

Chicago Daily Law Bulletin.



Cross-examining defense experts requires a plan

September 20, 2011

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If I told you that on Sept. 25, halftime at the upcoming Bears v. Packers game, you could win \$25,000, if you successfully kick a football through the goal posts from the 30-yard line, what would you do? No doubt, you would practice kicking off a tee at a local football field every night, right? Yet, in personal injury litigation, when stakes are similar — even higher in most cases — plaintiff attorneys will often take a medical expert's discovery deposition with very little preparation or practice. In both situations, only preparation and practice will get the job done.

In fact, too often, when it comes to defense medical experts, plaintiff lawyers have a one-track mind: "I need to find a way to minimize the damage this witness is going to inflict on my client's case." Personally, I like to take a more positive, glass half-full approach. By doing my homework, thoroughly preparing and taking as much uncertainty as I can out of the equation, I prepare to take a deposition that exposes the expert's weaknesses and, hopefully, strengthens our case.

A planned attack will foster creative ways to use the testimony of defense experts to either induce an early settlement or assist in building a solid case for trial. Often, the goal will vary depending on the client's circumstances and desires. If examined correctly, defense medical experts can actually be a great vehicle for maximizing overall damages in an injured client's case. Of course, this cannot happen unless you have a plan and thoroughly prepare before taking the deposition.

So, what can you do to make the process less painful (and dare I say fun)? Here's the quick and easy answer. First, obtain all of your client's medical records related to the incident. Yes, all of them. If the incident aggravated a pre-existing condition, obtain the prior records related to that condition as well. Then, organize the records. (More on that below.) Review the records ad nauseam in preparation for the deposition. Create a medical records outline. Use a

good medical dictionary, reference book or Google to look up all abbreviations and unknown terms. After all, in the context of medical records, "RR" means recovery room — not railroad. If you are going to spar with an expert doctor, at least be armed with the appropriate lingo. When going toe-to-toe with the medical expert, one surefire way to lose credibility is mispronouncing words or not knowing an abbreviation's meaning.

Set up a meeting with your expert witness or a medical consultant to discuss technical terms and to obtain tips on the types of questions to ask the defense expert. Review the appropriate medical literature. Review the expert's curriculum vitae and research his credentials well ahead of time. Locate old deposition or trial testimony transcripts and thoroughly review them. If the expert published articles or books, read the pertinent sections and locate any critics.

"I don't really have to review every medical record, do I?" Um, yes, you do. In fact, you should actually use and reference medical records, emergency room records, nurse's notes, prescription orders, labs, etc., when deposing the expert. Upon detailed review, you will no doubt find several gems related to the plaintiff's complaints of pain, the administration of pain medication, therapy notes documenting limited abilities, etc. These records are invaluable. They could and should become your demonstrative evidence. Think ahead. The defense expert will most likely deny or look for a way to diminish your client's ongoing complaint of pain and suffering. At trial or during an evidence deposition, highlight the notes that document pain/medications, etc., and point them out to the defense expert on cross-examination. Also, ensure that you have obtained all the prescription records documenting the pain medications your client has taken from the date of the accident to the time of trial.

So, how should you organize medical records? When the documents from records' requests start pouring into the office, the sheer amount of records will appear daunting. (Don't worry; there are probably many duplicates.) Your first instinct will be that you will never have time to read every record. But, you must! And you may not want to hear this, but Saturday is probably a good time to review and organize records. After all, if you are going to be a successful trial attorney, you cannot just assign a paralegal or clerk to draft a medical records summary.

Now, how to get organized? Chronologically is best, of course. If the client underwent long-term or complicated care, you should not hesitate to create a medical records summary. However, to make the summary worth your while, you must understand the method doctors use to document care in a patient's chart. Most use the SOAP system, which has been in practice for many generations. SOAP is an acronym that stands for Subjective (your client's complaints), Objective (the doctor's observation), Assessment (the diagnosis) and Plan (how to treat the patient). Each entry in your medical records summary should attempt to capture an abridged version of SOAP. Always compare nurses' notes to doctors' notes, and if they differ, make a notation in your summary.

Now for the fun part. When deposing an expert (or any health-care provider for that matter) use the SOAP system to maximize damages in your case. For example, take your client's subjective complaint of nine on a scale of 10 for knee and lower back pain following the injury-causing occurrence. Your question to the expert: "Would you agree that the subjective

complaint is related to the occurrence?" If the expert says "no," the discovery deposition is the perfect time to ask the expert to what he attributes the complaint. Ninety-nine percent of the time, the expert will say degenerative arthritis. Don't be afraid of that answer. It is better to know it during discovery than to find out at trial. Sarcastically, you may infer that is quite the coincidence that the onset of pain occurred shortly after the occurrence.

Now take an objective observation. The treating doctor noted 65 percent loss of range of motion during a routine visit approximately a month before the date of the expert's deposition. The question: "Would you agree that the loss of range of motion is related to the occurrence?" Again, the answer may be "no" and the expert may attribute it to arthritis, but at least you know what you have to contend with at trial. Why not ask the expert when the loss of range of motion began?

The success or failure of a case often depends on how you handle expert witnesses at trial. The first time you meet the expert at his discovery deposition should not be treated lightly. Taking the "fishing expedition" approach could be as dangerous as embarking on a deep-sea dive at night. Your failure to establish a plan of attack will tell the expert and opposing counsel that you did not prepare for the deposition and they will make every attempt to confuse you. You will only have yourself to blame for a missed opportunity. Even if your plan is to be vague at the deposition, don't be naive. Know more about your client's case than your opponent.

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