

THE ADVOCATE

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G. Marshall Mundy
Frank W. Rogers III

SPECIALIZING IN:

- Medical malpractice
- Family law
- Personal injury
- Wrongful death
- Nursing home litigation

1328 Third Street, SW
Roanoke, VA 24016
540-982-2900

Fax: 540-982-1362

E-mail:

info@mundryrogers.com

Web site:

www.mundryrogers.com

LITIGATION: *not the only option*

Everyone probably has seen an exciting courtroom drama portrayed on television or in a movie. In real life, however, going to court to settle a civil disagreement is not glamorous or enjoyable. Litigation is a difficult process. Clients must take time away from their normal activities and usually experience intense anxiety and stress. In addition, they must pay attorney's fees and court costs. For these reasons, we at **Mundy, Rogers & Associates** believe that litigation should be the last resort for dispute resolution. Negotiation, mediation, and arbitration are generally less stressful and more cost-effective than litigation.

NEGOTIATION

If a client can communicate with the other party—either personally or through their lawyers or another intermediary—our first step is to negotiate. We communicate with the other party to identify, discuss, and resolve pertinent issues. A negotiation is successful when both parties agree to a written settlement, thereby avoiding the extreme results often associated with litigation.

MEDIATION

In mediation, the parties employ a neutral individual, skilled in dispute resolution, to facilitate the process. The mediator helps the

parties identify their issues and guides them through information-sharing, negotiation, and resolution. Mediation is a great option because the parties decide how to resolve their own conflict. This means that the agreements are often more flexible, case-specific, and agreeable than those achieved in litigation.

ARBITRATION

Arbitration also involves a neutral third party. However, as in litigation, the parties can't settle their own dispute. The arbitrator determines the outcome of the case. Arbitration does have advantages over litigation; it has more relaxed rules and is usually much less expensive.

A capable lawyer in the current legal climate must be skilled in litigation as well as proficient in the intricacies of negotiation, mediation, and arbitration. We have found that many lawyers are just beginning to recognize the benefits of these alternative dispute-resolution methods. However, we at Mundy, Rogers & Associates have used these methods successfully for many years. We always work with our clients to identify the best ways to resolve their disputes to achieve the most favorable results possible.



Law clarifies parents' obligation to pay unreimbursed medical expenses

Until July 1, 2004, most judges ordered divorced parents to share payment of a child's "extraordinary" medical or dental expenses that weren't reimbursed by insurance. "Extraordinary" was defined as charges in excess of \$100 for the treatment of a single illness or condition. Each judge interpreted this vague language differently, resulting in inconsistent child-support orders.

Effective July 1, 2004, the custodial parent now must pay for his or her child's unreimbursed health and dental expenses up to \$250 in a calendar year. Once the \$250 threshold is met, both parents will share payment of these expenses proportionately in the same percentage they currently pay under the child-support guideline worksheet.

This change may affect your child-support rights and obligations. If you have any questions about these issues, please consult your family law attorney immediately.

The best legal thinking gets the best results

HMOs and patient care

To obtain the best care at the lowest cost, HMO members can ascertain their rights and responsibilities from a number of sources.

- At enrollment, members obtain a comprehensive handbook or guide that outlines benefits, treatments, and services the plan covers.
- The HMO plan contract defines benefits, such as deductibles and lifetime limits, with greater specificity.
- The plan's Member Services telephone representatives can advise on what the plan covers, particularly for "out of network" services.
- If HMO coverage is provided through an employer, the company's human resources office can answer questions about plan rules, costs, coverages, appeals, and complaints.
- A state's insurance department can also advise



on HMO patients' rights and responsibilities.

- HMOs customarily pay for services on the basis of specific treatment guidelines, called practice protocols. Members can usually obtain the best medical attention with the highest coverage when participating physicians follow HMO treatment protocols.

When an HMO plan errs

Most HMOs deliver members' health services as promised in the contracts. When they do not—or deny or delay treatment—members have legal recourse. A diabetic patient with numerous high-risk factors for cardiac disease suffered a myocardial infarction and died. The patient's wife and estate sued the HMO for delaying stress-testing and not prescribing blood-pressure medications. Their lawyer provided evidence that with timely treatment, the patient would have had a near-normal life expectancy. The jury awarded a wrongful-death verdict and damages.

Manufacturing, employment, and injuries

It's no secret that our nation's manufacturing sector has declined in scope and size over the past decade as productivity has increased and jobs have moved overseas.

Surviving manufacturing companies know that they must continue to make accommodations to remain efficient and competitive. Management may lay off part of its workforce, which means that the fewer remaining employees pick up more of the work. Purchasers increasingly look for suppliers who can provide needed products and services at lower costs. Supervisors may extend or delay maintenance and replacement schedules to get additional months or years of use out of capital equipment. Some companies overhaul and renovate plant equipment rather than replace it.

Rebuild...with safety

When a maintenance employee crawled beneath a refurbished conveyor system to make an adjustment, the motor's chain drive crushed his wrist and severed part of his pinkie. Since the injury was to his dominant hand, he sued his employer for loss of future wages and inability to do repair work. His attorney argued that the equipment's rebuilder had failed to incorporate an inner chain guard that would have prevented accidental contact with the chain drive. The parties settled.



Cosmetic surgery



According to the American Society of Plastic Surgeons (ASPS), in 2003 over 8.7 million procedures were performed on patients who wanted to improve their appearance and manage signs of aging—a 32 percent increase over 2002. Invasive surgical procedures grew 5 percent. Minimally invasive procedures, such as Botox® injections, grew 41 percent.

Like all other surgeries, cosmetic surgery involves risk. Reality programs, such as ABC's *Extreme Makeover*, may cause some patients to fail to appreciate the seriousness of cosmetic surgery as well as potential outcome problems and side effects associated with surgery and medications.

ASPS suggests that patients considering cosmetic surgery...

- insist on a physician board-certified by the American Board of Medical Specialties.
- demand safe surgical facilities.
- require a medical examination and evaluation.
- learn all they can about cosmetic surgery.
- seek ASPS-affiliated physicians.
- ask questions.

Outcome problems

Cosmetic-surgery patients can seek justice in the courts when physicians make preventable mistakes. Following surgery to lengthen his chin, a patient suffered restricted lip movement. The plaintiff's attorney showed that the patient was not warned of the procedure's risk. A jury awarded a judgment, which a judge reduced. The case will be retried.

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HOME WARRANTIES

Builders who construct new homes usually provide a one-year written warranty through which they agree to correct construction or cosmetic workmanship deficiencies.

In most cases, contractors want to satisfy customers. Many construction companies conduct a premortgage settlement walk-through of a new property, which enables owners to identify contractual omissions or substitutions and final-finish blemishes that builders should repair.

Sometime near the end of the first year, the builder may ask owners for a "punch list" of additional problems to be fixed. This is usually the home buyer's last opportunity to point out serious plumbing, HVAC, electrical, and other concerns. It may take 12 months to discover squeaky floors or steps, drywall screws that have popped up, gutters and downspouts that don't work properly, or more serious issues.

After the first year, some builders will continue to repair problems that they reasonably acknowledge as their responsibility. However, others may feel that the warranty's liability has run its course, noting that defective construction or deficient finish issues have become the owner's maintenance responsibility.

PERSISTENT PROBLEMS

When problems persist, home owners may find assistance from consumer-protection guidelines or even state liability laws. When these don't solve the problem, home owners have recourse to legal remedies through the justice system. One home owner requested that his builder correct a drainage problem that repeatedly caused flooding and damage to his property. When the contractor refused, the home owner's attorney sued for negligence, breach of warranty, fraud, and nuisance. A jury awarded punitive damages.

Medical technology and premature babies

Neonatal Intensive Care Units (NICUs) are high-technology hospital departments.

Neonatologists have 24-hour access to computerized physiological data on a high-risk or premature infant's health status. Electronic monitors continually assess and report basics, such as temperature, blood pressure, and respiration. Doctors may request specialized high-tech testing to evaluate a baby's blood oxygenation, cardiac functions, and even vision and hearing capabilities.

Equally important is the time and care that skilled and experienced physicians and compassionate staff give to each infant. Newborns' parents recognize the balance between the masses of high-tech NICU equipment and the quality time caregivers spend touching, talking to, and smiling at babies.

When errors occur

Although NICUs help many newborns survive, parents have recourse when caregivers make preventable mistakes. A baby was born prematurely at 27 weeks of gestation. The hospital's pharmacy erred in mixing a nutritional glucose solution, which caused the baby to suffer hypoglycemia, seizures, and brain injury. The parents sued for negligence and reached a structured settlement for lifelong care.



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“Indemnify and hold harmless”

More and more consumers are being asked to sign “indemnify and hold harmless” contracts before hiring contractors, giving permission for children to go on school outings, or even joining spas.

To seek liability protection, businesses and other organizations add “hold harmless” language to contracts. This means that if there is a loss or harm resulting from negligence, the signer may have a much harder time seeking and obtaining recompense. In addition, should the negligence somehow harm a third party, the signer may become a party to that lawsuit. For example, if a carpenter’s hammer slips and injures a mailman, the hiring home owner might be a lawsuit’s first target, since the “indemnify and hold harmless” contract might hold him or her liable for the carpenter’s mistake. What should consumers do?

- Read contracts carefully.
- Ask if there are “hold harmless” clauses.
- Cross out clauses, initial the deletions, and sign the contract.
- Ask your insurance agent if your liability policy covers potential harm.
- Seek legal counsel.



Medical malpractice UPDATE

Caps don’t reduce doctors’ rates

Despite medical injury caps passed by the Florida and Texas legislatures in 2003, physicians’ insurance rates continue to rise in those two states. The much-touted cap solution to rising medical malpractice insurance rates didn’t keep Florida and Texas insurers from asking for and receiving policy rate increases for 2004.

In Florida, which put a \$500,000 ceiling on non-economic damages in malpractice cases, the state’s Office of Insurance Regulation announced a “presumed factor” rate increase of 7.8 percent for 19 different insurers.

Two months after a \$750,000 cap on noneconomic damages (\$250,000 limit on an individual physician’s liability) was incorporated into Texas’ constitution, its insurance commissioner announced that a physician-owned insurer that covered a third of all Texas doctors asked for a 35.2 percent insurance rate increase for doctors and a 67.9 percent increase for hospitals and other institutional health-care providers. Although a second large insurer decreased rates 12 percent, reductions in coverages and increases in deductibles effectively neutralized its effect.

