated the basic standards of medical care. That's why it's critical.

Now, you have competing medical experts that the jury will have to evaluate. How effective is this argument that's made by the defense? "It's a judgment call. Don't blame me. I went to medical school. I did my training. I'm here at a prestigious medical institution in New York City. Why are you blaming me for something that I used my best medical judgment?"

You know what? Juries like that argument. "Hey, why are you picking on this doctor? He's a great guy. He's got great credentials. What he's telling us is reasonable." That's the inherent problem with the judgment call where they're saying, "Don't blame me. I had multiple choices. The following were all acceptable choices but I made the best judgment call based upon the problem that was going on at that moment."

How do we deal with that? We deal with that by evaluating whether or not the judgment call truly was an exercise of the doctor's best judgment or did he have multiple choices and the choice that he picked was a departure from the standard of care. Let me give you an illustration of how this works. Let's say a patient goes to a doctor for an opinion about what to do. The doctor tells her, "I would treat you this way." She decides to go to four other doctors to get other opinions. Four of those doctors tell her, "I would treat you this way."

The fifth doctor says, "No, no, no. I wouldn't treat you that way. I'm going to treat you this way." He's clearly in the minority, but he's going to say, "Hey, this choice to treat this patient this way is within acceptable medical standards, even though it's in the minority. Just because I won't do it the way that the majority of doctors do it doesn't mean it's wrong."

What do you think happens? The patient chooses to go to Dr. Number Five. You can sense the foreshadowing. She develops a problem and a complication during course of surgery. She then sues the doctor, and the doctor in his defense turns around and says, "I exercised my best medical and surgical judgment. Don't blame me for what happened. I did nothing wrong here. If I did, you also did it. If I did and you did it, guess what? You're not really that injured, are you?" Those are the defenses that come up over and over again.

What happens though if the doctor's choice to treat this patient really wasn't within acceptable guidelines, acceptable standards of care? Regardless of whether he was in the majority of the doctors who would do it or the minority, if that treatment fell below the standard of care, the fact that he chose to use his best judgment is not going to work, at least not as effectively as if it really was within the standard of care.

Now, here's something that will really help you understand and be able to explain to these people you're chatting with. They don't understand that simply because they wound up with a complication or a problem during the course of treatment or surgery, that it may not be evidence of medical malpractice. From the patient's perspective, all they know is, "Hey, I was fine going in to the hospital. I came out with a following horrible complications."

You tell them, "Hey, just because you got a complication does not mean that there was evidence of malpractice. It might, but then again, it might not." They get very defensive. They get very upset because they know in their mind something must have happened. The doctor must have done something wrong. The nurse must have given me the wrong medication. Otherwise, I would not have had these problems.

You know what? Maybe that's true, but in order to answer the question, you have to evaluate what do you have to do, what was the key issue in the case, what do you think was done wrong, and what injury did you suffer as a result of that? The next thing you have to answer is, is your matter timely?

Let's say you decide and you evaluate, "Yes, both of those things sounds like a case, and yes, this matter is timely." Here are a couple of things that you need to know now. By the way, let me give you a perfect example of how a judgment call defense fell flat and it destroyed the defense's case.



A gentleman who's 37 years old, he was having difficulty urinating. He went to a urologist here in New York City who did a procedure known as a Cold Knife Urethrotomy, where they stick a small scalpel into the penis and to the tube that transmits urine from the bladder out through the penis. It is as painful as it sounds.

Now, that fixed him for a couple of days, but he developed a problem again. He goes back to the urologist who says, "Let's do this again," and that worked for another few days. Finally, the urologist says, "Okay. This is really a Band-aid. Let's try and do something more permanent. I want you to come in to the hospital. We'll put you under general anesthesia, and I'm going to insert into your urethra, the tube that transmits the urine a device known as a Metal Stent, and it's a spring-loaded coiled device. The whole purpose is that when you put it in, when you release it, it pops open, and the whole goal is to keep that tube open to allow urine to pass through without a problem.

This gentleman had scar tissue that kept building up in his urethra. Patient said, "Okay. Let's do it." Now, that was problem number one, the choice by this doctor to go ahead and tell him to do this. The other thing I want you to keep in mind is the age of this gentleman. He's 37 years old, and I'll tell you why that's an important point in a moment.

During the procedure, the doctor realizes, "You know what? I'm going to put in two of these metal stents back-to-back. There's enough room. I think it will help keep this urethra open." That's what he does. Now, the patient has woken up. The procedure goes fine. Within hours after the anesthesia wears off, the patient begins to experience tremendous pain in his groin area in the penis.

The doctor tells him, "Don't worry. You'll get used to it. Take some pain medication. Not a problem." "Okay." This gets worse and worse, and it gets worse in the mornings when he wakes up with an erection before he goes to the bathroom, and it gets worse during the day when he does develop an erection. It gets so bad, the pain becomes so excruciating and so agonizing that at one time in the doctor's office notes, the patient is relaying to him what the problems are.

He tells him, "The pain is so horrible, I'm thinking of committing suicide when this happens." The doctor wrote that down, recorded that." Now, it's getting worse and worse. Finally, after about two months ... By the way, this metal stent is intended to be permanent. The skin tissue inside the urethra grows over the metal stent and it literally becomes embedded in there. It's designed to stay in there.

Now, two months later after this ongoing agonizing complaints of pain, the urologist says, "You know what? Maybe I take you back into the operating room. I'm going to try and move it away from where I think it's putting pressure on the nerve." Patient says, "Do something. Do anything." "Okay."

Here is where judgment call number two comes in. The doctor goes in to do and manipulate this device. What he encounters immediately is that this device is now permanent. As he tries to tug it and move it, he realizes that this has now become embedded within the urethra. As he's attempting to try and move it and manipulate it, the metal pieces begin sheering off. It becomes thread-like, sharp metal pieces, and he's pulling it out piece by piece by piece. Thankfully, this gentleman is under anesthesia.

When he finishes, the doctor realizes that there's no way that this device can stay in. He's got to take both of them out. The patient wakes up, he's in horrible pain, and he ultimately sees a urological reconstructive surgeon who takes a look inside and says to him, "Oh, my God! It looks like a bomb went off in your urethra. What happened to you?"

Now, this reconstructive surgeon had to spend the next year and a half fixing this gentleman's problem where he had to reconstruct the inside of his penis. Horrible, horrible situation. While this is healing, they couldn't allow the urine to come out of there because that would not allow this reconstruction to heal. So they had to create a diversion for the urine to come out. Where do they create it? They had to make a whole between his anus and his scrotum. Every time he had to urinate, he had to sit down. Actually, this is disgusting. This went on for an entire year and a half until he was finally healed.

We're bound to bring the lawsuit against the urologist. This is a long-winded way of me explaining to you how this judgment call scenario came into play. The doctor in his defense turns around and says, "Based upon my educated decision, it was my judgment call to utilize this device for this gentleman, and not just one of these stents but two, back-to-back." That would be fine if this utilizing this device was within acceptable medical standards. Every medical expert I consulted said, "Yes, this device is appropriate for a gentleman who is over the age of 65, who no longer has the ability to maintain an erection." Why? Because the medical study shows that every time someone has an erection using this device, they have horrible, excruciating, agonizing pain.

How old is this guy? Thirty-seven years old. The choice by this doctor to utilize this device in a gentleman 37 years old was a departure from good and accepted medical practice. The fact that he put in two of these stents back-to-back was a departure from good medical practice. The fact that this guy tried to manipulate and pull it out after two months of pain was a departure, a violation from the basic standards of medical practice. This case did not go to trial because the defense realized that the argument that this was a good judgment call would never ever work at the time of trial.

I shared that story with you just to give you an insight and an understanding into how these judgment call defenses are used sometimes very successfully, but in this case, it was not.

Let's move on. What happens if the person you're talking to tells you that they have horrible psychological distress? They're depressed, they're traumatized about what happened, but they don't have any physical injury. Nothing physical happened to them. Is this the type of case you want to get involved in? I'm going to share something with you. More than 26 years of practice, I'm going to suggest to you that you run away as fast as you can in cases that have only psychological damages.

Now, that's not to say they don't have valid cases. It's not to say that their injuries are any less important than physical ones, but there's a huge challenge and a huge problem with proving the case because most of the time, these people who suffer psychological damages alone, typically have a history of problems. They come with a lot of baggage. Being able to distinguish what they had in the past, with how they're focusing now and how they're dealing now, that becomes very challenging and very difficult.

Let me share with you a great example. Let's say a woman is pregnant, 39 weeks pregnant, ready to deliver. Through carelessness by the gynecologist, the baby dies in utero, dies. The mother believes that something was done wrong and had they recognized the baby was in distress before the baby ultimately died, that they could have induced labor and delivered this child who would have otherwise been healthy.

Now, can you bring a lawsuit for the wrongful death of a baby who dies before being born? Yes or no? Shout it out. I can't hear you. Correct. You cannot bring a case for a baby who is unborn who dies in utero, but the law in New York will allow the mother to bring a lawsuit for injuries that she personally suffered as a result of the baby

dying in utero. Sometimes she'll have a physical injury. Many times, she's only have a psychological injury.

Should you take that type of case? You will find that most, myself include, most good trial attorneys who handle these cases will typically not want to get involved and taking case only on psychological damages. Again, that's not to say they don't have a valid case, and there are some attorneys who will take that. Keep that in mind, as you're talking to this grieving parent because it's a tragic situation, but it's not a case you really want to get involved in.

How about informed consent? Let's say the person you're chatting with tells you, "The doctor didn't tell me I could suffer the risk, that I could go blind from the cataract surgery." Do you take a case like that? Don't you have to ask a few more questions about what the doctor told this patient about whether or not one of the risks associated with this cataract surgery was going blind? Absolutely.

"Mrs. Jones, tell me what the doctor told you." "Oh, he told me I could suffer infection, bleeding, injury to another adjacent organ." "Okay." Let's change this up a bit. Let's say there are no physical injuries but the patient suffered a complication that's a risk of the procedure, had massive bleeding, she needed transfusions. Do you take a case like that where the patient turns around and says, "The doctor didn't tell me I could have bleeding during the surgery."

If the case only involves informed consent where the patient was not given enough information to make an educated decision about whether or not they should go ahead with the surgery, do you take a case like that? In my opinion, the answer is absolutely not, and here's why. The patient is always going to argue, "The doctor didn't tell me this is a risk of the procedure." Now, the doctor comes in for his deposition, and I ask him, "Doctor, what did you tell the patient were the risks?" "Oh, of course I told that one of the risks was infection, and in addition, it's in the informed consent that she signed."

Then it becomes a he said, she said scenario. It's not a battle of the experts. It's a battle of credibility between a plaintiff and a defendant. Who does the jury believe, the injured patient or the doctor with 25 years of experience and all these great qualifications? In most cases, the jury is going to believe the doctor.

Here's a quick stat for you. In New York, the majority of medical malpractice cases, about 95% of them that are brought, settle prior to trial. Of those 5% that go to trial, the majority of those cases are won

by the doctors. Unlike a car accident case or a simple negligence case, if you think you can simply file a case to try and get money from an insurance company representing a doctor or a hospital, you are 100% mistaken.

They do not settle these cases. They fight you tooth and nail. If they do decide, it is only after discovery, it's only as the cases on the trial calendar as you're approaching trial, unless you got a clear smoking gun, and it's obvious, and then everybody can agree on the amount. That doesn't happen that often. Don't believe that you could simply send off a letter to the insurance company and they're going to bow down and give you everything you want. It doesn't happen that way.

Now, what happens ... Do you remember a phrase you learned in law school? *Res ipsa*. *Res ipsa loquitur*, the thing speaks for itself. The document speaks for itself. The injury speaks for itself. Can you use that legal doctrine to show that your client has a valid basis for a case? The answer is, yes, you can.

Let me share with you an interesting cork. Let's say for example, patient goes in to have surgery on his right hand. He comes out of surgery, and he's got a third-degree burn on his shoulder in addition to the surgery they did on his hand. How could this possibly have happened? He had nothing to do with shoulder surgery. This was a hand surgery, a hand surgery problem.

He comes out of the operating room with a third-degree burn. Was he under the control of the people in the operating room? Absolutely. Was he under anesthesia? Yes. Could he possibly have contributed to this injury by himself? No, but for the defendant's negligence, doctor, the nursing staff negligence. This injury would not have happened.

First of all, can we use that argument? Yes, we can use it in our pleadings. Do we need to bring in a medical expert to explain to the jury that, "Hey, if you go in for hand surgery, you shouldn't be coming out with a third-degree burn to your shoulder." The law says, "No, we don't need to bring in a medical expert to explain something so obvious to a jury."

You told me where things become complicated and the jury doesn't understand the medicine involved, but I will tell you, here's the cork. You will find that every experience or good medical malpractice attorney who handles these cases will always bring in a medical expert even though they don't need to in this *Res ipsa* case. That's because we want the jury to understand why this injury occurred.

We want the jury to understand what type of injury this gentleman received. We want them to know how debilitating and what treatment he needed in order to fix this problem. Yes, the law does not require us to bring in an expert where it's a Res ipsa case, but we can only use this argument and this claim if the patient was under the exclusive care and control of the doctor in the operating room and the staff, the patient did not contribute, whatsoever to this injury, but for the defendant's negligence, carelessness, this injury never would have occurred.

That's another way that we can use that. When you're listening to this person tell you about, "Hey, let me tell you about my tale of woe, what happened. I went in for surgery and I wound up with some problem to my foot or to my brain," whatever it is. You may be thinking, "Hey, you might have a case here, and you might be able to use Res ipsa," and that's important to know.

Another thing that you should be asking, "Who are the potential defendants? Are they private attending physicians? Are they residents, doctors-in-training? Are they nursing staff? Are they employed by the hospital?" We always need to know whether they are employees. Why do we need to know that? It's because of two doctrines that each of you know about called Vicarious Liability and Respondeat Superior.

We know that an employer is always responsible for the acts of its employees. We always need to know whether the doctor was an employee of his professional corporation or were they employees of a hospital. We will always need to bring the employer or the professional corporation into the lawsuit as well as the person who actually caused the harm.

Now, you know this information. The question I have for you is what do you do next? What do you do at this point now you've garnered all this great information? You've learned the story, you've determined it's timely, you have some ideas about what type of theory it is, you understand that there are some legal issues that need explaining, and now, you've got to ask yourself the question, "Do you want to handle this on your own or do you decide to refer it out to an experienced medical malpractice attorney?"

If you choose to send the case out to an experienced attorney, here are a number of things that you must know before you make that phone call. You have to know that the fees in a medical malpractice case is different than in an ordinary negligence case. In an ordinary

negligence case, the attorney's fee is a third, and there are variations about when the expenses get paid. For the most part, it's a third.

In a malpractice case, the fee is less, much less. It only starts at 30% and drops by 5% as we go up in increments on what we can obtain for the client. It's known as the Sliding Scale. Let's say for example, we take on a case that's been referred by someone, and I'm able to obtain 22% as the attorney's fee. You would then receive 22% of our 22%. If we can get 30%, then you would get 30% of our 30%. It's a sliding scale of a sliding scale.

Before you can justify getting a referral fee, you have to agree to two things. The first is you have to discuss with this person who's a potential client the fact that you are now referring them out to an attorney who handles these cases on a regular basis and get their consent that if they are successful, there is only one attorney fee that will be shared between law firms or two attorneys. You must get their consent, and that's typically done by the attorney who's handling the case for you. They'll put in writing in the retainer.

The other thing that you must keep in mind is that you must participate in and assume joint responsibility for the case. Now, what does that mean? It means different things to different attorneys, and there's no bright line other than to say, "What qualifies us doing some level of legal work?" Some people would argue that doing some level of legal work constitutes talking with the client, identifying the issue, identifying what facts are important.

Some would argue that getting the patient's medical records constitutes some level of legal work. Some would argue that talking with the attorney who's taking on the case to discuss legal strategies and the claims that are likely to be brought constitutes some level of legal work.

Before you send the case out, you must identify from whatever attorney you're going to use what they ask and what will help you justify receiving a referral fee. As long as those things are met, then you have no problem obtaining a referral fee if they are successful.

Now, what else do you need to know? If the attorney that you send the case to rejects the case, it is very important that the attorney send out a non-acceptance letter. We call them Rejection Letters, but contained within that letter should also be your name. "Hey, Mrs. Jones. I just want to let you know that neither I nor Mr. Referring Attorney will be able to help you with your problem. You have only two

and a half years in which to file a lawsuit. I highly recommend you go to another attorney immediately to get another opinion." Ask the attorney whether they do that.

Another thing you want to know is, does the attorney have the ability to communicate with his clients on an ongoing basis? Is it monthly? Is it weekly? How often do they communicate with their clients? You want to know whether they have a system in place. By the way, if you do not have a system in place to communicate with your clients, I would highly recommend you developing one because the more you communicate with your clients, the more they recognize you are helping them, working on their case.

The less client calls you get saying, "Hey, what's going on with my case. I haven't heard from you in months," very important to identify what type of communication system they have. "Oh, we don't communicate. We just wait for the clients to call us." No, that's not good enough. Every month, phone calls should be going out or a letter or an e-mail, whatever, maybe every two weeks, something to communicate on a regular basis to keep them in the loop and to keep you in the loop. Very important. You don't want to simply have a year or two go by wondering, "What's going on with that case I referred out to that attorney?" You need to be kept in the loop.

One of the things that I will always ask to every referring attorney who's talked to the client, "What do you think a jury is going to do when they see this person on the witness stand? What's your opinion of the witness? Are they a nice, sweet, little, old lady? Are they aggressive? Are they hostile? What's your opinion? I want to know your opinion." Very important.

I also want to know what's the likely venue where this case is going to take place. Is it going to be in Brooklyn, Bronx, Queens, Manhattan, Richmond, Staten Island? Where? Where is it likely going to be? Where did the medical wrong doing occur? Where does the patient live? That will all help evaluate whether or not this is a case that needs to be taken.

Another thing you need to keep in mind, what are the damages that this person received? We know that in most of these medical malpractice cases, the damages, the biggest one are pain and suffering, past pain and suffering from the time of the injury until the time of trial, and future pain and suffering from the time of trial, for the foreseeable future. That's critical. Of course, there are other elements of



economic damages. Financial loss, lost wages, and other economic losses that can be quantified, medical expenses.

What happens in a death case? In a death case, some of the damages include pecuniary loss. What's the financial loss to the family as a result of this person's death? Is there any conscious pain and suffering? Let's take a look at the Joan Rivers matter for example.

Joan Rivers was under anesthesia during a colonoscopy at the time that she suffered irreversible brain damage. Now, her family is bringing the lawsuit for wrongful death. We know that she has tremendous economic loss and that will be the biggest component of her case because if the patient had no conscious level of awareness of what was going on, about the problems that she was enduring, then it would be virtually possible, if not, extremely challenging to show to a jury that she was conscious and aware of what horrible things were happening to her.

What usually occurs in a death case is we look for the pain and suffering. That's normally the biggest component, but in her case, it's going to be the other way around with economic loss. What happens though if the patient is not working and is elderly? What are the damages then? Now, you've got a big problem. Now, there's no economic loss. There may be some pain and suffering, but now, you also have another problem to think about.

You must assume that an elderly person is on Medicare, and you must also assume that her medical treatment was paid for by Medicare. Why is that important? Because if you are successful, Medicare will come to you at the end of the case and say, "Pay us back, all of it, most of it, some of it." They want to be paid back, and guess what? We are obligated to pay them back. Then we have to negotiate with them.

Let me share with you a quick story about how Medicare almost destroyed a client's case of mine. A disabled young man who is working crossing the street, gets hit by a car, suffered traumatic injuries, fractured femur, horrible internal damage, was intubated for two and a half weeks. His sister calls me and says, "Please take my brother's case."

Within a few weeks, I was able to get the full insurance policy, \$100,000 for this horribly injured gentleman. What we didn't know at the time, we knew Medicare paid for his bill, but we didn't have the

bill. It's only two months later that Medicare send us the information saying, "Okay, we paid \$350,000. Pay us back."

I said, after my expenses, after my attorney's fee, he's going to be left with nothing." They said, "Hand it over." I said, "No. I didn't take this case just to walk away with the fee. I took this case to help this injured patient, injured victim." Through negotiation and appeals, and ongoing appeals, we ultimately were able to resolved it so that the client actually walked away with \$10,000 which is horrible."

The reality is his medical care would not have gotten paid had he not been receiving Medicare. Had I known that information at the outset, I never would have taken on this case because you don't take a case just to generate a fee. You want to help the client. That's why it's critical for you to know whether or not the patient has Medicare or Medicaid. They are both must be repaid and you have to negotiate with them. You need to know whether or not an autopsy was done.

Remember I talked about at the very beginning about a gentleman whose father died from a massive blood clot to the lungs, known as a Saddle Embolus. How do we know that? Because an autopsy was done. We knew what the cause of death was. If there's no autopsy, and not everyone does one, but if there's no autopsy, we won't know the precise cause of death.

If we don't know the precise cause of death, it may be impossible to show why this gentleman died. If we can't show why he died, now working backwards is going to be very difficult, very challenging to show that there were departures from good and accepted medical care.

Now, what information have you learned this morning that I made a guarantee for you about? I guaranteed you that the information that I would share with you this morning would somehow help you during the course of your professional career. What did you learn?

You learned that talking to these people, talking to your clients, your adversaries, your colleagues, friends, in everyday situations, at some point during your life, you will encounter people to tell you their tale of tragedy. As you begin to listen to them, you are going to ask the question in your own mind as well a with the client, "Hey, what do you think was done wrong and what injury did you receive as a result of that?"

Once you identified that information, you're now going to ask yourself, "Okay. Is this matter timely? Are we talking about something that

happened 20 years ago or something that happened three weeks ago?" Once you identified that this matter is timely, you're now going to ask a number of other questions, "What are the damages? What are likely defenses that are going to arise? What are the issues? What's the key issue here? Was it a failure to diagnose breast cancer? Was it a scenario where a doctor did something improperly? Was it a scenario where a doctor claims to have used his best judgment and did something that even though most other doctors would do, he did just the opposite?"

You'll find that oftentimes, the second doctor the patient goes to to get things fixed, they often are the hero. They say, "Oh, I would have never done it this way. I would have done it this way. You would never have this problem." Great. Try getting that doctor to come in and testify to say that. What's the likelihood of that happening? Zero, almost zero.

Once you begin to talk to these people, you developed this information, now the question for you is, "What do you do next?" You've got all this great information, you don't handle medical malpractice cases, you have made a decision about whether to keep the case and try and do it on your own or refer it out to somebody else. You've now chosen to refer it out and what happens next, you now have to ask those questions that will help you make sure that if they are successful, you are entitled to receive a fee for referring the case out.

Then you have to go ahead and give the attorney information that's going to help him identify more great information about whether or not to take on a case like this.

I'm going to leave you with this final comment. In your reading materials, whether you get it online or in the book, I included a copy of a book I wrote called Secrets of a New York Medical Malpractice Attorney. You can buy that online, but you already have it in your materials. It is a consumer-oriented book. It is not a book. It's not a legal treatise for attorneys. It's a compilation of articles designed for consumers to understand how medical malpractice cases work in the State of New York.

I highly encourage you to read it. It's an easy read, it's a quick read. It will help you understand more of what we've been discussing this morning. It will give you a better idea of how these cases work and more importantly, the key question is, "How can you help your potential clients solve their problems even though you don't handle

medical malpractice cases, whether it's bankruptcy, real estate, mergers and acquisitions.

Whatever it is that you do, you will encounter people who have these problems, and now at least you'll be knowledgeable and can teach these people about how these types of cases work and whether they may have a valid basis for a case. I hope this has been helpful. I hope you enjoyed it. My name is Gerry Oginski. Thanks so much, everybody.