ETHICAL CONSIDERATIONS WHEN DEALING WITH PLAINTIFF'S TREATING PHYSICIAN

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Any practitioner that handles a personal injury case ordinarily will have a physician testify on behalf of the Plaintiff addressing such issues as course of treatment, diagnosis, prognosis and causation. There are two preliminary questions that a practitioner needs to address when identifying a physician as a witness. How the medical witness is identified by Plaintiff's counsel will define various ethical issues that are created in dealing with the medical witness.

In most personal injury cases, there will be a treating physician involved in the care and treatment of a plaintiff. Plaintiff's counsel must first make the determination as to whether the treating physician will even be used as a medical witness on behalf of the Plaintiff. If the treating physician is in fact going to be identified as a medical witness for the Plaintiff then Plaintiff's counsel needs to decide whether the treating physician will be called as a "fact witness" or as a "damage/medical expert witness".

Generally, if a treating physician is simply testifying as a fact witness there are less ethical issues than if the treating physician has been designated as an expert medical witness. In the former designation, the treating physician is simply testifying as a fact witness based upon the patient/plaintiff's medical chart. Ordinarily, no medical report is needed. However, since the treating physician is serving as a fact witness and presumably offering medical opinions, he/she must still be qualified as an expert witness before his or her opinion can be elicited at trial or in a deposition.

Through normal discovery means such as a request to produce or a subpoena, defense counsel will be provided with a copy of the treating physician's office chart and will know in advance the facts to which the treating physician will be testifying.

When testifying as a "fact witness" the testimony of the treating physician must be strictly limited to only those medical facts and opinions necessary for the medical care rendered to the patient/plaintiff. When a treating physician is listed as a fact witness, plaintiff's counsel should consider whether it is even necessary to pre-meet with the physician before the physician's deposition or trial testimony. While "pre-meet" sessions are routinely done with experts, including medical expert witnesses, plaintiff's counsel runs the risk of "tainting the medical chart testimony" by pre-meeting with the treating physician and encouraging him or her to act as an advocate on behalf of the patient/plaintiff.

If a physician fact witness has to be subpoenaed for a deposition, it is not advisable to pre-meet or speak with the doctor before the deposition. The reason for this is in doing so there is an implicit misrepresentation to the Court and jury as to the physician's involvement in the litigation. The Court and jury are misled by the suggestion that the treating physician had to be subpoenaed to testify but yet having a pre-deposition prep meeting with the physician contradicts the notion that the physician witness had to be subpoenaed to cooperate.

If the treating physician fact witness is truly testifying as a fact witness based on information contained in the patient's chart then arguably there is marginal value in pre-meeting with the treating physician since the testimony of the physician to be developed in a deposition or trial is really based on medical facts of record anyway.

However, when the treating physician has been subpoenaed by counsel for defendants then the role and involvement of plaintiff's counsel will change accordingly. While exparte meetings by defense counsel with the treating physician are prohibited, plaintiff's counsel has an obligation to his client to make sure that the treating physician is advised before his or her

deposition or trial testimony that the plaintiff does not authorize or permit a pre-meet session with defense counsel.

Further, through appropriate motion in limine practice as plaintiff's advocate, plaintiff's counsel has an obligation to raise the appropriate objections to ensure that the scope and parameter of the treating physician's testimony as a fact witness is confined to medical issues that are pertinent only to claims made by the plaintiff in the lawsuit. Plaintiff's attorney should be vigilant in preventing a treating physician to disclose medical history and issues which the patient did not authorize nor was not waived by the lawsuit being filed.

More challenging issues arise when a treating physician has been designated as the "damage expert witness" by plaintiff's counsel. Once this occurs and assuming that either verified answers to written interrogatories or medical report has been furnished to defense counsel then Pa.R.C.P. 4003.5 ordinarily do not permit deposition testimony of medical expert witnesses.

When a treating physician has been retained as an expert medical witness, the physician, like it or not, becomes more of an advocate for your client in his/her litigation. The reason is that unlike the role of a medical fact witness where a physician's office chart is essentially "transcribed" into testimony, when a doctor is identified and retained as a medical expert, the opinions will be developed and elicited from the medical witness that are not necessarily contained in his or her chart.

As like any other matter in litigation, a personal injury case is about developing evidence in support of your client's damages claims. This includes "working with" a treating physician in exploring medical and vocational issues that either have not been addressed nor resolved in the physician's medical chart.

Unless there is a companion workers' compensation claim that preceded the personal injury lawsuit being litigated contemporaneously with it, vocational ramifications of the patient's injuries are seldomly proactively addressed by the treating physician. It is the responsibility of plaintiff's counsel to fully develop the medical and vocational issues from treating physicians who are designated as expert witnesses. Generally, this is done in the form of a letter sent to the treating physician requesting a narrative report. Fortunately, many attorneys will simply send a boilerplate standard letter requesting that treating physicians summarize the patient's chart setting forth the history obtained, diagnosis, course of treatment, prognosis and causation. Seen by itself nothing is ethically improper with this approach. However, this mechanism for obtaining an expert report leaves it up to the total discretion of the treating physician to opine on matters that may not be medically significant in plaintiff's damage claims.

In developing evidence in support of plaintiff's claim for damages, there is nothing improper or unethical in "directing" a medical expert witness to address specific issues in medical and vocational evidence that plaintiff's counsel wishes to develop for his client's case.

Should plaintiff's counsel obtain the treating physician's expert medical report by a letter requesting a medical report or pre-report meeting with the treating physician to discuss what issues the medical expert needs to address in his report, extreme caution needs to be exercised by plaintiff's counsel. Under either approach the physician should be provided with whatever documentation is necessary which will serve as a basis for the medical witness expert opinion. If the opinion to be solicited involves whether plaintiff can return to work at his pre-accident job then by all means plaintiff's counsel should provide the medical expert witness with a copy of plaintiff's written job description or if one is not available then excerpts from plaintiff's deposition that would describe the physical requirements of the job. Leaving it up to plaintiff's

lawyer to summarize for the doctor what he or she thinks are the physical requirements of the plaintiff's job may result in the physician being misled (even if it is inadvertently) with the true physical requirements of the plaintiff's job. This certainly makes the physician vulnerable for cross-examination.

The disadvantage of pre-meeting with a medical expert for discussing issues that need to be addressed in a medical report is that what issues or points are verbally discussed with a doctor either are forgotten or lost in translation by the time the doctor dictates the medical report.

Also by pre-meeting with a physician in anticipation of a medical report, Plaintiff's attorney runs the risk that the physician will take notes of the meeting and discussion which may unearth a harvest of information for cross-examination of the physician. Also, it may be discovered if the physician's records are subpoenaed that Plaintiff's lawyer met with the doctor to discuss what the witness needed to write about. Either way it makes the expert witness vulnerable for cross-examination.

The less troublesome approach is to take the time to review the client's complete chart and understand in advance all of the issues which you would like to have the physician address. Once these issues have been identified and isolated then the less risky approach would be to write a detailed letter setting forth specifically those questions and issues that you want the physician to address when writing his or her report.

An example of such a letter to a physician is attached as Appendix A. In doing this plaintiff's attorney creates a "paper trail" of not only what information was provided to the medical expert witness but also those particular opinion questions that the expert witness was asked to address. This insulates the doctor from many collateral issues of cross-examination and

maintains his "impartiality", which in theory is the role that an expert witness is hired to serve in litigation.

What then does one do if a "preliminary" report is received from a medical expert witness? The response is to treat it just as it is a preliminary report since it will eventually have to be produced anyway. If the medical expert report is less than satisfactory in terms of substance or issues you want the physician to address then your recourse should be to request a supplemental report from the physician. Again, a follow up letter advising the doctor that certain issues were either overlooked or not fully addressed demonstrates your commitment to your client in your role as an advocate. Again, a follow up letter to a physician and a supplemental reply will provide the paper trail that will protect both the practitioner and the expert witness from any alleged improprietariness.

While an expert is being paid for his or her time in reviewing documentation to form opinions, the compensation paid to the expert should not be for those opinions. By being particularly specific with the medical expert as to what opinions you are attempting to solicit from the expert witness, you are acting within the permissible realm of zealously representing your client's interests. The pitfall occurs when you attempt to influence for the expert what ought to be his or her opinions. Defining subject matters and issues for an expert to opine is certainly not only contemplated but expected by the Pennsylvania Rules of Civil Procedure.