HEARTACHES
MEDIATION

Confidential Information for T. W. Collier, CEO
Farmington Hospital

You are the CEO for Farmington Hospital. Your obligation is to the hospital's Board of Directors and, necessarily, to the hospital's patients and physicians.

A few months ago, you received an aggressive letter from a plaintiff's attorney, threatening a malpractice suit against the hospital and a number of its nurses and physicians, and describing how the parents of a deceased child were suffering due to their alleged incompetence, and requesting a meeting with them. You asked your assistant to tell you what it was all about. She spoke to the Chief of Surgery, Dr. Knowles, who was familiar with the case. Knowles explained that an infant, Joshua Fairday, had suffered from a serious congenital heart defect, was in terrible shape before surgery, and that some risks cannot be avoided. You referred the letter to the hospital's outside counsel for litigation and put the hospital's insurance carrier on notice. You had no desire to be subjected to angry accusations by grieving parents and also anticipated that any lawyer would advise against it. Instead, you sent a brief but polite letter expressing sorrow at the death of their child, but requesting they communicate with the hospital's outside counsel regarding any legal claims.

You remember a nagging worry that 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 no others on the pediatric surgical team would agree to operate with them any longer. Dr. Burns, the hospital's Medical Director, had informed you that, as a result of physician complaints, the Chief of Surgery, Dr. Knowles, 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. You understood from Burns that Wilson was trying to claim whistleblower status and had gone through certain confidential hospital files. However, Wilson was already under a cloud for questionable judgments as an anesthesiologist.

Dr. Burns and Dr. Knowles had supported the surgical team in maintaining Wilson's accusations of surgical incompetence in pediatric cardiac surgery were unfounded. At the morbidity conferences for each case in which an infant or child was lost, the surgeon was able to demonstrate unusually difficult characteristics of the heart defect or weakness in their condition. The surgical team was outraged at Wilson's allegations – who is not a surgeon – and ultimately refused to operate with Wilson. While under the policies and procedures of the hospital, Wilson had the technical right to appear at a more formal hearing, and to challenge and appeal the termination, you know they were advised to resign and did so.

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You are told that plaintiff's counsel, Attorney Hoffman, is one of the more aggressive and successful medical malpractice plaintiff's litigators in the state, based in Cincinnati. You knew a lawsuit was on the way.

Shortly thereafter, you were alerted to a letter in the local paper, written by Joshua Fairday's parents, purporting 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." The paper also printed another column, apparently prompted by Dr. Wilson, reporting on his 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 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 director invited the reporter to call if there were any more rumors. You are not aware of any more reporting.

The letter and column did lead to half a dozen or so calls from parents of children scheduled for cardiac surgery within the next few months. You 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.

Shortly after that, you were not 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.

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The hospital decided to retain the well-respected attorney E.F. Adams, at Mornys, Vater & Shees in the City, instead of the small Farmington law firm it usually used. The attorney you had worked with at the Farmington firm thought they might be conflicted out, because Dr. Wilson had met with them and discussed issues raised in the Fairday case. You also notified the hospital's insurance carrier that suit had been filed. (Later, because there appeared to be no coverage issues, the insurance carrier agreed that it and the hospital would jointly retain E.F. Adams, to save on defense costs.) Dr. Dellahunt was advised to retain independent counsel and to notify their medical malpractice insurer.

Attorney Adams met briefly with you and more extensively with your 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 any of its medical, surgical, or nursing staff.

Shortly after that, Attorney Adams called you to explain that, in an initial scheduling conference with counsel, the magistrate judge asked if the parties would consider mediation of the case. Because formal discovery had not begun, plaintiff's counsel was insisting on voluntary exchange of certain information: Joshua Fairday's full medical record, including the cardiology, surgery, anesthesiology, 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 Adams and Dr. Dellahunt's attorney objected to providing records other than Joshua's, plaintiff's counsel made an oral "offer of proof" to the magistrate describing Dr. Wilson's statistical study and the surgical team meeting on the evening prior to Joshua's surgery. The magistrate advised the defense attorneys 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."

Subject to the parties agreement, the mediation was scheduled for a few months later, to give both sides time to select a mediator and 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.

You gave your attorney permission to select a mediator "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 were happy to learn the mediator selected was from the City, with 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 the relevant hospital records. In preparation for the mediation, you met with attorney Adams to review the status of the case. Adams informed you that the surgical expert recommended by insurance company, a semi-retired cardiologist from Columbus, had reviewed Joshua Fairday's medical records. The expert concluded that Joshua's was an unusually complex TGA defect, with a larger than average

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hole between the heart's chambers, and that his heart muscle appeared to have been in weakened condition prior to surgery. The expert didn't see evidence of surgical technique that fell below the standard of care.

Not surprisingly, the plaintiff's experts, a well-respected 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 Dellahunt's assertion that Joshua was in a weakened condition prior to surgery, though they noted that waiting 6½ months for the Arterial Switch is a bit long and can take its toll on a 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 any notion 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."

Although your expert's report was positive, you can see they are not as highly credentialed and impressive as the plaintiff's experts. You also know the Fairdays will be using, directly or indirectly, information gathered by Dr. Wilson regarding the mortality percentages for Arterial Switch and AVSD surgery performed at Farmington Hospital, particularly by Dr. Dellahunt. As your attorney explained, the numbers look bad: the mortality rates at Farmington for the past 2 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.

Attorney Adams advised you that these numbers did not look good for Farmington Hospital. You consulted with the Chief of Surgery, Dr. Knowles, who continues to stand with his surgeons, maintaining that Farmington had an unusual run of very difficult cases. While you know that is possible, you and your attorney decided to look further. At the attorney's request, you authorized them to retain 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. The professor was not asked for a formal report, just a review and discussion of the data, on a confidential basis. The professor reported that, based on a

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rough-cut analysis, it is 85% likely that the differences in rates would not have occurred without cause. In short, chances are that *something* was not going well at Farmington Hospital.

In addition, you decided to try, very quietly, to get an internal confidential assessment of the quality of care in the hospital, particularly pediatrics, surgery, and the ICU. You set up small boxes near various bulletin boards in the hospital with a small sign that asked: "How are we doing? If you are a doctor, nurse, or patient, please tell us if you have any concerns about the hospital. Of course, we like nice comments too! You need not sign your name – all comments will remain confidential." You were surprised by the number of negative comments received. Several respondents, identifying themselves as nurses, provided detailed critiques of ICU operations, and condemnations of a number of surgeons. Some of the medical staff indicated concerns with people operating "beyond the range of their competence", and a "slipshod, chummy review procedure where excuses are tolerated, and bad practice continues without concern for patients." You were shocked by these comments, because they were articulated by current staff, not just a disgruntled former employee. You have not told the lawyer about this informal information gathering exercise.

At your lawyer's suggestion, you also looked into 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.

You 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 that 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 full review at Farmington was 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. Just before Farmington officially began performing pediatric cardiac surgery, JCAHO did come in to inspect the facilities and staffing and gave tentative approval. JCAHO is due to come in for a regular accreditation review within the next few months.

You are familiar with Farmington's medical staff by laws requiring regular peer reviews. At Farmington Hospital, this occurs approximately once every two years. Dr. Dellahunt had not undergone his two-year review at the time this case was filed. And, because of liability concerns and the pending suit, Dr. Knowles and the staff agreed to delay Dr. Dellahunt's review. 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

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surgical team to review and discuss the surgery or treatment in order to learn from what occurred. You were 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 Dr. Knowles or any member of the surgical team thought the surgeon was not performing competently, it would have been incumbent upon them to call for independent outside review.[1] While you do not know whether 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 proposed and 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 infant's death and said Dellahunt seemed knowledgeable about the surgical techniques and strategies available. Dr. Wilson's proposal was overwhelmingly rejected.

Your attorney also asked whether there were any concerns about Dr. Dellahunt's credentials or training, or with any other members of the pediatric cardiac surgical team. You explained that, when the hospital expanded its surgical capacity, it brought on two new surgeons: Dr. Dellahunt and Dr. Rasheesh. Dr. Rasheesh had completed a residency in general surgery, and one in cardiac surgery, and 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 surgeons who were likely to be 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.

Neither you nor the Medical Director had any reason to believe Dr. Dellahunt and Dr. Rasheesh were 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. Dr. Rasheesh's sister in-law is a senior nurse in labor and delivery. Dr. Dellahunt went to high school in or near Farmington and has extended family with many ties to the hospital community.

Your lawyer told you that hospital has a good chance of winning on the Fairdays' claims. 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. The attorney also indicated that juries are loathe to find against community hospitals. Any

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

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mistake made or substandard care (the length of the surgery is a bit troubling) rests with Dr. Dellahunt in this case.

Of course, the hospital's malpractice insurance is in place . You are relieved that the insurer doesn't seem to be raising any coverage defenses. It is the insurer's responsibility to buy off any risk the hospital might face in the litigation. You understand the hospital's policy limits to be in excess of $3 million per event. While you wouldn't want them to pay too much (the hospital would be penalized in next year's premiums), and you don't want to admit liability or invite more lawsuits, the insurer should know not to block a reasonable settlement. Any funds contributed directly by the hospital (in addition to insurance) would have to be approved by the hospital's board. The hospital's budget is always tight, but you would be able to find reasonable additional funds, if absolutely necessary. Though you assume the board would ultimately follow your recommendation, various board members would strongly question a decision to let the insurer off the hook for any of the settlement.

You recognize that the hospital would suffer if the insurer failed to put up reasonable funds. Failure to settle will force the case to trial. You can think of nothing worse than this case going to trial or hitting 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 all non-emergency admissions, especially for pediatric care and obstetrics. You can see that 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 completely 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.

Business aside, if the plaintiff's allegations were even partially true, it would trouble you greatly. You did not go into a not-for-profit hospital business instead of a corporate job to bring about unnecessary infant deaths. If there is something wrong with the way your hospital is caring for patients, it is your job to fix it.

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

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