
GENERAL TACTICAL CONSIDERATIONS

Defending Counsel: I am basing my objection on your objection.

Deposing Counsel: That's it? That is the entire reason?

Defending Counsel: That's correct. That's correct.

[g]—Concluding the Deposition

Since the law in many jurisdictions is often not explicit with regard to how far plaintiff's counsel may go in seeking the opinions of a defendant doctor, much of this kind of testimony is objected to during the deposition. Similarly, plaintiff's counsel may object when his client is questioned along a broad front about prior related and unrelated medical treatment. As a consequence of both attorneys' obstinate postures, motions for further depositions are often made, particularly when one side has been less generous than the other in allowing questions. In an attempt to forestall such motions, some attorneys will conclude their examinations with a series of questions that they know their adversaries will not allow their clients to answer. The theory is that this lays the foundation for a cross-motion and will therefore inhibit opposing counsel from taking any action to seek additional depositions.

The types of questions typically asked the defendant include the following: pendency of other malpractice cases during the same policy period involved (a significant fact to a plaintiff whose recoverable sum might be contingent upon the doctor's insurance coverage, which may have a ceiling for multiple claims within the policy period); opinion of the doctor's own conduct and that of his colleagues, and whether it departed from accepted medical practices; prior testimony as an expert in other proceedings involving the same medical issues; and the identity of a text in the doctor's specialty that he considers authoritative.

The questions to a plaintiff might entail: all medical treatment rendered, even the most remote; conversations between the plaintiff and other subsequent treating doctors and even potential medical experts who might have met, examined and/or spoke to the plaintiff; and a reiteration of questions asked during the deposition which seem to be clearly admissible, yet were resisted by counsel during the examination.

[3]—Strategic Considerations for Plaintiff's Counsel**[a]—Avoiding Exposure of Theories**

Counsel should avoid telegraphing the theories of his case unnecessarily through his examination of the witnesses. This hazard is demonstrated in an examination of a defendant doctor in a medical malpractice case during his examination. While apparently reading from an evaluation provided to the plaintiff by a medical expert, the examiner asked the following questions:

- Q.** Doctor, during the performance of the sympathectomy was a Doppler flow meter used at any time?
- A.** No.
- Q.** Was one used during the performance of the below-knee amputation?
- A.** No.
- Q.** Are there procedures which could be performed to ream the arteries, to clean them out, to remove occlusions?

Defending Counsel: I object. It's too general and too broad.

- Q.** With respect to these individual arteries, was there a procedure available at that time which could have been used to remove the occlusions that had been detected on the arteriogram?

Defending Counsel: I object. I will permit the witness to answer.

- A.** The nature of the pathology detected by the arteriogram was so deep and extensive that any of the available procedures for obviating the pathology was not applicable in this case.
- Q.** At the time of the performance of the sympathectomy had anticoagulants been administered to the patient?
- A.** No.
- Q.** At the time of the below-the-knee surgery were anticoagulants administered?
- A.** Not to my recollection.

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- Q.** When a cast is applied would you as a physician normally expect some swelling and edema of the tissues where the cast is applied to the leg?

Defending Counsel: Objection. I will permit the witness to answer.

- A.** Well, the cast has nothing to do with the production of edema.
- Q.** Well, when you put a cast on a leg, in this case on a stump, would one normally expect some edema or swelling to form underneath the cast?
- A.** There is always a certain amount of edema that forms at the site of any incision of any operative procedure.
- Q.** Would a cast affect that in any way?

Defending Counsel: Objection. It's too general a question.

- Q.** After the procedure had been performed and the prosthesis applied, did the patient—was the patient allowed to ambulate?
- Q.** I will change the question. When was the first time the patient ambulated after the below-the-knee operation?

Defending Counsel: According to the chart?

Deposing Counsel: According to the chart.

- A.** There is a note written by the resident on the first postoperative day, on June 22nd, that states, "First postop day, afebrile. Permitted to use bathroom with help. Does not complain of any pain."
- Q.** When was the first time that this chart indicates the patient was allowed to ambulate without assistance?
- A.** There is a note dated on June actually there is a note written on June 27th stating, "Patient going to physiotherapy daily." Although it does not state what he's doing in physiotherapy.
- Q.** Were any cultures taken of the area where the amputation took place?

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Q. At the time of the amputation.

A. I would have to refer to the chart. (Searching.) There is no microbiology report on the date of the surgery.

Q. Was a Doppler flow meter used at any time?

A. No.

Q. Doctor, in the performance of the below-knee amputation was a drain inserted?

Defending Counsel: I object to the last question, whether the Doppler flow meter was used at any time.

Deposing Counsel: During his examinations of the patient between the time of the performance of the below-knee surgery.

Defending Counsel: That was testified to already, that it wasn't used at that time.

Deposing Counsel: Let me rephrase the question for the doctor.

Q. Was a Doppler flow meter used during any of the visits that you made of the patient after the performance of the below-knee surgery?

A. I don't recall.

Q. Do you know whether or not a Doppler flow meter was used by anyone else during their examination of this patient?

A. I don't know.

Q. Now, going back to the last question that was asked; was a drain inserted at the performance of the below-knee amputation?

A. The chart does not reflect that.

Q. Does the Goodfellow Hospital in 1994, did it have a hyperbaric oxygen chamber?

A. Not to my knowledge.

Q. Other than this arteriogram which we have already discussed, were there any other x-rays taken of the patient?

A. No, the next x-ray is the arteriogram which was done on June 7th. The next x-ray is dated on June 17th, chest.

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Those are the only x-rays which are recorded in this chart.

- Q.** Were partial prothrombin times taken of this patient on a daily basis after the performance of the below-the-knee amputation?
- A.** There is a prothrombin time dated on June 10, stating a reading of 14.4 and 12.4. That's the only one that is recorded in this chart.

The examination went on in this fashion with each of the plaintiff's points (many of them being inappropriate ones) being specifically aired with the defendant. The same results could have been accomplished by simply asking the doctor whether all his medical orders were entered on the chart, whether his operative report fully described all the procedures which were performed and whether he performed any other medical procedures upon the plaintiff other than those recorded in the chart.

[b]—Revealing the Information Gathered

An early determination must be made regarding the future of the case so that an appropriate strategy can be developed. If a case is a serious one, any extraneous ammunition should be carefully stored in the vault and not even hinted at during the deposition. If there is a history of a prior similar accident or a pre-existing medical condition, an absolute denial of these matters by the witness during the deposition will enable trial counsel to argue that the witness was intentionally concealing these facts because the prior events or conditions, rather than the claimed grievances, are responsible for his present complaints.

Where, however, a less serious case is involved, and one which should be settled because of probable liability exposure, defense counsel can sometimes secure a token settlement by exposing prior events which are sometimes unknown even to plaintiff's counsel and which would significantly diminish the claim.

In one case, plaintiff claimed to have received an injury in a supermarket when the shelving collapsed and fell on her leg. She claimed that although the traumatic injury was minimal, the event exacerbated her multiple sclerotic condition causing her now to