

# A Glimpse into a Challenging Area of Practice

## Plaintiff's-Side Medical Malpractice Lawyers in Wisconsin Lose 90 Percent of the Time at Trial. It Has Not Deterred J. Michael End, L'73.

A young man living in western Wisconsin had pain in one of his calves. He told his aunt who was a nurse. She thought it could be a deep vein thrombosis, a serious condition, and she promptly took him to the local clinic. A staff member there felt the man's calf and didn't think anything was unusual, other than the man might have a varicose vein. The man and his aunt left.

Four days later, the man came back. He said he was still in pain and was now short of breath. The staff at the clinic

did a chest X-ray. A doctor said it was pneumonia, even though later it was determined that the X-ray didn't indicate that. The man was given antibiotics.

A week later, the man returned to the clinic, saying he was in great pain and his breathing was very labored. The staff ordered a urine test. As the man was leaving the clinic, he collapsed and died. He had a pulmonary embolism (a blood clot in his lungs) that originated with deep vein thrombosis in his leg, just as the man's aunt had told the clinic at the start.

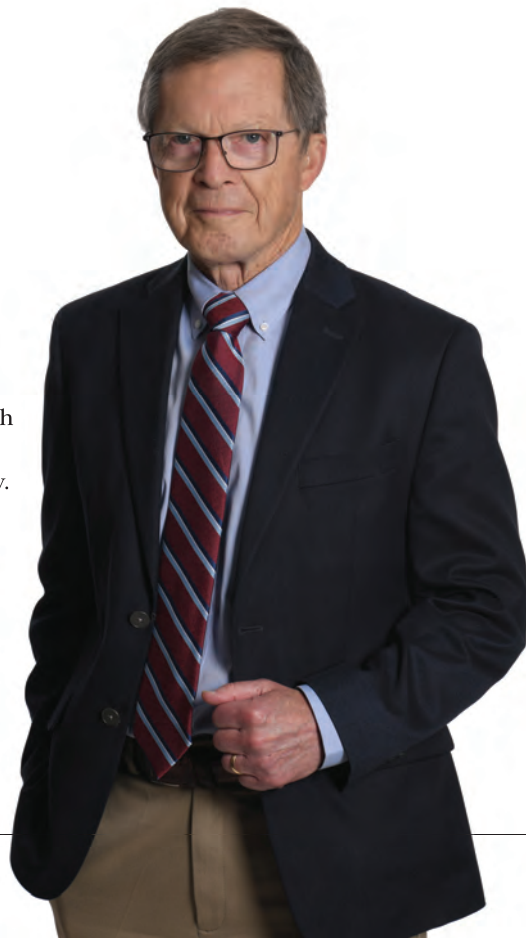
Welcome to the world of J. Michael End, L'73, a leader among a small number of lawyers in Wisconsin who represent plaintiffs in medical malpractice cases. (End recently sat down for an interview with the *Marquette Lawyer* to provide a window into this world.)

Why is it a small number, about 10 or so currently, across the state—including End and his two partners in a firm based in downtown Milwaukee? A big reason, End says, is that it is so difficult to win a medical malpractice case, particularly in Wisconsin. Plaintiffs nationwide lose about 90 percent of their cases—and those are among the relatively small number of cases that lawyers agreed to pursue, after screening or sorting.

Indeed, End says, he lost that case in western Wisconsin, which occurred 17 years ago. After hearing from the man's family and looking into the situation, End had agreed to represent the family. "I thought the case was relatively strong," he said.

As End recounts it, in the county where the case was tried, pretty much everybody knew everybody else, and the clinic was a fixture. It was not until the second day of trial that End learned that the bailiff was a retired doctor from the defendant clinic. End brought in a nationally respected expert to testify that the clinic should have spotted the man's problem. But the defense brought in an expert who said the clinic staff acted reasonably.

"You can't always bank on winning on the facts," End says.



## The History Behind Current Medical Malpractice Law

The current era of medical malpractice law in Wisconsin began in 1975. Arguments at that time maintained that medical malpractice cases were becoming numerous, awards were large, and malpractice insurance premiums were rising. Medical care in the state was being affected negatively, advocates for change claimed.

The Wisconsin legislature enacted a law requiring all Wisconsin physicians and hospitals to have medical professional liability insurance. The required minimum limits of coverage are now \$1 million per claim and \$3 million per year. The law also created a state-administered fund to pay any damages exceeding the mandated \$1 million/\$3 million of liability insurance coverage. Doctors and medical institutions generally were required to make annual payments to that fund. And legal standards were changed such that it became harder for plaintiffs to win.

Almost 50 years later, the system remains in operation. Over the decades, there have been steady declines in the number of malpractice cases won by plaintiffs and in the amounts of awards to plaintiffs. The state fund for awards over \$1 million has been used, but not to a level anywhere near the amount that it has accumulated. In a recent report, it listed a net position of \$1.26 billion. The fund's net position had been \$361.3 million in 2012, so it has increased, on average, about \$100 million a year since then. End pointed out that Wisconsin health providers were required to make no premium payments to the fund in the past three years because of the fund's strength.

The annual report issued in 2022 for what is known as the state's Injured Patients and Families Compensation Fund said that from July 1, 1975, through June 30, 2022, the fund was named in 6,398 claims, and it made payments on 691. That means payments were made from the fund in less than 11 percent of claims. The total amount paid from the fund over 47 years was just south of \$1 billion (not to be confused with the more than \$1 billion currently in the fund).

In June 2022, 157 hospitals, 16 hospital-affiliated nursing homes, 16,220 physicians, 979 nurses anesthetists, and 1,255 other participants were taking part in the system, for a total of more than 18,000 individuals and agencies covered. There were 45 new claims filed that year, or less than one claim for every 400 participants.

End pointed to figures from Wisconsin's director of state courts showing the number of medical malpractice lawsuits filed in 1999 to be 294. That has trended down steadily since then, with only 87 cases filed in 2022—fewer than 30 percent of the 1999 total.

End also pointed to case law from the Wisconsin Supreme Court holding that surviving spouses or minor children are the only family members who can collect compensation in a medical malpractice case involving someone who died as a result of malpractice.

"I can't tell you the number of times the phone rings, and I hear this story, and I say, 'Well, was your mother survived by her husband?' 'No, Dad died five years ago.' 'And are there any minor children?' 'Oh, no, we're all in our 30s now,'" End says. "We have to say to the people, 'You don't have a cause of action in Wisconsin.'" End says that such a restriction on recovery is quite unusual among states across the country.

Then there are the jury instructions. End says that the standard jury instructions in medical malpractice cases in Wisconsin make it difficult to win. For example, in the case of a doctor in general practice, Wisconsin's standard jury instructions say that the doctor is "required to use the degree of care, skill, and judgment which reasonable . . . doctors who are in general practice . . . would exercise in the same or similar circumstances, having due regard for the state of medical science at the time . . . plaintiff . . . was treated [or] diagnosed." (The omitted portions of the quotation concern similar instructions for other cases, involving doctors who are not in general practice but specialists.) End says it is not hard for lawyers for defendants in a malpractice case to find doctors who will testify to that effect.

Overall, he says, "Wisconsin is either the worst or the second-worst state of the 50 states in the number of payments per population for medical malpractice. We are embarrassingly horrible." He adds, "I try not to take cases that are going to lose. I want to win. Yet so often, I do my best to win a medical malpractice case and present a really strong case, and somehow we lose."

### What Motivates Michael End?

So why does he do it? To what extent is his practice "a cause" for him? End doesn't see it so much as an ideological or political cause, but rather as an effort to help people. "I would say that

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— Michael End

the cause is trying to help an individual who needs help and knowing that it is going to be against all odds,” End says.

His practice is something he somewhat slipped into long ago. End grew up in the Milwaukee area. He is, as he put it, a “3Mer.” He graduated from Marquette High School, Marquette University (majoring in political science and philosophy), and—with a gap for military service in Vietnam—from Marquette Law School. His father was a doctor, as were others in his family. Did he consider going into medicine? He says he always fainted at the sight of blood, so no.

He met his wife, Joan, when both were undergraduates at Marquette. They were married while he was in law school. They’ve been married for 52 years and have four adult children and 10 grandchildren.

End says he had a law school classmate who was working at a firm that specialized in defense of insurance companies. End got a position as a clerk at the firm. After graduation, he became involved in mortgage foreclosure cases and personal injury cases. That led to his first medical malpractice case. Even then, he says, a lot of lawyers didn’t want to touch such cases, but he was interested. He has maintained it as his specialty for more than 40 years.

He recalls that his first medical malpractice case involved someone who had lost hearing in one ear after a doctor’s treatment. End did extensive research on the procedure involved in the case and found an expert witness from Fort Lauderdale, Fla., to testify. “My memory is that I managed to lose that case, but what I’ve learned after doing malpractice work all these years is that that’s not unexpected.”

## The State of Representing Medical Malpractice Plaintiffs

End and his colleagues have won cases as well—he’s made a living, after all, and remains dedicated to the work. But he says as it has become harder to win, the number of lawyers taking medical malpractice cases has gone down. He understands why younger lawyers would avoid the work, and he doesn’t know the future of the specialty.

“Every day, people call our office and say, ‘I’m looking for a malpractice lawyer,’” he says. “Many of the people have horrible injuries, and they deserve some compensation. But we have to weigh, using our experience as best as we can, whether or not this case is one that we want to take on and if the potential result at the end of

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it is enough to warrant spending hundreds of hours of our time.” He says there have been cases where expert witnesses alone have cost more than \$100,000.

“There aren’t a whole lot of lawyers doing it, so the poor injured person has a tough time finding someone,” he says.

End recounts a case from northern Wisconsin from a few years ago. A woman in her 70s had an aortic aneurysm. The local doctor measured it and wrote in the chart what he found. End says the size of the aneurysm put it in a category where experts that End brought into the case said the risk of surgery outweighed the potential benefit. The doctor went ahead with the surgery, and the woman died during the procedure. “I’ll never forget the *voir dire*,” End says of the jury selection process. All the jurors knew each other. End went ahead with the case, the defense attorneys brought in an expert who said the local doctor made a reasonable decision, and the plaintiffs lost.

But it is not easy to win in more populous counties either, he says. At the time of this interview, his firm had just lost a case in Milwaukee County in which the plaintiff was a woman who underwent a procedure involving her thoracic spine. She had walked into the hospital, but became a paraplegic as a result of the surgery. The woman lost in court.

So why does he keep doing this? “It’s an opportunity to help people to whom a favorable outcome is very important, and I have learned enough medicine and trial experience over the years to enable me to sometimes help those people,” End says. Now in his 70s, he said he wants to keep up the practice. “So far, I’m still enjoying it,” he says. “I like to tackle the cases.” There are still many people who deserve their day in court for things that happened to them, he says, even if finding lawyers to take their cases—and especially to win them—is hard. ■