HEARTACHES
MEDIATION

Confidential Information for Marty Hoffman, Esq.
Attorney for the Plaintiff, Joshua Fairday (deceased) and His Parents

You left your health law practice in a large law firm in the state's largest city several years ago, to "change sides" from defense to plaintiff's work. You wanted to work for yourself and could no longer tolerate the slimy feeling of defending well-financed corporate or individual defendants when they had done wrong. It seemed immoral at worst, or a wasteful at least, to expend your life's energies trying to save an insurer's or a hospital's money, or to let physicians duck responsibility for the consequences of their incompetence or laziness.

Fortunately, your spouse's job as a tenured law professor is secure, because the first few years were difficult financially. With your law school classmate Phil O'Brien, you established Hoffman & O'Brien as a boutique plaintiff's law firm focusing on plaintiff's medical malpractice and whistleblower cases, as well as products liability and consumer class action suits. You soon learned that plaintiff's contingency work can be personally, professionally, and financially rewarding, but requires comfort with risk and long dry spells. While you have occasionally borne the financial brunt of a defense verdict, you feel completely right about representing clients harmed by negligence or malfeasance. In the medical malpractice arena, your practice is helped by having previously worked on the defense side. You still enjoy the respect and trust of medical malpractice defense lawyers with whom you had worked previously. Indeed, they have been good referral and marketing sources, inviting you to present the plaintiff's perspective at conferences and on CLE panels.

The story of your clients in this case, Ellen and Elliot Fairday, parents of deceased Joshua Fairday, deepens your commitment to this work. It makes you angry at the all-too-common immorality, secrecy, and mediocrity of doctors, hospitals, and the health care system.

At your first meeting with Ellen and Elliot Fairday, you learned that they are 32 and 35 years old and have been teachers in the Farmington, Ohio public schools for the past 8 years. They moved from the large City to Farmington, when Ellen Fairday finished her teaching degree and got her first job at Farmington Elementary. Elliot Fairday had an excellent reputation as a junior high science teacher and had no trouble finding a job in the Farmington Middle School. A few years ago, Elliot was promoted to Assistant Principal. While Ellen remained a first-grade teacher, she was given responsibility (and some extra income) for coordinating the younger elementary enrichment programs.

Two years ago, the Fairdays were thrilled by news of Ellen's pregnancy, after many years of trying. However, several months into the pregnancy, an ultra-sound indicated their unborn son had a serious heart defect. They were told there were many surgical techniques available to correct the defect, and that while he might need an interim procedure shortly after birth, he would not have open-heart surgery until he was a little bit older.

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Their son, Joshua Fairday, was born at Farmington Hospital with the heart defect known as "Transposition of the Great Arteries" ("TGA"). He died approximately 6 ½ months later, as a result of that defect and unsuccessful surgery to correct it.

As the Fairdays explained Joshua's TGA, his left ventricle was connected to the pulmonary artery, instead of his aorta, and the right ventricle connected to the aorta, instead of to the pulmonary artery. Immediately after birth, Joshua was placed in a neo-natal intensive care unit ("ICU"). The Fairdays were referred to the pediatric cardiologist on staff who explained the problems with Joshua's heart in terrible detail. The cardiologist referred them to a surgeon at Farmington Hospital, describing them as "one of the region's most experienced surgeons" who could correct this condition in neo-natal infants.

While in the ICU, Joshua was treated with Prostaglandin E to keep the arterial duct open. The Fairdays understood (from the cardiologist) that this is usually rapidly effective in improving the blood oxygenation by encouraging more blood flow to the lungs and more flow through the hole between the two atriums (which is common in hearts with TGA). At that point, Joshua received a cardiac catheter – a type of closed heart surgical procedure to help him survive prior to the open-heart Arterial Switch surgery his condition required.

The Fairdays were told (and you have confirmed) that TGA is one of the most common of the dangerous heart abnormalities, and that the Arterial Switch operation was first developed and used approximately ten years ago, replacing an older surgical sequence involving multiple procedures. Because they were told that Arterial Switch procedure was not experimental, involved only one surgery, and would improve their son's chances of long-term survival, they approved it. Frankly, when parents learn that their newborn baby has a serious heart defect, there is not much they can do except trust the doctors.

The pediatric cardiologist told the Fairdays that Joshua was doing well with the Prostaglandin E. They understood the Arterial Switch is generally performed when a baby is three to four months old. However, Joshua seemed so small and thin, the cardiologist suggested delaying the surgery until he had grown a bit. Surgery was finally scheduled when Joshua was 28 weeks – 6 ½ months old.

The Fairdays' final appointment with the surgeon, Dr. Dellahunt, the day before the surgery, went smoothly. He seemed kind and gentle, perhaps a bit tired or harried, nothing unusual. He again explained the Arterial Switch operation, and briefly examined Joshua. According to the Fairdays, Dr. Dellahunt remarked that surgery is always delicate, but Joshua was a good candidate, and "we should be able to switch things round so this fellow will grow to be big and healthy – much more "pink" than he is now."

For the Fairdays, waking and bringing their son into surgery was terribly difficult. The surgery took much too long, at least 7 hours from the time they left Joshua until he came out of the operating room. After 4 hours, they began to suspect things were not going well, because a nurse had told them he should only be in surgery "four to five hours, give or take."

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They rushed in to see their son in the ICU recovery and were greeted by Dr. Dellahunt, who was by his side. Dellahunt looked up, smiled, and said to the Fairdays and the ICU nurse, "Well it took a while, but he looks nice and pink," and made a notation on Joshua's chart before he walked away. When the Fairdays looked at Joshua, he did not look at all well. Besides the various breathing tubes and bandages, his skin looked light grayish, particularly at his feet and hands. They thought they saw small tremors going through his body. When they said something to the nurse, she said she would check on it. She gently suggested that they go to the cafeteria and get some rest.

The Fairdays did not want to leave Joshua alone, but over the next half hour, they took turns getting coffee from the cafeteria, calling relatives, etc. Suddenly, about an hour after Joshua arrived in the ICU, they saw the nurse nervously check his monitor and sound an alarm. The anesthesiologist, Dr. Wilson, and various doctors and nurses rushed in, and began manipulating Joshua's chest, administering shots of some kind, and finally giving him electric shocks. Within 10 minutes, they could see that he was not responding. The resident physician sadly told the Fairdays that Joshua had not survived.

Dr. Dellahunt came in as the ICU team was working on Joshua, turned to the Fairdays, and said, "I am so sorry. Joshua was a sick little boy. His poor heart must have been tired out from waiting so long before the Switch." Dellahunt looked down and slowly walked away.

It was many months before the overwhelming numbness subsided enough for the Fairdays to function. Before Joshua's death, through a hospital-sponsored parent support, the Fairdays had become friendly with several other parents whose children were also diagnosed with heart defects. At first, they were reluctant to get back in touch. But Ellen Fairday finally called another parent when she learned her baby had also died after surgery by Dr. Dellahunt, several months before Joshua. Through that mother, she learned of two other babies who had died, one on the operating table and one a week or so after surgery.

Eight months ago, five months after Joshua's death, the Fairdays noticed a column in the local paper called "Comings and goings down at Farmington Hospital." The columnist noted that the pediatric anesthesiologist, Dr. Wilson, had resigned after only a short time, and had filed suit against the hospital, claiming that they were effectively terminated, or forced to resign after discovering just how "down on the farm and backward in time" the practice was there. Wilson claimed charges of Wilson's shortcomings and "being difficult" were trumped up because Wilson had called them on their botch-ups. Wilson claimed to have evidence that the surgeons at Farmington Hospital performing heart surgery on babies had much higher mortality rates than surgeons in "quality" hospitals elsewhere. Wilson stated that one of the surgeons finally admitted they couldn't handle neo-natal heart surgery, and was giving it up, "but not before they decided to sack me, because secrets are more important than patients in this terribly chummy backwater town." Hardly an in-depth report, the article also cited an anonymous nurse who stated it was not a responsible hospital practice to use the same ICU equipment and the same surgeons for tiny babies as for adults. The nurse was constantly depressed by seeing so many babies die on the operating table. "Yes, it's part of the risk you take when you work in the ICU," the nurse said, "but there seems to be a curse on Farmington." The balance of the article quoted the director of the Medical Staff and other

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hospital officials who asserted they couldn't comment on particulars, but "it should be obvious to the public Wilson was bitter about their termination and is just pointing fingers at everyone else."

At that point, the Fairdays decided to contact a lawyer. Before reading that article, they had not thought about suing anyone. Nothing could bring Joshua back to life, and they knew his was a serious heart defect, difficult to repair. They accepted that the Arterial Switch surgery was complex and involved risk that their child would not survive, no matter how skillful the surgeon or hospital care. Dr. Dellahunt and others on Farmington's medical and nursing staff seemed knowledgeable, professional, and sincerely sorry when Joshua died.

A family friend in the City referred the Fairdays to you. After hearing their story (on an initial consultation basis), you told them that while pediatric heart surgery is always difficult, you too had heard some troubling rumors about Farmington Hospital. You knew from the grapevine that its pediatric cardiac surgery service was put in place quickly and aggressively promoted. You suspect the hospital was intent on expanding business and increasing revenues, perhaps before specialized surgical expertise was in place.

You offered to do some initial investigation on the Fairdays' behalf, using paralegals to search data bases concerning mortality rates for the Arterial Switch surgery, and perhaps checking on Dellahunt. You asked their permission to write to the hospital on their behalf to obtain Joshua's complete medical record, and to obtain an informal opinion from a doctor with whom you often consult. You also asked if they had any objection to your speaking about Joshua's case with the Dr. Wilson mentioned in the newspaper article. You offered to do this research for a modest hourly fee, not to exceed $3,000, but stated that if there appeared to be merit to a malpractice claim, you would be willing to take the case on a 33% contingency fee plus expenses.

The Fairdays authorized this initial research, explaining it was probably the most important piece for them. They wanted to know the real reason Joshua had died. And, if you learned that mistakes were made, they want to help make sure these mistakes would not happen again, so that Joshua's death would not be in vain.

Several weeks later, you called the Fairdays to meet and review the preliminary results of your research and investigation. You asked if they objected to your inviting Dr. Wilson, the anesthesiologist mentioned in the article, who had been Joshua's anesthesiologist and present at his death. The Fairdays agreed Dr. Wilson could be present.

At that meeting, you and Dr. Wilson presented the Fairdays with information that angered you when you learned it, and undoubtedly caused them terrible anger and anguish. It means that Joshua Fairday would likely be alive today, if his surgery had been performed by a better surgeon, in a better pediatric cardiac facility. In fact, if the Fairdays had been informed of what was discussed in Farmington's surgical team meeting the night before Joshua's surgery, it is unthinkable that they would not have elected to take him elsewhere.

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Apparently, the Arterial Switch surgery performed by Dr. Dellahunt on Joshua was first used approximately 10 years earlier, replacing another surgical sequence which was less surgically difficult, but less effective for patients. When the Arterial Switch surgery was first performed, the operations tended to be lengthy, as long as 6 or 7 and even up to 8 hours, and large number of patients failed to survive. Surgical techniques aside, length of surgery alone contributed to mortality rates. During open-heart surgery, patients are hooked up to a heart-lung machine. It is hard on the body and its vital organs to be on that machine for lengthy period of time. This is particularly true for infants and small children. After four or five years of experience with the Arterial Switch surgery, average times were drastically reduced – to no more than 4 or 4 ½ hours, barring unforeseeable circumstances. These times were reduced at pediatric cardiac surgical centers in London, Australia, Boston, Chicago, Seattle, Philadelphia, and the City, due to refined surgical techniques and better coordinated surgical teams. Thus, within 5 years after this surgery was pioneered, the mortality rate for infants was less than 20-21% in most major centers, and recently as low as 15% in some centers. According to Dr. Wilson, the mortality rate at Farmington Hospital during his short tenure there was 35-40%.

Dr. Wilson had become alarmed at the number of infants dying during or shortly after Arterial Switch surgery and in Atrio-Ventricular Septal Defect ("AVSD") surgery, performed by Dr. Dellahunt and Dr. Rasheesh. Wilson talked to a nurse-colleague in the ICU, who had also moved recently to Farmington Hospital. The nurse agreed with Wilson's observation that too many infants were dying when these doctors operated, more than in other hospitals, and that the surgery seemed to take much longer. The nurse commented that Dr. Dellahunt had a habit of telling parents that their deceased baby had been "so very sick and weakened," when they had been relatively robust prior to surgery. The nurse had also observed Dellahunt record on patients' post-operative charts in the ICU that they were "pink and tolerated surgery well," when that wasn't true. The nurse suspected Dellahunt was trying to shift blame, to make it look like the surgery had been successful, but post-operative care would be to blame if the patient did not survive.

These observations caused Dr. Wilson to raise concerns within the surgical team, and at the morbidity conferences held by the surgical team in the wake of a death or "adverse outcome." Each time, Dr. Rasheesh or Dr. Dellahunt would describe the case as very difficult or unusual and launch into technical discussions of the presenting arteries or the size of the hole in the patient's heart. Occasionally, they would complain that the cardiologist's reports and tests had failed to reveal an aspect of the patient's heart defect, which came as a surprise and took additional time in surgery. With every death, the surgical team would nod and accept their explanations.

Dr. Wilson was not nodding, however. Wilson was disturbed enough about the situation to speak to the Chief Physician, Dr. Knowles. However, Knowles had fully accepted the surgeon's explanations. Wilson then spoke on a confidential basis to a former medical professor at a conference, who recognized a potentially serious problem and advised Wilson to gather the evidence.

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Dr. Wilson began to investigate, gaining access to the surgeons' files through central file archives, and compiled statistics for the last few years, since Dellahunt's and Rasheesh's arrival and the beginning of pediatric cardiac surgery at Farmington. Wilson prepared a report summarizing the findings: for the previous two years, the mortality rates for Arterial Switch surgery at Farmington were 35-40%, compared to rates of 20 – 21% percent at most major pediatric surgery centers, and 15% in some centers. Also, the time elapsed in average surgery was far longer, 6 – 6 1/2 hours at Farmington, vs. 4 hours or less elsewhere. Dr. Wilson's report questioned the experience and qualifications of Dr. Dellahunt, whose major training was in adult cardiac surgery and had limited exposure to pediatrics. Finally, Dr. Wilson also noted Farmington's lack of dedicated surgical teams, operating rooms, and ICU facilities for neonates and very young children compromised the quality of care.

As you and Dr. Wilson were careful to explain to the Fairdays, it is important to understand that statistics work in funny ways. When absolute numbers of surgeries performed are small, a short run of bad luck and difficult cases can dramatically affect percentages. If surgery is skillfully performed, these things will "even out" over time, and a small hospital's mortality rates should be no higher than any other. However, if the numbers do not even out, the statistical variation would be strong evidence that the standard of care was not being met, either in surgery or in post-operative care.

The evening before Joshua's surgery, Dr. Wilson presented this report and findings to the surgical team and to Dr. Knowles, during a morbidity conference scheduled to discuss the recent death of an infant patient of Dr. Dellahunt. The surgical team was outraged and berated Dr. Wilson for invading other doctors' files, told Wilson not to be naïve about statistics when the absolute numbers are small, and noted that a run of difficult cases can make numbers misleading. Dr. Wilson argued strongly that Dr. Dellahunt should not be permitted to perform Arterial Switch surgery again; the next day's surgery should be delayed and a specialist brought in from the City or elsewhere. Dr. Wilson pressed Dr. Dellahunt for review of the circumstances leading to prior adverse outcomes. Dr. Dellahunt again maintained that the infants' heart conditions had presented unusual and difficult challenges, not foreseeable from cardiologist's reports or prior tests, and the infants were terribly weak. The matter was put to a vote, and all but Dr. Wilson voted in favor of permitting Joshua's surgery to go forward.

The next morning, when the Fairdays brought Joshua in for his "pre-op" preparation, *no one mentioned the previous evening's controversy to them*, or suggested that they consider bringing Joshua to another pediatric cardiac surgeon. The surgery went ahead as scheduled. Joshua died that day.

The next day, the surgical team announced they would refuse to operate with Dr. Wilson as anesthesiologist. Members of the surgical and medical staff avoided Wilson in the hallways, treating Wilson like a traitor. Only a few sympathetic nurses appeared willing to speak with Wilson at all. One of those nurses, B.J. Stanton, a friend of Dr. Wilson's, announced that they would no longer work on pediatric ICU patients. Dr. Dellahunt gave notice to Dr. Knowles that they would no longer perform the Arterial Switch, though willing to perform other, less

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complex procedures. Dr. Wilson does not know if the surgical team conducted a morbidity conference to review the causes of Joshua's death. If so, Wilson was not invited.

The next week, Dr. Wilson was summoned to the office of Pat Burns, the hospital's Medical Director, to review issues relating to their clinical privileges at Farmington Hospital. (Dr. Wilson had technically been employed by GAS - General Anesthesiology Services – but that employment relied upon having clinical privileges at Farmington.) Without officially terminating Wilson's privileges, Burns reported the Farmington surgeons all refused operate with Wilson as anesthesiologist (giving Wilson no income) and Burns would not interfere on Wilson's behalf. Burns left the clear impression that Wilson's privileges would be terminated in the near term unless they chose to resign. Wilson did so.

The Fairdays were overwhelmed by this information. They both began to sob, knowing that Joshua might be living, had they brought him to a different hospital and a different surgeon. You thanked Dr. Wilson for attending the meeting. You suggested the Fairdays take some time for themselves. Rather than schedule another appointment, they asked to reconvene in an hour, and went for a long walk.

By the time the Fairdays returned to your office, they were deeply angry at every living soul at Farmington Hospital who saw what was happening there, even Dr. Wilson. "How could they cover up and make excuses? How could they let this happen again and again, in the spite of the numbers and the needless deaths? How could they believe Dr. Dellahunt's self-serving stories? How could they let Joshua's surgery go forward, without telling us about the meeting the night before? *Why didn't one of the nurses or Dr. Wilson take us aside and tell us to get Joshua out of there and take him to a more skilled surgeon*?"

You listened to them pour out anger and incredulity and agreed. Then you softly said, "We can't bring Joshua back. The question is: what do you want to do now?" You went on to explain that the Fairdays had a number of options. They could try to make an appointment to see the General Counsel or the CEO or any other official at Farmington Hospital, to present what they had learned and ask for an explanation. They could expose the story to the newspapers. They could begin an effort to connect with parents of other babies or children who died after heart surgery at Farmington Hospital, through a news story, town bulletin boards, doctor's offices, or social media and the internet, to try to understand the magnitude of the problem and find any patterns.

"One option," you explained, "is to immediately file a lawsuit for medical malpractice." You explained that there appears to have been malpractice by the hospital and its officials, and by Dr. Dellahunt, so they would be named directly in the suit. Depending upon the evidence discovered, and on the Fairdays' feelings, Dr. Wilson and others on the surgical and nursing teams might be named individually. You told them that, under Ohio law, a medical malpractice suit must be filed within a year of the time they knew or should have known of the malpractice. To the extent the problem is one of negligent credentialing – allowing doctors to begin performing surgery or continuing to perform surgery for which they were not qualified – they probably have two years. You explained there would be some

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controversy over when one "should have known." To play it safe, you suggested filing within the next few months, before the first anniversary of Joshua's death.

"Another option," you continued, "is for me to write a strong 'lawyer letter' to the General Counsel at Farmington Hospital, articulating your claims – why you have every right to be horrified by the level of care, blindness, and intentional cover-ups at Farmington Hospital, which led to the tragic and possibly unnecessary death of your son. We could wait for their response, perhaps see if someone from the hospital will meet with us."

You emphasized: "In either event, it will be important for you both to think about what you would like to see come out of this, what your interests are. You could certainly collect for any monetary losses you have incurred, but I don't know what those are. You may be able to collect damages for 'loss of enjoyment of life, loss of companionship, and pain and suffering,' including psychological injury, and punitive damages. These are subject to strict limits under our state law. However, a recent case calls into question how these limits be applied to psychological suffering. When we go forward, we can discuss this further."

The Fairdays explained that their primary interests are not money, but the loss of their son did cause them some financial hardship. While Elliot Fairday has continued in his job as Assistant Principal, they have both suffered from depression, which has also taken a toll on their marriage. They have paid for psychological counseling and some short-term marriage counseling. (Their marriage is now stronger than ever, thanks to that.) But Ellen Fairday has been unable to shake her depression. She found it impossible to walk into the elementary school building and work with children. She had taken a six-month leave after Joshua was born because they knew his medical condition would require her care. After he died, she extended the leave for an additional six months, and then went back as a "teacher's assistant" at 2/3 of her former teacher's salary. (As a teacher's assistant, if she is absent a day or two because of depression, it is not as critical to the functioning of the classroom.) Ellen has also given up all responsibilities for enrichment curriculum. Before Joshua's death, she was earning $52,000 a year - $48,000 as a first-grade teacher and $4,000 for the curriculum responsibilities. When she returned as a teacher's assistant, her salary dropped to $32,000. She does not know how long she will have to remain in that position, or whether she will be able to overcome depression enough to maintain it. The Fairdays' psychological and other counseling has cost at least $10,000, and Ellen Fairday is likely to require an additional $6,000 a year in counseling and prescription drugs. Of course, money cannot begin to compensate them for the loss of their child, or for their inability to enjoy life on a day-to-day basis.

The Fairdays' primary goal is to make sure that nothing like this ever happens again, not to any child in Farmington, indeed, not to any child in Ohio, or anywhere. They want to make sure incompetent surgeons are not permitted to wield a scalpel, and doctors don't defer to their self-serving buddies when they should know it puts a child at risk. They strongly believe (and you agree) the hospital administrators, doctors, nurses, and everyone who knew what was going on should be punished for trying to cover up, hide information, and silence the doctor who brought forth the data, and failing to stop Joshua's surgery on the day of his death.

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They also feel strong allegiance to the families of other children who might not have died, had they had heart surgery at the City Children's Hospital instead of Farmington Hospital. They feel that their lost children should be represented too. On the one hand, they are inclined to reach out to these families, to tell them what they have learned about Dellahunt and Farmington. They might want to join in action against the hospital and force corrective action. On the other hand, the Fairdays wondered aloud whether it is more ethical to spare them the information. Or is it better to spare them terrible feelings of guilt from knowing their babies might be alive had they made different choices?

Mr. and Mrs. Fairday ultimately asked you to draft a strong "lawyer letter" to the hospital's General Counsel and CEO and asking for a meeting. You drafted a five-page letter, outlining their legal claims against the hospital and its doctors, expressing the Fairdays' outrage at the events leading to Joshua's death, and requesting a direct meeting. The only response received was directed to you, expressing "sorrow at Joshua's unavoidable death due to a congenital heart defect" and directing future correspondence and discussions to the hospital's outside counsel. You forwarded the letter to the Fairdays, who were outraged that no one from the hospital even deigned to sit down with them!

The Fairdays asked you to commence the legal process by filing suit against the hospital and the surgeon. (You agreed to take the case on a 33% contingency basis.) You discussed with them the option of naming Dr. Wilson as a defendant as well, given Wilson's knowledge of Dr. Dellahunt's incompetence and failure to alert the Fairdays, or any other parents. The Fairdays thought long and hard about this issue, finally asking you NOT to name Dr. Wilson because "Wilson was the only one who tried to do anything." You agreed that Wilson would be a good witness for the Fairdays, and that, in terms of helping parents in the future, it was important "not to punish the whistleblower, even if the whistle should have been blown louder and sooner."

The Fairdays also wrote a letter to the local paper, despite your advice that the threat of writing would give them more leverage. They didn't care about leverage. They wanted to alert parents in town to the danger of taking their children for surgery at Farmington Hospital. Their letter was printed, but you do not know what effect it had.

You filed the complaint, serving notice upon Dr. Dellahunt and the hospital. Not long after formal answers were filed, you were called to an initial scheduling conference before a magistrate judge, who had been asked if you (and your clients) would consider mediation. As you explained to the Fairdays, because there had been no formal discovery, you insisted on voluntary exchange of certain information: Joshua'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 pediatric cardiac surgeries performed by Dr. Dellahunt, as well as information concerning the defendants' insurance coverage and policy limits. When the hospital's and Dr. Dellahunt's attorneys objected to providing records other than Joshua's, you 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.

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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."

You and your clients viewed this as a good sign. However, you warned: "It's not good to become overconfident. One never knows what will happen in a case like this. Just because evidence is discoverable, or as in this case, informally exchanged for a mediation, doesn't mean it would be admissible at trial. It can be tough to get a jury to rule against a doctor."

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 agreed to make sure necessary insurance carriers were put on notice, and party-representatives with full settlement authority would attend the mediation.

Unfortunately, the cost of expert reports and the mediator are expensive, and not covered in the contingency fee arrangement. When you advised the Fairdays that these were essential, they said they could arrange to cover the costs.

The Fairdays gave you permission to select whichever mediator you thought best: "as long as he or she is fair and honest and not a buddy of anyone at Farmington Hospital." You forwarded them the resume of the mediator selected. They seemed pleased that the mediator was from the larger City, with excellent credentials and a great deal of experience.

Last week, you reviewed and sent the Fairdays copies of both sides' expert reports. Not surprisingly, the defense expert, a semi-retired cardiologist from Columbus, reviewed only Joshua's medical record. He concluded that Joshua's was a difficult TGA defect, with a seriously enlarged hole between the heart's chambers, and his heart muscle appeared to have been in weakened condition prior to surgery. The defense expert concluded there was no evidence of surgical technique that fell below the standard of care.

Your experts, a pediatric cardiologist and a surgeon from Harvard Medical School and Children's Hospital in Boston, agreed that TGA is a serious heart defect and Joshua's case was not simple. However, they observed that Joshua's TGA was not worse than most others repaired in Arterial Switch surgery by experienced surgeons. 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. Your experts dismissed Dellahunt's assertion that the cardiologist's reports and tests had missed subtle aspects of Joshua's heart defect, making them unforeseeable. "Dr. Dellahunt may not have studied the reports or the ultrasound pictures carefully enough, but to an experienced reader of such

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documents, all the necessary information was present." Finally, the surgeon was particularly troubled by the surgery's excessive duration – 7 hours under general anesthesia in the operating theater and 6 ½ hours on the heart lung machine. He asserted that the surgery's duration 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.

You called the Fairdays to discuss the experts' reports and suggested they think carefully about their interests prior to the mediation. You emphasized that mediation is an informal process and may yield creative remedies or solutions not possible with a court verdict.

You explained to the Fairdays that, as a named party, Dr. Dellahunt would be present. You asked them to think about whether they would be comfortable being in the same room with Dellahunt. You explained that if they were not comfortable, you would want to let the mediator know in advance. You also asked to meet with them a few days before the mediation, to talk about how they could participate most effectively in the process.

Within the week prior to the mediation, you received two calls from other parents of deceased children at Farmington, potentially interested in retaining you as counsel and filing suit. You set up initial meetings with these potential clients after the scheduled mediation date. You do not believe they have been in contact with the Fairdays, and you do not believe their potential cases should affect the Fairdays' right to negotiate a good outcome in mediation.

You have spent significant time beyond the initial investigation – an estimated 80 hours – working on the pleadings, reviewing documents, speaking with the experts and with your clients, and will expend more time in preparation for the mediation. On the other hand, the case could easily involve an additional 300 to 400 hours in discovery, trial preparation and trial. In most instances, the value of this time would be recovered with a liability verdict in favor of the Fairdays. However, you recognize that wrongful death cases for babies are tricky from a damages perspective, where there is little or no economic loss. In a case like this, punitive damages should be available, but you know there are caps on certain damages in Ohio. A recent Ohio decision calls into question whether the caps can be applied to psychological damages. You will have to do the research on damages issues prior to the mediation, and you will want to discuss these issues with the Fairdays, when appropriate.

Prepare for the mediation. Your preparation should include at least one meeting with the Fairdays.

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