HEARTACHES
MEDIATION

Confidential Information for E.F. Adams, Esq.
Counsel for Farmington Hospital

You are a senior partner in charge of litigation in the city's downtown office of Mornys, Vater & Shees, a well-respected Ohio law firm specializing in defense. In the past few years, the firm's transactional attorneys have expanded its corporate health law practice. It also made sense for the litigation group to take on more work for hospitals and other health care clients. Last year, you had successfully defended hospitals in two medical malpractice cases. You were delighted when Farmington Hospital's CEO asked you to serve as outside litigation counsel. Anticipating a claim, Collier sent you the letter written to him by parents of a deceased child, Joshua Fairday, who died after open heart surgery at Farmington Hospital several months earlier.

According to the CEO (who obtained the information from the hospital's Medical Director), Joshua Fairday had a serious congenital heart defect and was in terrible shape before surgery. "Some risks cannot be avoided." The CEO did not respond to the letter's request for a private meeting, not wishing to be subjected to the grieving parents' angry accusations. The CEO anticipated that you would advise against speaking directly to a potential plaintiff. They sent a brief but polite letter to the plaintiff's, expressing sorrow at the death of the Fairdays' child and suggesting they deal with the hospital's outside counsel regarding any possible legal claims.

At the time, the CEO told you of their "nagging worry" this litigation threat could have been instigated by Farmington Hospital's disgruntled former anesthesiologist, Dr. Wilson. Wilson resigned at the hospital's "suggestion" several months ago because none of the other pediatric surgical team would agree to operate with him any longer. The Medical Director had told the CEO that, as a result of physician complaints, the Chief of Surgery had convened an informal "grievance hearing" about Dr. Wilson's performance. At that hearing, the physicians maintained that Wilson was impossible to work with, arrogant, rude, uncooperative, and untrustworthy. They recommended termination of Wilson's clinical privileges at Farmington Hospital and termination of their contract with General Anesthesiology Services (GAS), the corporate entity that provides anesthesiologists on the hospital's medical staff.

The CEO understood from the Medical Director that Wilson was trying to claim whistleblower status, and Wilson had gone through certain confidential hospital files. However, Wilson was already under a cloud for questionable judgments as an anesthesiologist. The Medical Director, Dr. Burns, and Chief of Surgery, Dr. Knowles, had supported the surgical team in maintaining that Dr. Wilson's accusations of surgical incompetence in pediatric cardiac surgery were unfounded. At the morbidity conference following each infant's or child's death, the surgeon demonstrated unusually difficult characteristics of the heart defect or weakness in the patient's condition that led to death. The surgical team was outraged at Wilson's allegations – Wilson is not a surgeon – and ultimately refused to operate with them. While under the hospital's policies and procedures,

Wilson had the technical right to appear at a more formal hearing, and to challenge and appeal their termination, they were "advised" to resign and did so.

Shortly thereafter, your client alerted you to a column in the local Farmington paper, apparently prompted by Dr. Wilson, reporting on their allegations of substandard care in pediatric cardiac surgery at Farmington Hospital, and the hospital's efforts to cover it up by terminating Dr. Wilson. Hardly an in-depth report, the article cited an anonymous nurse who stated that it was not responsible to use the same ICU and the same surgeons for tiny babies as for adults, and that they were constantly depressed from seeing so many babies die on the operating table. "Yes, it's part of the risk you take when you work in the ICU she said, but there seems to be a curse on Farmington." The balance of the article quoted the Medical Staff Director and other hospital officials who asserted that, while they couldn't comment on particulars, "It should be obvious to the public that Dr. Wilson is a bitter and justly terminated former employee, pointing fingers at everyone else."

A while later, the Farmington paper published a letter written by Joshua Fairday's parents, which purported to "warn the community of danger at Farmington Hospital," alleging incompetence in pediatric cardiac surgery, and notifying parents that mortality rates were "worse at Farmington than in other quality hospitals."

Shortly after that, your public relations director fielded a call from a local reporter indicating they were considering a more thorough investigation. Fortunately, hospital's public relations director tactfully suggested that grieving parents of a child who had died from a serious heart congenital heart defect might understandably not be objective sources of information. The same can be said of a terminated, disgruntled, former employee. She noted that the complete story of the medical case involved extremely technical physiology and surgical details. The reporter backed off, and the hospital's public relations person invited her to call if there were any more rumors. You are not aware of any further reporting.

The published letter and column did apparently lead to half a dozen or so calls from parents of children scheduled for cardiac surgery within the next few months. The CEO instructed all hospital staff to recommend these parents talk to their cardiologists and surgeons and make their own decisions, but also to assure them that the hospital was committed to caring for its patients, particularly young patients with heart problems.

A few days later, you were not at all surprised to learn that the hospital and Dr. Dellahunt were served with notice of a suit filed by Attorney Hoffman, on behalf of the deceased Joshua Fairday and his parents. You know Attorney Hoffman is one of the more aggressive and successful medical malpractice plaintiff's litigators in the state.

The hospital's insurance carrier, AHIC (American Hospital Insurance Corporation) was immediately notified. Later, because there appeared to be no coverage issues, AHIC agreed to retain you jointly with the hospital to save on defense costs. Dr. Dellahunt was advised to retain independent counsel and to put their medical malpractice carrier on notice.

You met briefly with the CEO and more extensively with the hospital's Medical Director and others on the nursing and medical staffs, and filed a brief answer to the complaint, denying all claims of any wrongdoing or omission by the hospital or its employees, Medical Director Dr. Burns, and various members of the nursing staff. You also spoke periodically with AHIC's representative, E.B. Dallman, Associate Vice President of Claims, to keep them updated.

Shortly after filing the answer, all counsel in the case were called to an initial scheduling conference before a magistrate judge and were asked if you (and your clients) would consider mediation. Because formal discovery had not begun, plaintiff's counsel insisted on voluntary exchange of certain information: Joshua Fairday's full medical record, including the cardiologist's, surgeon's, anesthesiologist's, and nursing files and all charts, and records of mortality and other adverse outcomes (such as brain damage) in all surgeries performed by Dr. Dellahunt. When you and Dr. Dellahunt's attorney objected to providing records other than Joshua's, plaintiff's counsel made an informal "offer of proof" to the magistrate describing Dr. Wilson's statistical study and the meeting on the evening prior to Joshua's surgery. The magistrate advised you to provide the requested information, because "information produced for mediation is covered by the mediation privilege, unless otherwise discoverable. Besides counsel, let me tell you right now that if I were ruling on a formal motion for discovery in this litigation, I'd allow it." You reported this to the CEO.

The mediation was scheduled for a few months later, to give both sides' time to agree upon a mediator and to have Joshua's medical records and other documents reviewed by independent experts. The lawyers agreed to exchange expert reports a week prior to the mediation. Defense counsel represented that party representatives and insurers with full settlement authority would attend the mediation.

The CEO gave you permission to select whichever mediator you thought best: "as long as he or she is fair and honest and not in the habit of bellying up to the plaintiff's side of the bar." You forwarded the name and resume of the mediator selected. The CEO seemed happy with the mediator's excellent credentials and reputation.

Since the mediation date was set, both sides have been investigating the facts and liability issues and retaining experts to review relevant hospital records. In preparation for the mediation, you met with the hospital's CEO to review the status of the case. You informed them that the surgical expert recommended by insurance company, a semi-retired cardiologist from Columbus, had reviewed Joshua Fairday's medical records, and concluded that Joshua's was an unusually complex TGA defect, with a larger than average hole between the heart's chambers, and that his heart muscle appeared to have been in weakened condition prior to surgery. The expert stated that the autopsy report included no evidence that the surgery fell below the standard of care.

As expected, the plaintiff's experts, a pediatric cardiologist and a surgeon from Harvard Medical School and Boston Children's Hospital, disagreed. While acknowledging that TGA is a serious heart defect and Joshua's case was not uncomplicated, they opined that Joshua's TGA was not worse than most others repaired in Arterial Switch surgery. They also reviewed Joshua's vital signs and test results from doctor's visits in the months prior to

surgery and on the morning of his admission. They disagreed with any notion that Joshua was in a weakened condition prior to surgery, though they noted that waiting 6 ½ months for the Arterial Switch is a bit long and can take its toll on the patient. They also disagreed with Dr. Dellahunt's notation of Joshua being "pink" and having gone through surgery well, based upon his troubling vital signs in the ICU immediately after surgery. The experts dismissed the idea that the cardiologist's reports and tests had missed subtle aspects of Joshua's heart defect, making them unforeseeable to Dr. Dellahunt. "Dr. Dellahunt may not have studied the reports or the ultrasound pictures carefully enough, but to an experienced reader of such documents, all of the necessary information was present." Finally, the surgical expert was particularly troubled by the excessive length of the surgery – 7 hours under general anesthesia in the operating theater and 6 ½ hours on the heart lung machine. He noted that the length of surgery indicates lack of expertise by the surgeon or surgical team, and "falls below the current standard of care" barring unforeseeable or unusual characteristics of the TGA defect.

Despite the positive nature of the report by defense expert, you wouldn't rely on it. That expert, recommended by the insurer, may not be seen as highly credible. If the mediation were to fail, you would recommend retaining another, more expensive "blue chip" expert before trial. You also know the Fairdays will also be using, directly or indirectly, statistics gathered by Dr. Wilson regarding the mortality rates for Arterial Switch and AVSD surgery at Farmington Hospital, particularly by Dr. Dellahunt. As your client explained, the numbers look bad: the mortality rates at Farmington for the past two years in Arterial Switch surgery have been 35-40%, compared to rates in most larger centers of 20-21% and, recently, as low as 15% in some centers. You know from the complaint that Dr. Wilson is alleged to have presented these statistics to others on the surgical team in the context of a morbidity conference, following the earlier death of an infant in Arterial Switch back surgery.

You explained to the hospital CEO that these numbers did not look good for Farmington Hospital. The CEO told you they had consulted with the Chief of Surgery, Dr. Knowles, who continues to stand with the surgical team, maintaining that Farmington had an unusual run of very difficult cases. While you know that is possible, you advised the CEO (who agreed) to look further. With the CEO's permission, you retained a statistics professor from the local college to review the likelihood that this discrepancy could have been due to random variation, given the smaller number of these surgeries performed at Farmington and the larger numbers in the general statistics. You did not ask for a formal report, just a review and discussion of the data, on a confidential basis. Based on their rough-cut analysis, the professor reports: it is 85% likely that the difference in rates would not have occurred without cause. In short, chances are that something is not going well at Farmington.

You suggested that the CEO review Farmington's medical staff credentialing and peer review processes and JCAHO's last report, as well as how Dr. Dellahunt was hired, granted privileges, and reviewed, and how the hospital came to begin pediatric cardiac surgery**.**

The CEO explained that three years ago, when Farmington Hospital hatched a business plan to stay competitive by expanding ob-gyn, surgery (including cardiac surgery) and pediatrics, it obtained JCAHO's tentative approval of the concept. JCAHO agreed the community would

be well served by expansion of those practice areas. JCAHO is a bit behind schedule in its review inspections, so its last review at Farmington approximately 2 ½ years ago. At that time, while the hospital had begun its expanded operations in ob-gyn, surgery, and pediatrics, it had not yet undertaken pediatric cardiac surgery. JCAHO is due to come in for a regular accreditation review within the next few months.

You are somewhat familiar with the medical staff by laws, and you know that regular peer reviews are required. CEO told you this occurs approximately once every two years at Farmington Hospital. Dr. Dellahunt had not undergone the expected 2-year review at the time this case was filed. And, because of liability concerns and the pending suit, Dr. Knowles agreed with staff that review of Dr. Dellahunt should be delayed**.** Despite lack of formal review, there would certainly be awareness among the medical staff if a doctor were not performing competently.

Farmington Hospital does maintain a policy of convening morbidity conferences whenever there is an adverse outcome: death or serious effects from surgery or other medical decisions. A morbidity conference is designed to be informal. It requires a medical or surgical team to review and discuss the surgery or treatment and in order to learn from what occurred. The CEO was informed by Dr. Knowles that morbidity conferences were conducted among the pediatric cardiac surgery team, whenever a child died after surgery. In those conferences, the doctors had to explain what caused the death. If the Chief of Surgery or any member of the team thought the surgeon was not performing competently, it would have been incumbent upon them to call for independent outside review.[1] While the CEO does not know for certain that Dr. Knowles was at all of these conferences, they attended most of the time.

Dr. Knowles did preside at a morbidity conference following an infant death in Arterial Switch surgery performed by Dr. Dellahunt, at which Dr. Wilson argued that Dr. Dellahunt should be prohibited from performing any more such surgery, including Fairday's, scheduled for the next day. Dr. Knowles was satisfied with Dr. Dellahunt's explanation of the reasons for the death and says Dellahunt's knowledge of surgical techniques and strategies available was apparent. Dr. Wilson's proposal was voted down.

You also asked whether there were any concerns about Dr. Dellahunt's credentials or training, or with any of the other members of the pediatric cardiac surgical team. The CEO explained that, when the hospital expanded its surgical capacity, it brought on two new surgeons: Dr. Dellahunt and Dr. Rasheesh. Dr. Rasheesh had done a residency in general surgery and one in cardiac surgery and had completed a fellowship in pediatric cardiac surgery. Dr. Dellahunt was formally trained in general surgery and adult cardiac surgery in Arkansas and had practiced in a hospital there for several years before moving to Ohio. Before Farmington Hospital operated on its first infant heart, both doctors were sent to training sessions at Children's Hospital in Philadelphia on the latest techniques in pediatric cardiac surgery. Other members of the ICU and surgical teams who were likely to be

[1] Autopsies are routinely performed, but the results are not necessarily compared with the conclusions reached in morbidity conferences.

working on any pediatric surgery were sent to specialized programs focused on the challenges of pediatric care. New ICU and surgical equipment was purchased, or older machines were retrofitted for pediatric needs.

The CEO and the Medical Director emphatically stated they had no reason to believe Dellahunt and Dr. Rasheesh would be other than the finest surgeons. The Medical Director was delighted when they accepted offers to come to Farmington. The medical staff granted both doctors full staff privileges. They immediately became part of the "Farmington family." Both doctors had roots in the community.

You told the CEO that, based upon this initial investigation, it has a reasonably good case. Common sense would argue that neither the hospital nor the surgeon should be blamed for the unfortunate fact that the great arteries were transposed in Joshua Fairday's heart. The Arterial Switch operation is difficult and delicate and highly risky, no matter how expert the surgeon or the hospital care. You also mentioned that juries are sometimes loathe to find against community hospitals. You can make the argument that any mistake made or substandard care (the length of the surgery is a bit troubling) rests with Dr. Dellahunt. You chose not to lecture the CEO on issues of management, negligent credentialling, and clubby peer review, which fails to learn what is going on in the operating theatre and fails to correct it. You will wait to see what additional information develops in the mediation. You are also aware that your responsibility is to the hospital entity, to seeing that the claims are appropriately analyzed, and risk realistically assessed on its behalf – not on behalf of the CEO or Medical Director. For now, given that it's the CEO who hired you, you are not going to criticize the hospital. You'll let them hear it from the other side, or from the mediator.

The insurer AHIC has confirmed the hospital's malpractice insurance is in place and there is no apparent coverage problem. The hospital's policy limits are $3 million per event. While you wouldn't want the insurer to pay too much (this would be reflected in next year's premiums), and the hospital shouldn't admit liability or invite more lawsuits, the insurer should know not to block a reasonable settlement. Despite the tragedy of the death of an infant, you do not believe that these are high dollar verdicts, because there would be no economic loss and no pain and suffering. You will want to do some jury verdict research on the range of possible awards, and to track recent changes in Ohio's law relating to medical malpractice recoveries.

As the CEO explained, the hospital would suffer if the case went to trial or hits the papers, particularly Dr. Wilson's statistics. Fear or even uncertainty about the quality of care for their children will send parents searching far away from Farmington for pediatric surgery. It can be predicted to affect admissions for pediatric care generally, and in obstetrics. A prospective mother won't choose to give birth where there is a question about the quality of care for her newborn. In short, win or lose, this case and bad press it creates could derail Farmington Hospital's strategic plan. (While the hospital had not quite met the strategic plan's projected numbers in pediatric surgery, its obstetrical practice and general pediatric practices had been on target. Without those revenues, the hospital's future would be directly and quickly threatened.)

Of course, one risk created by settlement is that more claims will follow – claims by the parents of other children who died after complex heart surgery at Farmington Hospital. You don't know what can be done about this, but it would be in the hospital's interest to discourage any more filings, or at least to know who's planning to sue, and to reduce publicity and consequent financial damage.

Do what you must to reach a reasonable settlement at the mediation, if it seems to be in the hospital's best interests.