

# For the *Defense*

**QMPW**

QUINTAIROS, McCUMBER, PRIETO, WOOD & BOYER  
DEFENDING THE HEALTH CARE, NURSING HOME AND LONG-TERM CARE INDUSTRIES

## Firm to Open in Tallahassee

Quintairos, McCumber, Prieto, Wood & Boyer will open an office in Florida's state capital this summer.

"Opening in Tallahassee is part of our long-term growth strategy," notes **Andrew R. McCumber**, managing partner of the Tampa office. "With so many of our partners spending time in Tallahassee during the Legislative sessions, as well as serving our clients in the area, it is a natural fit for us."

QMPW's sixth office will be in downtown Tallahassee, and gives the firm a presence in every major city in the state. **Christopher J. Karpinski** will relocate from Jacksonville to manage the new office, and will be joined by associate **Andrew T. Sheeley**.

## Fort Lauderdale Office News

**Susan P. Sistare** has been appointed as managing attorney of the firm's Fort Lauderdale office.

We also welcome **Kimberly Ross Shapiro**, who joins the firm as a senior associate. Shapiro, who concentrates her practice in medical malpractice, nursing home negligence and products liability, was a member at Stephens, Lynn, Klein, LaCava, Hoffman & Puya.

## QMPW Names New Partners

Quintairos, McCumber, Prieto, Wood & Boyer is proud to announce **E. Patrick Buntz** of the Orlando office and **Albert J. Ferrera** and **Thomas A. Valdez** in Tampa have been named as partners.

"We are proud to recognize these three outstanding attorneys. It is a tribute to their hard work, professionalism and success," said **Hugh L. Wood, Jr.**, managing partner. The firm now has 13 partners and over 50 attorneys in five offices in Florida.

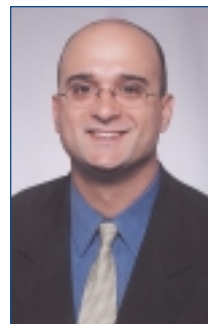
### E. Patrick Buntz

Rick Buntz has managed the firm's Orlando office since it opened in 2001. Prior to that, he practiced law with Cohen, Jayson & Foster, P.A. in Tampa from 1993 until joining the firm in 2000.

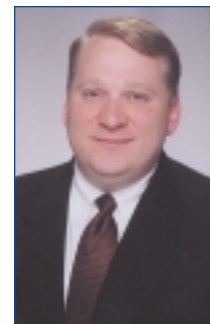
Buntz co-authored the following articles with Albert Ferrera: "Integrated Health Services v. Redway: The Applicability of Florida's Medical Malpractice Pre-Suit Provisions to Claims Alleging Residents' Rights Violations," published in the *Andrews Nursing Home Litigation Reporter* [Volume 3, Issue 6, December 29, 2000] and "Beverly Health and Rehab. Services v. Young: Fla. App. Ct. Gives Nod to Requiring Advance Punitive Damages Proffers," also published in



E. Patrick Buntz



Albert J. Ferrera



Thomas A. Valdez

the *Nursing Home Litigation Reporter* [Volume 3, Issue 9, February 9, 2001].

A 1988 graduate of Stetson University, where he received a BA degree in Political Science, Buntz earned a Juris Doctor from the Stetson University College of Law in 1990.

### Albert J. Ferrera

Al Ferrera joined the firm's Tampa office in 1999. He is a graduate of the University of South Florida, where he received a BA degree in History in 1994, and, in 1997, he earned a Juris Doctor from Florida State University. While finishing his J.D., he was Vice President of the Federalist Society and President of the Spanish-American Law Student Association.

After graduating from law school, Ferrera practiced Labor and Employment law representing management clients in Employment Discrimination, OSHA,

ADA, Wage and Hour, and Appellate cases in the Florida federal Courts and the 11th Circuit Court of Appeals.

Ferrera participated in Operations Desert Shield and Desert Storm in 1990-91 as a crew chief of an armored Amphibious Assault Vehicle with the 2nd Marine Division.

### Thomas A. Valdez

Tom Valdez joined QMPW in Tampa in 1998 shortly after its formation. A 1991 graduate of the University of Florida, he earned a BS degree in Business (Finance). Valdez went on to earn a Juris Doctor, Magna Cum Laude, from Florida State University in 1997.

During law school, he was President of the Moot Court team and recognized for outstanding advocacy and leadership skills.

He first practiced law with Cummings & Thomas, P.A. n/k/a Smith Currie & Hancock, LLP in Tallahassee. ♦

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# Confidentiality of Healthcare Documentation Major Concern Under New Privacy Regulations

By Susan P. Sistare, Esq.  
Chair of QMPW's  
Insurance Defense Group,  
Fort Lauderdale

The Defense Research Institute's recent Medical Liability and Health Care Law seminar was a forum for several topics, such as new Health Insurance Portability and Accountability Act (HIPAA) regulations, and the causes of neonatal encephalopathy and cerebral palsy.

The biggest change facing a healthcare litigator today is HIPAA, which raises issues related to the confidentiality of healthcare documentation. On April 14, 2003, its privacy regulations became effective.

April 14th marked a very important milestone for those affected under the regulations. Employees, owners, directors and officers now are exposed to potential criminal and civil liability should it be determined their organizations have not implemented all the provisions under HIPAA. Essentially, the use and disclosure of Protected Health Information (PHI) is now significantly restricted by Federal law, 45 CFR 160-164.

Section 164.502(a) prohibits the use and/or disclosure of an individual's PHI, except as provided therein. Permitted uses include for treatment, payment and healthcare operations (§506), and with authorization (§508). There is an "opt-out" provision (§510) and certain listed exceptions (§512 and §524). "Health-care operations" includes quality monitoring, credentialing, underwriting, legal services, planning and development, and management and administrative purposes. Authorizations to



attorneys must meet specific form requirements.

Patients' rights provided by these provisions include:

- ◆ *Notice of privacy protections* (§520),
- ◆ *Ability of patient to request additional protection* (§522),
- ◆ *Limitations on inspection and copying* (§524),
- ◆ *Opportunity for patient or patient's representative (i.e., plaintiff attorney) to amend patient's medical records (by supplement, §526), and*
- ◆ *Required accounting for disclosures* (§528).

Patients' ability to request additional restrictions on disclosure of PHI may be used as an obstacle to discovery, and raises other issues about the obligation of the facility or records custodian to comply with the patient's request. The right of a patient or attorney on the patient's behalf to offer "amendments" to the medical record certainly raises the possibility of unscrupulous attempts to either ameliorate unfavorable entries in the record, or create or insert additional information into the record, which may affect the record as a whole. These possibilities are particularly

troubling in the nursing-home domain, since many times cases are very record intensive.

A facility records custodian would be well advised to consult the facility's risk manager or legal counsel before accepting any additional restrictions or amendment to the record proffered by a resident/patient or counsel. Some amendments may be rejected on certain specifically enumerated grounds – the record is already accurate and complete, the amendment sought is not accurate, the record sought to be amended is not yours, etc. – and a rebuttal amendment may be permitted.

PHI records must be segregated from regular legal files that may be accessed by unauthorized persons, and protected from inadvertent disclosure to unauthorized persons. This may raise problems for attorneys who use outside services to copy voluminous medical files. This may be avoided by the use of "business associate contracts."

Penalties for violations may include fines, ranging from \$100 for mere technical violations, to \$50,000 for wrongful use, \$100,000 for use under false pretenses, and \$250,000 for commercial or malicious use.

Another major topic during the seminar was a promising session reviewing the cause of neonatal encephalopathy and cerebral palsy as a result of alleged intrapartum hypoxia. In plain English, that means brain damage in newborns, allegedly caused by oxygen deprivation during birth.

There are four essential criteria that must all be satisfied in order to conclude that a child's cerebral palsy was caused by oxygen deprivation during birth.

① Evidence of metabolic acidosis in the fetal umbilical cord arterial blood obtained at delivery.

② Early onset of severe or moderate neonatal encephalopathy (i.e., lethargy, stupor, coma, seizures) in infants born at 34 or more weeks of gestation.

③ Cerebral palsy of the spastic quadriplegic or dyskinetic type.

④ Exclusion of other identifiable etiologies, such as trauma, coagulation disorders, infectious diseases or genetic disorders.

Unless all four conditions above are met, the cerebral palsy was not the result of intrapartum hypoxia.

Some significant statistics offer promise to the defense in a cerebral-palsy case. Studies show there is no evidence of intrapartum hypoxia in over 70% of cases of newborn encephalopathy. Isolated pure intrapartum hypoxia accounted for only 4% of moderate to severe newborn encephalopathy. Intrapartum encephalopathy may have been superimposed on preconceptional or antepartum risk factors, with pre-existing insult in 25% of cases. Another study showed intrapartum asphyxia was a possible cause of brain damage in only 8% of children with spastic cerebral palsy. Overall, the incidence of neonatal encephalopathy attributed to intrapartum hypoxia, in the absence of any other preconceptional or antepartum abnormalities, was estimated at 1.6 in 10,000 infants.

The pathway from an intrapartum hypoxic-ischemic injury to subsequent cerebral palsy must include neonatal encephalopathy. Hypoxic-ischemic encephalopathy is a minor component of the broader range of the diagnostic category causes of neonatal encephalopathy.

For copies of materials on any of these seminar topics or names of speakers, contact me at [ssistare@qmpwlaw.com](mailto:ssistare@qmpwlaw.com). ◆

*In March, Susan P. Sistare and QMPW partners Hugh L. Wood, Jr. and Andrew McCumber attended the Defense Research Institute's "Medical Liability and Health Care Law" seminar in San Francisco.*

# Depositions: America's Favorite Question and Answer Game

By **Martin L. Khoury, Esq.**  
*Associate, Miami Office*

The first step in a lawsuit is the filing of a Complaint. Once filed, the discovery process begins. "Discovery" means exactly that — each side has the opportunity to discover the facts of the case.

For example, each side will propound Interrogatories, questions intended to explore the opposing party's basis for the suit or its defense. Both sides also propound Requests for Production, asking for documentation to establish certain facts to be used in litigating the case.

## **What is a Deposition?**

In its simplest terms, a deposition is testimony that is taken under oath other than in a courtroom.

While a deposition is a relatively simple process, there is no other tool as effective for uncovering facts.

Questions asked in a deposition can open the doors to other events and circumstances that would otherwise remain undiscovered. The deposing attorney can ask follow-up questions and the opposing counsel can cross-examine the witness. This is all done under oath just as if the witness were sitting in a courtroom.

## **What should you do if you receive a summons for a deposition?**

When you are served a subpoena for deposition, it contains the date, time and location of your deposition, a list of documents you will be expected to bring with you, and the names of the attorney representing the parties to the lawsuit.

Do not call the attorney who sent you the subpoena for deposition. Rather, call the *other* attorney to find out whom, if anyone, represents

your interests or those of your employer. Most good lawyers conduct pre-deposition conferences with witnesses a few days before the deposition. This conference allows you to review a copy of the medical records, to understand clearly your role, if any, in the alleged injury.

Chances are, you are not the target of the lawsuit. It is your employer, under most circumstances, who is vicariously liable for your acts and omissions while done during your employment. If you made a mistake while on the job and someone was hurt as a result, your employer is responsible and likely has the appropriate insurance to cover a claim.

## **Setting the stage**

If you are called for a deposition, what can you expect? The deposition will most likely take place in an attorney's or court reporter's office. The witness (you), a court reporter, and at least one attorney for each side will be present. You will be asked to take an oath or affirmation that the testimony you are about to give is the truth.

As the court reporter records everything said, the deposing attorney usually will ask questions about your background.

If the case involves medical malpractice and you are a caregiver, you can expect questions about your experience, training, education, where you worked and for whom you worked.

You will be asked about licenses you hold, continuing education seminars you have attended, and your relationship with your employer or former employers. Any disciplinary action that has been taken against you will be revealed. The reasons you left each of



your employers will be explored.

If the suit involves your actions or the level of care you provided, the plaintiff's attorney will be sure to get on the record information that adversely reflects your competence.

The second part of the deposition will typically surround a significant event(s). Many lawyers like to structure their deposition questions in chronological order, beginning with your account of the facts starting days or weeks prior to the event.

## **Understanding your role in the deposition process**

It is important to understand the company's chain of command, and policies and procedures upon which actions are taken. For example, if the allegation surrounds a medication error, you will be asked which doctor ordered the medication, who accepted and signed off on the order, the process by which medications are checked out and the documentation procedure used to ensure the right medicine in the right dosage was given to the right patient at the right time. Where and when the error occurred, and why, is important to determine who is liable for a Plaintiff's injury.

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## **QMPW Continues To Grow**

We are pleased to welcome the following attorneys who joined the firm this year:

### **Miami**

**Jose E. Bosch**

### **Tampa**

**Jason S. Miller**

### **Jacksonville**

**Jason M. Miller**

**Andrew T. Sheeley**

### **Orlando**

**Jose Garcia**

### **Fort Lauderdale**

**Kimberly Ross Shapiro**

**Susan P. Sistare**

**Amy S. Weinstein**

## **Attorneys Present Seminars**

In March, Tampa partner **Thomas A. Valdez** presented at the Professional Education System Institute's *Florida Nursing Home Negligence: Asserting Claims & Defending Nursing Homes* seminars in Tampa and Orlando.

Miami attorney **Martin L. Khoury** presented *Radiology: Legal Issues and Depositions* on April 2nd at an ADVANCE event in Orlando.

Miami attorney **Catherine B. Parks** presented an inservice seminar on April 3rd to approximately 70 employees of the Hillcrest Nursing & Rehab Center. The focus of the inservice was how to prevent lawsuits, the importance of good documentation and avoiding common "pitfalls."

The hiring of an attorney is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

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## America's Favorite Question and Answer Game

*Continued from previous page*  
**Speak clearly and  
Take your time**

Always speak clearly since the court reporter must write down everything you say. Take your time. If you need to collect your thoughts before answering a question, do so. Do not anticipate the question before it is asked, and do not answer questions that are not yet asked. If the attorney feels you haven't given a complete answer, he/she will ask a follow-up question.

### **Documentation and notes**

Many medical malpractice cases involve documentation. If you made notations in a patient's chart you can expect to see a copy of the chart.

You will likely be asked to identify your handwriting, initials or signature. Often, you will be asked to read your notations aloud so they become part of the record. Sometimes, when your recollection of the facts is different than what discovery has

revealed to the deposing attorney, you may be asked to justify your decisions, notations and reasoning.

Your notes may be entered into the record as exhibits, and a copy of what you wrote marked as an exhibit for the Court. Always document a chart as though a jury will read your words and an attorney will ask you to explain them.

### **Deposition don'ts!**

What should you not do during a deposition? Do not be evasive. Avoid long rambling narratives when a question asks for a yes or a no answer. Avoid answering a yes or no question with phrases like "not very much" or "it wasn't always that way." Those answers only open the door for more questions. If you must qualify an answer, it is best to start with a yes or no, and then qualify the answer afterward.

Sometimes witnesses launch into such rambling and pointless narratives that the attorney may be forced to ask the original question again to get an understandable answer.

Only answer from personal knowledge. Answers like "I guess so," "I assume so" or "I would think so" are answers that do nothing but confuse both sides. If you do not understand a question, do not answer it until it has been rephrased and you are certain of what you are being asked.

### **Depositions can be lengthy**

How long might a deposition take? It varies. Witnesses who are clear, concise and direct with their answers find their depositions to be much shorter. Even the deposing attorney can't say for sure how long the deposition will take because it is impossible to tell what facts will be uncovered that may require further exploration. Arrive 10 minutes before your scheduled time.

If you have any questions beforehand, call the defense attorney and ask. You will not be allowed to ask questions once the deposition begins. ♦

## QMPW In the Community

Miami partner **Jane Thornton Mastrucci** has been active since 1991 in the Coconut Grove Outreach Center, where she often answers basic legal questions, such as completing legal forms, landlord-tenant issues and how the homeless can find shelter.

Kudos to attorney **Jose Garcia** of our Orlando office for serving as a judge for the recent Florida High School Mock Trial State Competition.

**Mary Hunter**, a nurse paralegal in our Tampa office, proves that there is life outside of work as a volunteer for the Intervention Project for Nurses Groups. Working with the group since 1991, Mary helps rehabilitate affected nurses, who have been referred for abuse problems and other emotional issues.

The Tampa office joined the Hillsborough County Appraiser's Office in the 6th Annual 5K Run for Shelter supporting local children's charities. Attorneys **Jason S. Miller** and **Sheila Nicholson**, along with secretary **Susan Rosenblatt**, spearheaded the effort.

*"...there is no other tool as effective for uncovering facts. Questions asked in a deposition can open the doors to other events and circumstances that would otherwise remain undiscovered."*