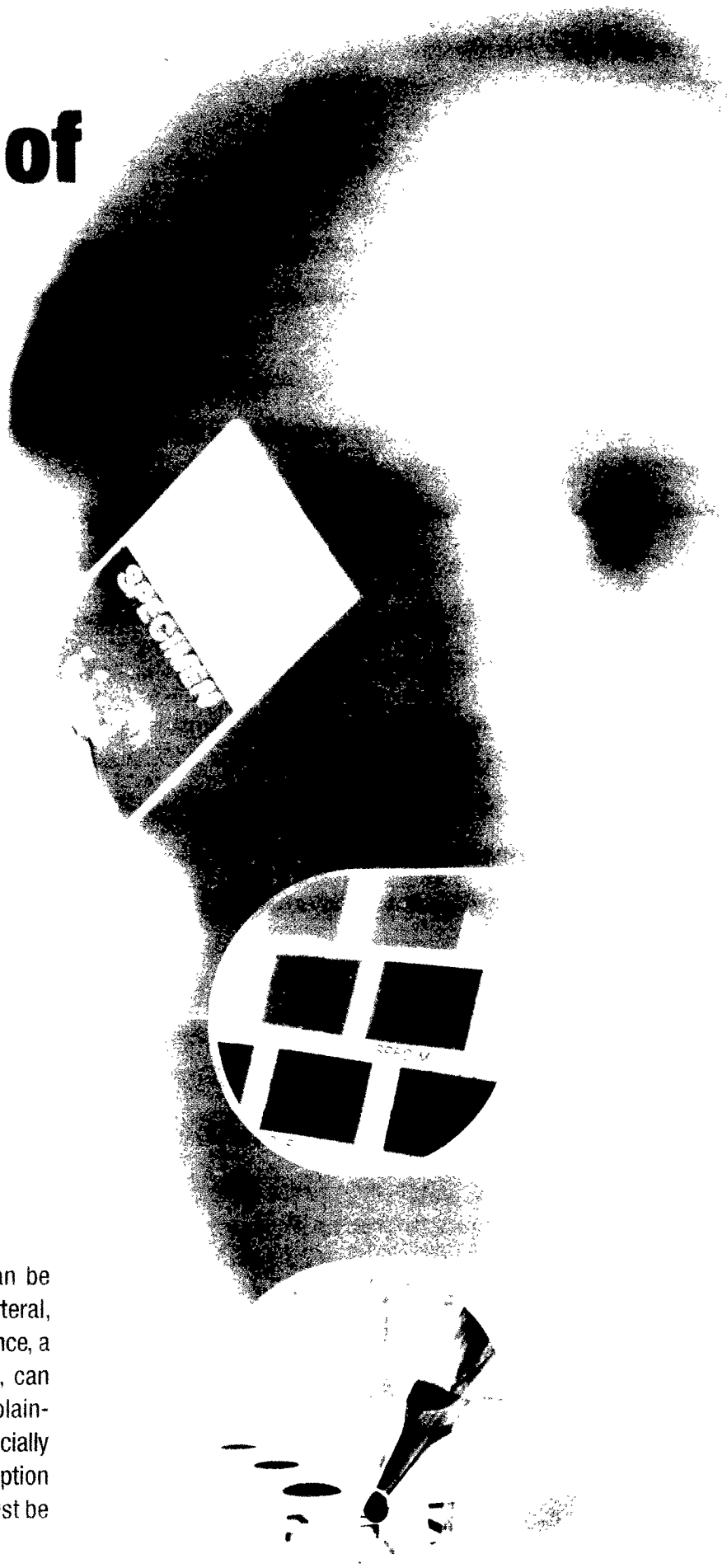


A Primer

Discovery of Pathology Evidence

by James M. Wood

A personal injury or disease action can be won or lost by a overlooked, and literal, item of evidence. This particular bit of evidence, a piece of tissue stored on a hospital shelf, can often definitively establish the cause of a plaintiff's injury or disease. Tissue analysis is especially important in the burgeoning field of prescription drug product litigation. Pathology tissue must be evaluated in every case if it is available.



This article details methods that will help the trial lawyer to understand, obtain, and evaluate tissue samples and reports. The initial preparation of pathology slides is described, as is the procedure for obtaining duplicate slides for a consultant's review. Professional societies and texts are identified to help the litigator find a potential expert witness or search for relevant and helpful medical articles.

Need for Discovery and Review of Pathology Evidence

In many prescription product cases the cause of disease or injury is often unraveled only by an evaluation of the evidence found in a pathology slide. Cases involving injuries attributed to premature birth, AIDS, DES, and vaccines demonstrate the absolute necessity for existing pathology evidence to be carefully examined.

For example, the cause of an early rupture of the placental membranes in pre-term birth cases is often vigorously contested. This condition can frequently be traced to a viral infection that has nothing to do with a drug or with an obstetrician's treatment. This infection may appear in a tissue sample of the placenta or umbilical cord. Benirschke, "A Review of the Pathologic Anatomy of the Human Uterus," 84 *Am.J.Ob.Gyn.* 1595 (1962); Minkoff, "Prematurity: Infection as an Idiologic Factor," 62 *Am.J.Ob.Gyn.* 137 (1983); and Naeye, *et al.*, "Causes and Consequences of Premature Rupture of Fetal Membranes," *The Lancet*, pp. 192-94 (January 26, 1982).

Here is another example. Plaintiffs' lawyers' decision to take a DES case depended on whether they were dealing with a primary

cancer of the vagina or a primary cancer of the cervix. A statistical association between the development of *vaginal* clear cell adenocarcinoma in a young woman and *in utero* exposure to DES had at one time been suggested. A case controlled epidemiological study has investigated this specific association. However, the disease was often found to be a primary cancer of the *cervix*. No epidemiological study has been conducted that has shown a statistically significant association with DES and *cervical* clear cell adenocarcinoma. While the anatomical distance between the vagina and cervix often is a matter of millimeters, the Oncology Committee of the International Federation of Gynecologists and Obstetricians defined specific guidelines to be used for the classification of vaginal and cervical cancers. These guidelines, together with an independent review of the pathology slides in a cancer case, provided counsel with an important fact to defend the case.

As a third example, a viral link to other cancers has been discovered by oncologists and experimental scientists. See, *e.g.*, Kaufman, *et al.*, "Herpes Simplex Virus and Human Papilloma Virus in the Development of Cervical Carcinoma," 29 *Cl.Ob.Gyn.* 678 (1986); Strelau, *et al.*, "Human Papilloma Virus Type 16 Related DNA in an Anaplastic Carcinoma of the Lung," 55 *Cancer* 1737 (1984). Because of the growing awareness that viruses are a cause of cancer, premature birth, and other physical problems, the role of virus in a case must be examined. Special training techniques or electronmicroscopy can be used by a pathologist to identify the virus. To "ask the right question" one must know the answer.

In these cases, the disease is often rare or presents a histologic pattern seldom seen by a hospital pathologist. Thus, the hospital pathology report may miss or not comment on an important clue that appears only from an examination of the tissue. The trial attorney

must, therefore, look beyond the hospital pathology report when evaluating the cause of a plaintiff's injury or disease and turn to a qualified pathologist who can help evaluate the precise nature of the condition.

Preparation of Pathology Slides

When human tissue such as bone, skin, or organ is removed in a biopsy or surgical procedure, it is routinely sent to the hospital pathology department or an independent pathology laboratory. The gross tissue specimen is first processed, with the tissue embedded in a paraffin wax block. A micron-thin slice of tissue is cut from the block. This tissue slice, which is approximately one-tenth the thickness of a piece of paper, is laid upon a glass slide, stained, and examined through a microscope. From a typical gross tissue specimen, literally thousands of slides can be prepared.

After the initial slide is prepared, the remaining tissue block is saved so that additional slides can be prepared if needed. Pathologists frequently mail slides to each other for "second opinions," but generally the primary pathologist *always* keeps the best slides as a matter of routine. The duplicate slides are cut from the wax tissue block in the same manner as the original slides.

However, evidence of the disease that is seen in the original slide may not be observed in the recut slides or only show up on a recut. An example of this is cancer. Malignant cells may be apparent in the original slide. However, because the cancer may not have invaded the next tissue layer, the cancer may not be seen in a recut slide. More importantly, if biopsy or surgical material is selected that discloses only clean tissue, the next section may show the presence of cancer. If there is ever any doubt as to the correctness of an interpretation of the recut slides, the original slides must always be reviewed.

To verify the original pathologist's diagnosis in any case, it is important that the consulting pathologist be permitted to review and to analyze the original tissue slides and to inspect a sufficient number of additional slides, including performing additional special stains as indicated.

Staining and preparation of pathology



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slides may require more analysis than is the routine of a hospital or laboratory pathology department. For example, the human papilloma virus has long been suspected to be a causal factor in the development of various cancers, including carcinoma of the uterine cervix or lung. To identify the virus in a particular cancer, physicians have developed tests for the staining or radioactive tagging of tumor samples. Consultants should always be asked whether or not there are independent staining or tagging tests that can be performed on tissue blocks to identify causes of an injury or disease not previously examined.

Once the defense attorney has taken preliminary steps to obtain original or recut slides, he or she will identify resources available to help understand and evaluate the evidence.

Pathology Resources

The College of American Pathologists has prepared a guide to understanding the categories in a pathology report. See http://www.cap.org/apps/docs/fact_sheets/pathrep.htm. The elements of the report described are the gross description, the microscopic description, the diagnosis and, if there is a malignancy, the tumor size and the tumor stage.

When the defense attorney decides that a pathology consultant should be retained, in searching for such a consultant he or she must remember that, like all other medical sciences, pathology has developed many subspecialties. He must become thoroughly familiar with the literature that describes the specific diseases, and he must consult with the appropriate subspecialists. The American Board of Pathology, Inc. recognizes such subspecialties as dermapathology, forensic pathology, hematology, immunopathology, medical microbiology, neuropathology, and radioisotopic pathology.

The American Board of Pathology is an important source for identifying potential consultants and experts. The mailing address of the Board is: Lincoln Center, 5401 West Boulevard, P.O. Box 25915, Tampa, Florida, 33622. Pathology departments at major medical schools or teaching hospitals are another fruitful source in finding specialists.

Here is a compilation of resources to which the defense attorney can turn in learning more about pathology (and other medical fields) and understanding specific diseases or injuries, as well as finding specialists who can serve as consultants.

The list is from Medline Plus Health Information, <http://www.nlm.nih.gov/medlineplus/databases.html>. Each citation on this site is linked to the specific website.

Cases involving injuries attributed to premature birth, AIDS, DES, and vaccines demonstrate the absolute necessity for existing pathology evidence to be carefully examined.

CHID online—Combined Health Information Database (Dept. of Health and Human Services): <http://chid.nih.gov/>

Clinical Trials.gov (National Institutes of Health): Provides information for patients about clinical research studies. <http://clinicaltrials.gov/>

DIRLINE (National Library of Medicine): Database of health organizations and research resources. <http://dirline.nlm.nih.gov/>

Drug Information from United States Pharmacopeia (United States Pharmacopeial Convention): A guide to more than 9,000 prescription and over-the-counter medications. <http://www.nlm.nih.gov/medlineplus/druginformation.html>

HSTAT—Health Services/Technology Assessment Text (National Library of Medicine): Access to full-text health care guidelines, assessments, and consumer guides. <http://hstat.nlm.nih.gov/hq/Hquest/screen/HquestHome/s/34413>

LOCATORplus (National Library of Medicine): NLM's catalog of journal, book, and audiovisual collections. <http://locatorplus.gov/>

MEDLINE Search (National Library of Medicine): Access to more than 11 million references to articles published in 4,300 biomedical journals. Enter what you are looking for in the box at the top of the screen. <http://www.ncbi.nlm.nih.gov/pubmed/>

NIH Consensus Statements (National Institutes of Health): Provides reports from major conferences that produce consensus statements and technology assessment statements on controversial issues in medicine important to health care providers, patients, and the general public. <http://consensus.nih.gov/>

TOXNET Databases (National Library of Medicine): Journal citations and data files on toxicology and related subjects. <http://toxnet.nlm.nih.gov/>

Databases on the Food and Drug Administration Web site (Food and Drug Administration): Latest regulatory information on food, drugs, biologics, cosmetics, medical devices, and radiological health. <http://www.fda.gov/search/databases.html>

National Ag Safety Database (National Institute for Occupational Safety and Health): <http://www.cdc.gov/niosh/nasd.html>

NIOSH Pocket Guide to Chemical Hazards (National Institute for Occupational Safety and Health): <http://www.cdc.gov/niosh/npg/npg.html>

Merck Manual (Merck & Co., Inc.): <http://www.merck.com/mrkshared/mmanual/home.jsp>

Merck Manual—Home Edition (Merck & Co., Inc.): http://www.merck.com/pubs/mmanual_home/contents.htm

National Rehabilitation Information Center (National Institute on Disability and Rehabilitation Research): <http://www.naric.com/search/>

Vaccine Info Database: Vaccine/Disease Information; State Vaccine Requirements for School Entry (National Network for Immunization Information): <http://www.immunizationinfo.org/search/index.cfm>

Virtual Hospital (an on-line health sciences library created at the University of Iowa): <http://www.vh.org>

Here is a listing of published books that may help the trial attorney become familiar with pathology issues.

Di Maio, *Forensic Pathology* (2d ed.) (CRC Press, Boca Raton, 2001)

Philo, *Lawyer's Desk Reference* \$1.58 (9th ed.)

Comar, Kutran, Robbins, *Robbins Basic Pathology* (W.B. Saunders 2002)

Tennehouse, *Attorney's Medical Deskbook 3d*, \$1:87 (2002)

Rosai (ed.), *Ackerman's Surgical Pathology* (6th ed.).

The literature discussing and investigating a specific disease must also be consulted. The following compilation is extracted from <http://www.tribehealth.org/consumer/general.htm>.

Medline Plus (General health information on diseases and conditions, as well as drugs and medications. The site has a complete medical encyclopedia with color illustrations.): <http://www.medlineplus.gov/>

Healthfinder (Fact sheets on health topics that can be printed): <http://www.healthfinder.gov/>

Mayo Clinic Health Oasis (Health education for the general public): <http://www.mayoclinic.com/index.cfm?>

Medem (Resources produced by a variety of leading medical societies, including the American Medical Association. Medem's Medical Library has a full range of patient education information.): http://medem.com/MedLB/medlib_entry.cfm

Merck Manual—Home Edition (Online edition of "The Merck Manual," a standard quick-reference text for the general public): http://www.merck.com/pubs/mmanual_home/contents.htm

Diseases Explained (Basic information on diseases and conditions, with illustrations): <http://www.diseases-explained.com/>

Lab Tests Online (Public resource on clinical lab testing produced by laboratory professionals. It has separate drop-down menus, allowing selection by disease, test, or age group.): <http://www.labtestsonline.org/>

The following periodicals have information on the cause of a disease, as well as identifying potential consultants and experts. The list can be found at <ftp://ftp.cap.org/superlinks/index.html>.

American Journal of Pathology (Philadelphia): <http://ajp.amjpathol.org/>

American Journal of Surgical Pathology (New York): <http://www.ajsp.com/>

Analytic Cellular Pathology: <http://www.esacp.org/acp.html>

Archives of Pathology and Laboratory Medicine (full text): <http://arpa.allenpress.com/arpaonline/?request=index-html>

Cancer Epidemiology Biomarkers & Prevention: <http://cebpub.aacrjournals.org/>

Cancer Research: <http://cancerres.aacrjournals.org/>

CAP Today: http://www.cap.org/apps/cap.portal?_nfpb=true&_pageLabel=patho_cap_today_page

Clinical Cancer Research: <http://cancerres.aacrjournals.org/>

Current Diagnostic Pathology: <http://intl.elsevierhealth.com/journals/cdip/board.cfm>

Human Pathology (Philadelphia) (full text): <http://www2.us.elsevierhealth.com/scripts/om.dll/serve?action=searchDB&searchDBfor=home&id=hupa>

International Journal of Experimental Pathology (Table of Contents): <http://www.blackwell-synergy.com/rd.asp?code=IEP&goto=journal>

International Pathology Online News (IAP) <http://iaphomepage.org/>

Journal of Cellular Pathology: <http://www.nottingham.ac.uk/pathology/tocso/jcepath.html>

Journal of Pathology (Table of Contents and abstracts): <http://ajp.amjpathol.org/>

Modern Pathology: <http://modpath.uscapjournals.org/>

Pathobiology: <http://content.karger.com/ProdukteDB/produkte.asp?Aktion=BackIssues&ProduktNr=224272>

Pathology International (Table of Contents): <http://www.blackwellpublishing.com/toc.asp?ref=1320-5463&site=1>

Reviews on Cancer On-line (ROCO): <http://www.elsevier.com/gej-ng/29/50/cancer/show/>

WebMedLit is a listing of medical journals. Here are a few of the titles that deal with pathology matters.

American Journal of Clinical Pathology (Philadelphia): <http://www.ajcp.com/>

American Journal of Forensic Medicine and Pathology (New York): <http://www.lww.com/product/0,1255,0195%252D7910,00.html>

Bulletin—College of American Pathologists: there is no online link

Current Topics in Pathology (Berlin): <http://medcat1.wustl.edu/cgi/ecd.cgi?4890970>: WUM:EDDGO

International Journal of Gynecological Pathology (New York):

<http://www.intjgynpathology.com/>

Journal of Environmental Pathology, Toxicology and Oncology (Park Forest, Illinois): <http://www.begellhouse.com/journals/0ff459a57a4c08d0.html>

Journal of Human Stress: <http://www.getcited.org/pub/100051759>

Journal of Pathology (Chichester): <http://www3.interscience.wiley.com/cgi-bin/jhome/1130?CRETRY=1>

Journal of Forensic Science Society: <http://www.forensic-science-society.org.uk/journal.html>

Pathology Annual (New York): there is no online link

Pediatric Pathology (Washington): <http://www.tandf.co.uk/journals/titles/15227952.html>

Toxicology Pathology (Newark, Delaware): <http://www.toxpath.org/toxpath.html>

The Joint Commission on the Accreditation of Healthcare Organizations also has relevant materials on pathology. These resources can be found at <http://www.jcaho.org>.

Comprehensive Accreditation Manual for Laboratory and Point-of-Care Testing (CAMLAB) (2004)

Comprehensive Accreditation Manual for Pathology and Clinical Laboratory Services (2002–2003)

Standards for Pathology and Clinical Laboratory Services (2002–2003)

Major medical schools and teaching hospitals invariably will have departments of pathology. Chairpersons of these departments can identify individuals within the department or those with national or international reputations in the field that might be available as consultants.

Various professional societies should also be considered as sources for consultants. These societies are listed at <ftp://ftp.cap.org/superlinks/index.html>, and include:

American Board of Pathology: <http://www.abpath.org/>

American Pathology Foundation: <http://www.americanpathologyfoundation.org/>

American Society for Investigative Pathology: <http://www.asip.org/>

American Society for Clinical Pathology: <http://www.ascp.org/>

Association of Pathology Chairs (including Program Directors Section): <http://www.apcprods.org/>

Canadian Association of Pathologists: <http://cap.medical.org/>

International Academy of Pathology: <http://www.iap.nu.ac.za/index.html>

Pathological Society of Great Britain and Ireland: <http://www.pathsoc.org.uk/>

Royal College of Pathologists: <http://www.rcpath.org/>

Royal College of Pathologists of Australia: <http://www.rcpa.edu.au/public/default.cfm>

Society for Ultrastructural Pathology: <http://sup.ultrakohl.com/>

United States and Canadian Academy of Pathology: <http://www.uscap.org/>

World Association of Societies of Pathology and Laboratory Medicine: <http://www.waspalm.org/WASPALM/framework.htm>

Additional Society Websites

American Association of Pathologists' Assistants: <http://www.pathologistsassistants.org>

American Cancer Society: <http://www.cancer.org/docroot/home/index.asp>

California Society of Pathologists: <http://www.calpath.org/>

European Board of Pathology: <http://www.europathol.org/>

European Society of Pathology: <http://129.240.38.9/esp/>

Group for Research in Pathology Education: http://qp.sgu.edu/QuickPlace/gripe/Main.nsf/h_Toc/AB828A8A567D514185256BE300568252/?OpenDocument

International Society of Gynecologic Pathologists: <http://www.isgyp.com/>

Pathology texts should be consulted by the attorney who is involved in litigation that concerns pathology matters. The first list below covers those texts published in 2000, 2001, 2002, and 2003. See http://www.cap.org/apps/cap.portal?_nfpb=true&_windowLabel=

[onlinestore_nonmembers_1](#) for an online book store.

O'Leary, *Advanced Diagnostic Methods in Pathology: Principles, Practice, and Protocols*

Greene, et al., *AJCC Cancer Staging Manual*

Fletcher, *Diagnostic Histopathology of Tumors*

Haber, et al., *Differential Diagnosis in Surgical Pathology*

Rubin, *Essential Pathology*

Cheng & Bostwick, *Essentials of Anatomic Pathology*

Lester, *Manual of Surgical Pathology*

Weidner, et al., *Modern Surgical Pathology*

Henry & Mathur, *On Call: Laboratory Medicine and Pathology*

Schneider & Szanto, *Pathology*

Damjanov & Linder, *Pathology: A Color Atlas*

MacFarlane, et al., *Pathology Illustrated*

Lydyard, et al., *Pathology Integrated: An A-Z of Disease and Its Pathogenesis*

Henson & Albores-Saavedra, *Pathology of Incipient Neoplasia*

Fajardo, et al., *Radiation Pathology*

Westra, et al., *Surgical Pathology Dissection: An Illustrated Guide*

Texts published from 1994 through 1999 continue to be valuable sources of information for the defense attorney wishing to learn more about pathology.

Rosai & Ackerman, *Ackerman's Surgical Pathology*

Weinstein & Graham, *Advances in Pathology and Laboratory Medicine*

Damjanov & Linder, *Anderson's Color Atlas of Pathology*

Kumar, et al., *Basic Pathology*

Majno & Joris, *Cells, Tissues and Disease*

Chandrasoma, *Concise Pathology*

Sternberg, *Diagnostic Surgical Pathology*, (2 vols., with CD-ROM set)

Weidner, *Difficult Diagnosis in Surgical Pathology*

Constantinides, *General Pathobiology*

James & Zumla, *The Granulomatous Disorders*

Epstein, *The Johns Hopkins Atlas of Surgical Pathology* (CD-ROM)

Goljan, *Most Commons in Pathology and Laboratory Medicine*

Sinard, *Outlines in Pathology*

Heller & Klein, *Pathology*

Linardakis & Linardakis, *Pathology*

Rubin & Farber, *Pathology*

Ward, *Pathology Atlases, Network* (CD-ROM)

Nathwani, *Pathology Atlases, Single User* (CD-ROM)

Wick, *Pathology of Pseudoneoplastic Lesions*

Robbins & Cotran, *Pocket Companion to Robbins Pathologic Basis of Disease*

Al-Sam, et al., *Practical Atlas of Pseudomalignancy: Benign Lesions Mimicking Malignancy*

Silverberg, et al., *Principles and Practices of Surgical Cytopathology*

Kirkham & Lemoine, *Progress in Pathology*

Jones, *Review Questions for Human Pathology: A Review for the USMLE Examinations*

Cotran, et al., *Robbins Pathologic Basis of Disease* (6th ed)

Damjanov, et al., *Rypins' Intensive Reviews: Pathology*

Hruban, *Surgical Pathology Dissection: An Illustrated Guide*

Sobin & Witteking, *TNM Classification of Malignant Tumours* (CD-ROM)

Sloan & Dusseau, *World Book in Pathology and Laboratory Medicine*

Raab, et al., *Year Book (1999) of Pathology and Laboratory Medicine*

Once the variety of resources listed above are collected and reviewed, and a consultant retained, counsel is well on the way to thoroughly identifying a cause of a plaintiff's injuries or disease.

Compelling Hospitals and Laboratories to Release Pathology Evidence

In virtually any type of discovery proceeding, lawyers will try to prevent their opponents from obtaining important bits of evidence. Litigation involving pathology is no exception. The most common obstructive behavior in this type of litigation is the attempt to prevent opposing counsel from obtaining the original or recuts of the original pathology slides. As is often the case with portions of medical records, counsel may claim that the pathology slides are protected from review by rights of privacy or privilege. These objections can be effectively rebutted.

First, courts generally accept the relevancy and discoverability of pathology evidence. *Oklahoma City v. Alvarado*, 523 P.2d 1073

(Okla. 1974); *Guibor v. Manhattan Eye, Ear & Throat Hospital, Inc.*, 90 App.Div.2d 733, 456 N.Y.S.2d 986 (1982); *Scafidel v. Crawford*, 486 So.2d 370 (Miss. 1986); *People v. Vick*, 11 Cal.App.3d 1058, 90 Cal.Rptr. 236 (1970).

Courts have recognized the importance of a defendant's independent access to pathology evidence. In *Schindler v. Superior Court*, 161 Cal.App.2d 513, 520, 327 P.2d 68, 73 (1958) (disapproved on other grounds in *People v. Garner*, 57 Cal.2d 135, 18 Cal.Rptr. 40, 44 (1961)), defendants in a murder case moved to obtain release of decedent's tissue specimens for their pathologist's analysis:

It may be that an independent examination of these specimens by another qualified pathologist may indicate that the death of the child was not due to the blows received, or at least may tend to refute that conclusion reached by the autopsy surgeon. These samples and specimens therefore should be made available to the petitioners.

Courts in other jurisdictions have also noted the direct relationship between access to pathologic evidence and fairness. *Harrison v. State*, 635 So.2d 894 (Miss. 1994) (failure to allow defendant access to pathologist and pathology evidence violated due process and was fundamentally unfair in criminal case); *Deason v. State*, 84 S.W.3d 793, 796 (2002) (Tex.App. 2002) (a pathologist is necessary in a capital murder case to ensure a fair trial).

Second, many jurisdictions provide that the filing of the lawsuit constitutes a waiver of the privilege as to the injury involved in the case. The pathology evidence thus becomes discoverable. See, e.g., California Evidence Code, section 996; *Annot.*, "Commencing Action Involving Physical Condition of Plaintiff or Decedent as Waiving Physician-Patient Privilege as to Discovery Proceedings," 21 A.L.R.3d 912 (1968); and 81 *Am.Jur.2d* Witnesses §270. In other instances a motion may be required to have the court expressly determine that a privilege has been waived.

Once claims of privacy and relevance are overcome, defense counsel may next assert that the defense is entitled to the report of the pathologist consultant. A claim by the plaintiff that the examination of the pathology

slides constitutes an "independent medical examination" must be rebutted, as well as an argument that unlike medical records, a review of the pathology slides is in fact a physical examination of a party. See, e.g., California Code of Civil Procedure, section 2032, and Rule 35 of the Federal Rules of Civil Procedure.

These arguments also can be defeated. First, the pathology evidence is existing physical evidence and is in fact no different than

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a discoverable X-ray or a medical record. Second, a plaintiff's privacy will not be intruded upon nor will he or she be examined when the slides are reviewed through a microscope. Most of the statutes involved in an independent physical examination apply only where the plaintiff is required to submit to a medical examination by a physician. Third, the identities and opinions of a defendant's confidential pathology consultants are protected from disclosure under the work product doctrine. See, e.g., *South Tahoe Public Utility District v. Superior Court (CH2M Hill California, Inc.)*, 90 Cal.App.3d 135, 154 Cal.Rptr. 1 (1979). A defendant's right to pretrial preparation includes the right to retain a consultant to examine existing physical evidence and to render a report which is protected from disclosure until the consultant is designated as a trial witness. *Scotsman Manufacturing Co. v. Superior Court (Roberts Brass Manufacturing Co.)*, 242 Cal.App.2d 527, 51 Cal.Rptr. 511 (1966); *Annot.*, "Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure," 33 A.L.R.Fed. 403 (1977); *Annot.*,

"Identity of Witnesses Whom Adverse Party Plans to Call to Testify at Civil Trial, as Subject of Pretrial Discovery," 19 A.L.R.3d 1114 (1968).

A plaintiff might argue that if released, the review of the slides amounts to an independent medical examination and is entitled to all protections and benefits of such an examination. This would be incorrect. For example, in *Estate of Patrick v. Board of Supervisors of Louisiana State University*, 836 So.2d 1, 2 (La. 2002), the Louisiana Supreme Court overturned the trial court's holding that independent medical examination requirements must be satisfied in order to obtain a tissue sample:

[T]he lower courts erred in utilizing the test for allowing an independent medical examination (IME) to determine whether to allow further testing of the tissue. One cannot analogize testing of the tissue in this case with an IME of a living person or with the performance of an autopsy . . . , both of which are intrusive procedures performed on the human body. Examination of tissue preserved more than eight years ago does not differ from examination of any inanimate substance for the purpose of discovery. Therefore, the heightened test . . . does not apply.

Once these objections are met, the defense attorney can obtain pathology evidence by motion or often by stipulation.

As an alternative to the cost involved in preparing a motion, a proposed stipulation for the release of pathology slides is also offered (see page 26). Once the slides are obtained they must be treated like any other original evidence.

In all circumstances a chain of custody must be preserved throughout the time that the slides are held by the attorney. The chain of custody must contain all pertinent information including the identity of the person obtaining custody of the slides, as well as the date and the time the person received the slides. Whenever there is an exchange of the slides, that fact must be recorded.

It is also recommended that because the original slides are unique, they should be left with the custodian, and that recuts of the existing pathology blocks be obtained whenever possible. Because of the fragile

nature of pathology slides, it is also recommended that the slides not be placed in the mail but be personally handled throughout the time that they are being reviewed.

Once the slides are received the practitioner must next retain a qualified specialist.

Conclusion

The pathology evidence in a personal injury case must never be overlooked. When obtained during pretrial discovery the pathology slides can provide critical and often outcome-determinative evidence of the cause

of a plaintiff's injuries. Careful preparation includes accessing the resources available to understand the pathology evidence in a case, identifying the appropriate expert, and obtaining access to the slides through the court. **FD**

Proposed Stipulation for the Release of Pathology Slides

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

ROBERT SMITH,)	No. AB 1234
)	
Plaintiffs,)	STIPULATION AND ORDER
)	PERMITTING RELEASE OF
vs.)	PATHOLOGY SLIDES
)	
XYZ COMPANY, a corporation, <i>et al.</i>)	
)	
Defendants.)	
)	
)	
)	
)	
)	

Plaintiff Robert Smith and XYZ Company, a corporation, through their respective attorneys of record stipulate as follows:

Upon request by Smith, Jones & Brown, Professional Corporation ("SJ&B"), attorneys for Defendant XYZ Company, the Custodian of Pathology of the following institution is authorized to release and transfer in the manner described in paragraph 4 below, any and all pathology slides of the plaintiff, as identified in the following Pathology Report (copy attached).

1. Exhibit A – University of Colorado Medical Center, dated August 31, 1978, Hosp. No. 611292-4, Path. No. 76S-5154.
2. The pathologist at this hospital or laboratory is authorized to prepare up to five (5) additional slides (hereinafter referred to as "new slides") from the tissue blocks prepared after surgery,

biopsy, or other procedure. Upon request by SJ&B, the Custodian of Pathology is authorized to release and transfer the new slides in the manner described in paragraph 4, below.

3. After obtaining custody of the new slides, SJ&B, or its designated representative, shall be permitted to retain custody of the new slides. If necessary, SJ&B will designate an individual to receive and review the new slides on behalf of XYZ. The identity and address of any such individual shall be subject to the confidentiality provisions of paragraph 5, below.

4. The new slides shall be transferred from the Custodian of Pathology to SJ&B, or its designated representative, by either of the following methods:

- a. They may be mailed by registered or certified mail directly to an individual designated in accordance with paragraph 3; or
- b. They may be transferred to SJ&B, or to its designated representative(s).

5: Confidentiality. If an individual is designated by SJ&B to receive and review the new slides referred to in paragraphs 1 and 2 on their behalf, and the name and address of that individual are disclosed to the appropriate Custodian of Pathology to permit the mailing of the slides in accordance with paragraph 4(a), the name and address of the designated individual shall be held in strict confidence by the Custodian of Pathology and shall not be disclosed to any other party, or its attorneys or representative(s).

Dated: _____, 2003.

By: _____
Attorneys for Plaintiff

Dated: _____, 2003.

By: _____
Attorneys for Defendant

IT IS SO ORDERED.

Dated: _____, 2003.

By: _____
JUDGE OF THE SUPERIOR COURT