MICHIGAN Lawyers Weekly

David Ottenwess, Ottenwess Law, Detroit

Education:
JD, Michigan State College of Law
BA, University of South Florida

Best known for:
Medical malpractice defense

Signature case / representation:
Hosp. Employees' Div. of Loc. 79, Serv. Emps. Int'l Union, AFL-CIO v. Mercy-Mem'l Hosp. Corp., 862 F.2d 606 (6th Cir. 1988), cert. granted, judgment vacated, 492 U.S. 914 (1988).

While not a medical malpractice matter, this case was a dream for a young attorney. I was able to act as both the trial and the appellate attorney in a Federal case involving labor law claims and alleged RICO Act violations. I represented the hospital and its CEO through some of the most contentious discovery I have ever witnessed. At the close of discovery, the District Court judge granted our motion for summary judgment which led to an appeal to the 6th U.S. Circuit Court of Appeals by the plaintiff. After getting clobbered at oral argument, my dismissal in the lower court was overturned. My client agreed to allow us to file a petition to the U.S. Supreme Court for a writ of certiorari. Incredibly, it was granted. No further briefing or argument was required as the Supreme Court vacated the 6th Circuit's reversal and remanded the case back to them to address the issues in light of a similar case that had been recently decided by the Supreme Court.

The interesting aside here is that my name does not appear on the Supreme Court briefing. I was too "young" to be admitted to the court's bar. But my boss was gracious and always gave me credit for what we both agreed was a lifetime achievement for a couple of "personal injury" attorneys.

Other important cases:
Daniels v. Charbeneau, MD, et al. (Wayne County Circuit Court, Case No. 84429551-NM) — Thirteen months out of law school, I was casually asked to "cover" a trial for one of the named partners in my firm. The case involved a severely brain damaged child. My client was one of four defendants. The target defendant was represented by a very experienced malpractice attorney and I was told to "follow his lead" as our defenses were identical. The trial took two-and-a-half months to complete. And while three of us obtained "no cause" verdicts for our respective clients, the target, who changed our joint defense days before the trial began, took a multimillion-dollar verdict. Fortunately, I recognized early in the case that I needed to mount my own defense — no matter the amount of pressure I was receiving from my more experienced co-defendant trial attorneys to "just go along." This was a lesson I have carried with me throughout the 50 plus trials where I have been lead counsel.

A Metro-Detroit based Radiology Group — This does not involve one case, but hundreds of matters over a 30-year period of representation. I had the honor of being this group's exclusive medical malpractice attorney until the group was absorbed by a national entity. The group was founded in the 1940s and it served the Detroit Medical Center for decades. During much of this time, they were the largest private practice

group in Michigan. In 1989, I was introduced to this client and the relationship continued until it ultimately ended in 2018 upon the dissolution of this proud company. I handled their professional liability matters, including a number of "collateral" problems which arose outside of the medical malpractice arena. I helped set reserves and otherwise managed their "on shore" matters on behalf of their wholly owned off-shore insurance company. Over the years, countless cases came to my office which probably made me the most experienced radiology attorney in Michigan. But the best part of this representation is the fact that I had a very strong relationship with the entire group. I was their "go to" guy.

Smith v. XYZ Corporation — Again, not a medical malpractice case, but closely related. Here I represented the plaintiff, a well-known and highly respected physician against multibillion-dollar entity incorporated outside Michigan. The case involved medical and managerial issues arising out of the wrongful constructive discharge of my client. After months of discovery involving day-long depositions and tens of thousands of documents, the case resolved for several million dollars.

Outlook:

In a legal sense, I do not see any major changes in medical malpractice law in 2021 and 2022, except for litigation procedures directly related to the world-wide pandemic arising from COVID-19. In terms of our practice, there has been a push to conduct depositions, meetings and hearings remotely. And while there are benefits to this practice, including saving our clients money, the higher stakes cases still require more than just a face on a screen.

One of the issues that I anticipate over the next year is whether a deponent is required to appear for an in-person deposition if one of the parties insist. For example, we are now seeing experts insisting on doing even trial depositions remotely. I find this problematic as oftentimes my presence at a deposition makes my cross examination much smoother, particularly when we are exchanging several documents and/or radiology studies. This is going to present problems as we move further down the Zoom path.

Further, over the years, it is clear that medical malpractice cases are becoming more complex and expensive to litigate, in large part due to the number of experts and specialties involved. Given these challenges, I have seen earlier ADR attempts. Unfortunately, the end result will be even less trial work for this specialty.

Working with clients:

In more than 35 years of practicing law, I have handled in excess of 600 medical malpractice cases and, as lead counsel, have tried more than 50 cases to jury verdict. Actually trying cases is what I enjoy most about my job. My experience in both state and federal courtrooms has provided me the insight to determine, early on in the life of any given case, not only whether it is legally defensible but whether the facts and individual defendants and witnesses involved allow the case to be properly presented to a jury in a specific courtroom. It is vitally important to quickly determine whether the case should be positioned for trial or for settlement and this allows me to provide sound and objective advice to my clients on how to address a particular case. The other, and equally important, approach in a case is to not lose sight of the fact that, like plaintiff's counsel, I am representing human beings — physicians, nurses and other health care providers whose life's work and reputations are being called into question. I approach these individual clients with compassion and understanding of the personal impact a malpractice case has on them.

Advice:

My first mentor sat me down and explained the "3 Bes." They still apply today.

Be committed. "You cannot do this work if you are not prepared to work hard. The subject matter is foreign and difficult, so be ready to roll up your sleeves."

Be prepared. "This is a fact intensive business. You can never be prepared enough. You will look foolish before a judge, jury and client if you are not fully prepared."

Be yourself. "Trying to be someone else in a courtroom is a ticket to disaster. A jury sees through it. Assume that they know who you are, even though they never laid eyes on you."