The Defense Attorney's Guide to Effective Cross-Examination of the Plaintiff's Treating Physician

By Matthew J. Larkin and Michael Oropallo

The cross-examination of the plaintiff's treating physician is often the pivotal event in the damages phase of a personal injury trial. Although one must tread carefully to avoid the obvious perils, this cross-examination presents the best opportunity to test the *bona fides* of the plaintiff's claims and can serve as the foundation of the defense's alternative position. Preparedness, tone and scope are the keys to the successful cross-examination of any witness, and they are certainly of paramount importance when cross-examining a treating physician. The ideal cross-examination of a treating physician should yield substantive information favorable to the defense, expose vulnerabilities in the plaintiff's claims, and will frequently reveal weaknesses in the foundation or breadth of the physician's opinions.

Preparation

Young scouts and trial attorneys alike are well served if they adhere to the familiar maxim to "be prepared." The critical issue, however, is how best to prepare for the cross-examination of a treating physician. In general terms, preparing for such is no different than preparing for the cross-examination of any other witness. The goal is to gather, organize and digest as much relevant information as possible. Then, you must winnow that information, first into topics or themes, determine those that are helpful to the defense, limit the number of topics to an effective number, then reduce that information into question format so that it bolsters your theme.

Preparation for cross-examination of a treating physician, like any other expert, requires increased scrutiny, time, effort and thought. Unlike most lay witnesses, however, topical research materials and information regarding the treating physician's qualifications, such as his professional history, records, publications and prior testimony, are usually more readily available, and can provide a bounty of information when preparing for his or her cross-examination. The best resource available is often the defense's own examining physician, who should be consulted to guide you through the medical issues and opinions, and direct you to other appropriate resources.

Determine what the plaintiff's attorney is likely to elicit from the physician on direct examination. In federal district court, you will usually have the deposition transcript of the treating physician, and should start by reviewing the strengths and weaknesses of the testimony. In New York State courts, expert depositions are prohibited so the available materials require even greater scrutiny, thought and innovation. Whether or not the treating physician has been deposed, you must conduct an exacting review of his or her records. This activity serves a dual purpose: 1) to elucidate the potential direct testimony; and 2) to determine what records and information were missing from the treating physician's file during the plaintiff's treatment. In most cases, the physician will have prepared a narrative report containing his opinions pursuant to 22 N.Y.C.R.R. § 202.17(b)(1), and often the plaintiff's attorney will have prepared an expert witness disclosure statement setting forth those opinions even though a CPLR 3101(d) disclosure is not required for a treating physician. *See Logan v. Roman*, 58 A.D.3d 810 (2d Dep't 2009); *see also Stark v. Semeran*, 244 A.D.2d 894 (4th Dep't 1997). These documents must be studied carefully to plot out the cross-examination and to ensure the witness will be confined to the subject matter and opinions disclosed. Such disclosures should also be reviewed for potential *in limine* motions.

Meet with your examining physician. If the plaintiff has not been examined, but the records have been reviewed by a physician, meet with the physician who has conducted the records review. In the alternative, consider a non-testifying consulting physician to assist you. Regardless, such a meeting or series of meetings should focus on obtaining a good working knowledge of the precise medical issues present. The meetings should be conducted face-to-face, in a conference room in your office, and free from telephone calls or interruptions. It is worthwhile to conduct this meeting even if you and your client have decided not to call the physician as a witness at trial. A qualified medical expert in the same field as the treating physician will be able to focus the issues that you should address in cross-examination, will direct you to relevant research, and may even provide you with personal knowledge on the treating physician's background and reputation.

Become familiar with the medical literature relevant to the treatment at issue. This may start with basic materials such as an anatomy texts, on-line medical dictionaries, or books of medical illustrations. It must, however, proceed to a more thorough review of the treatments provided and the procedures performed, and get progressively narrower until you have a complete grasp of the precise issues likely to be addressed by the treating physician. While you need not be able to perform the procedures in question, you must be able to stand before a judge and jury, and most importantly, the treating physician, and speak with authority and knowledge on the narrow topics at issue, being careful not to overstep your bounds.

Gather potential impeachment materials. This may include any publications authored by the treating physician and transcripts of his prior testimony. Regarding publications, a good place to start is with the treating physician's resume or *curriculum vitae*, but that should only be the start—do not end there. Also, do not assume the physician has listed all of his publications, or that her resume is up to date. Do your own research. Contact attorneys in your firm who may have experience with the plaintiff's attorney or the treating physician, and reach out to your colleagues in the defense bar who may be willing to share their knowledge with you as well. Getting your hands on prior testimony can be invaluable for cross-examination.

Interview the treating physician if you can. This is perhaps the best method of preparing for cross-examination, but is often the most underutilized. There is a common law tradition of conducting *ex parte* interviews of a plaintiff's treating physicians. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") has not abrogated that custom, but has imposed some procedural restrictions. *See Arons v. Jutkowitz*, 9 N.Y.2d 393 (2007). Under *Arons*, a plaintiff can be compelled to provide an authorization permitting an *ex parte* interview of the treating physician. This does not mean, however, that the physician must speak to you. You may, however, be pleasantly surprised to find that the treating physician is willing to discuss his treatment with you and may offer insights that are not apparent from the medical records and reports.

Subpoena the treating physician's file to the courthouse. You may find that the physician has not disclosed his complete file pursuant to authorizations processed during the discovery phase of the case, or that may have been "scrubbed" in advance. You may also uncover correspondence between the physician and the plaintiff's attorney that provides good fodder for cross-examination. If the treating physician fails to abide the subpoena, you may even be able to cross-examine him before the jury on the fact that he sought to evade a legal obligation. In any case, having the treating physician's complete file in your hands before cross-examination is invaluable, and the best method to accomplish that goal is to issue a subpoena. Under HIPAA, you will be required to provide an updated authorization for service with the subpoena, which plaintiff's attorney should normally provide in advance of trial to allow you to obtain updated medical records.

Conducting the Cross-Examination

The basic cross-examination techniques should not be swayed by the type of witness in the chair. Like any other witness, you need to assert control over a treating physician by setting the tone, asking leading questions, confining the witness's answers and, if appropriate, impeaching the testimony through prior inconsistencies or extrinsic evidence. Yet, these techniques must be honed to deal with a knowledgeable and prepared professional, who has probably testified in the past and is committed to the propriety of his treatment and validity of his opinions.

Determine whether you want to cross-examine the witness. When it comes to a plaintiff's treating physician, the answer to that question is invariably "yes." You do not want to leave the jury with the impression that the medical issues are not subject to dispute. If, during trial preparation, you find yourself leaning toward not conducting a cross-examination of the plaintiff's treating physician, you should reconsider your settlement position or attempt to move the case into alternative dispute resolution. One instance in which you may not want to cross-examine the treating physician is when you have a strong liability defense and want to focus the jury on the liability issues. This a dangerous course, however, and should generally be avoided. Another scenario where you may not want to conduct cross-examination of a treating physician is when you have a strong cross-claim against a codefendant. In that case you want the jury to be focused on the dispute between the plaintiff and the codefendant. You should, nonetheless, prepare a cross-examination of the treating physician in the event the codefendant's attorney also decides not to cross-examine the physician.

Set the tone. In most cases, a treating physician should be treated differently than a hired expert who has had little contact with the plaintiff. Generally, a treating physician will not exceed the scope of his expertise and will concede points that should be conceded. Remember, it is your examining physician who will testify later during the defense case that has had minimal contact with the plaintiff and has been hired to provide an opinion. If you focus your cross-examination on issues such as compensation and patient contact, you are laying the foundation for the plaintiff's attorney's summation when he turns those points against your examining physician.

Avoid minutiae when addressing the physician's qualifications. If the treating physician has ventured too far from his field or has had disciplinary actions against his license, address his qualifications at the outset of the cross-examination. Other issues such as hospital privileges, malpractice settlements, board certifications and residencies in particular disciplines are appropriate to raise, but should be given limited attention and should not be mentioned at all if your own expert does not possess the qualifications that the treating physician is allegedly lacking. Most people who sit on juries like and respect the physicians they come in contact with during their daily lives and attempts to diminish a physician's testimony at trial by concentrating on trivial issues will usually be ineffective.

Elicit helpful testimony. As a general rule of cross-examination, you should try to extract testimony that supports the defense position or corroborates a disputed fact.

In many instances the treating physician's file will contain entries that are supportive of the defense arguments or are merely innocuous but will appear to support your arguments to the jury. For instance, most surgeons will testify that the surgery they performed was successful, at least in part. Unless mentioned in the surgical note, the surgeon should also testify that there were no complications during surgery. Where there has been extended treatment, the treating physician's records often show improvement in the plaintiff's condition over time. Plot those entries out chronologically before the jury. Focus on activities that the plaintiff can still perform despite the injury. For example, if the record does not contain any restrictions on driving, establish that the plaintiff is still able to drive a car. If there is an issue with the plaintiff's compliance with medical advice, bring out any missed appointments or failure to follow medical directives. The overall focus should be to lay the groundwork for your examining physician's testimony. Establish the points that the two physicians agree upon. For instance, if the treating physician has documented full range of motion in the plaintiff's back and your examining physician is going to testify to that same fact, bring it out during the cross-examination. If you do not have an examining physician to testify for the defense, you will still want the jury to hear the testimony that supports your summation arguments.

Expose the limits of the physician's knowledge. In most cases, the treating physician will be a specialist such as an orthopedic surgeon or neurologist who did not treat the plaintiff prior to the accident. Establishing the lack of a baseline may be a critical issue. For example, if the plaintiff is a laborer with limited range of motion in his shoulder, establish that the physician does not know the plaintiff's pre-accident range. If the plaintiff has had prior injuries to the same body part, and those records are not within the physician's file, establish that the treating physician was unaware of the prior complaints and treatment. Testimony that reveals the treating physician's lack of information is frequently the strongest evidence to discredit the plaintiff's claims.

Reveal the treating physician's reliance on the plaintiff's history, complaints and test responses. Virtually every treating physician will testify that a history was obtained from the plaintiff at the outset of the treatment and this history is based upon subjective complaints made by the plaintiff. You should be able to elicit testimony that the treating physician assumed that the plaintiff provided accurate information and disclosed all prior injuries and ailments. After taking a history, the treating physician should have performed a physical examination in which both objective and subjective tests were performed. You should be able to draw out testimony that the treating physician relied on the fact that the plaintiff was giving his full effort during testing. The treating physician should also acknowledge that his diagnoses were based on the history and physical examination. Upon taking a history and conducting a physical examination, the treating physician will have formulated a plan of action. After these facts have been established before the jury, the treating physician should admit that if the history is inaccurate or the plaintiff failed to perform to his full ability during testing, than the diagnoses and plan of action are not accurate as well.

Impeach the treating physician with prior inconsistencies and omissions. Although you may find that a softer touch is most effective when cross-examining a physician, there are times when a direct confrontation is appropriate and necessary. If the physician has affirmatively contradicted his own records, he should be confronted with the inconsistency. Similarly, if the treating physician has embellished or expanded his opinions, he should be challenged with omissions in his file. Unlike other witnesses, a treating physician is obliged to keep complete records and should acknowledge that all relevant information regarding the treatment of the plaintiff is recorded in his file. If the physician deemed the material important, it was recorded. If it is not recorded, that means it was not important to the care. Once these facts are confirmed, question the physician on the omissions. Finally, if the physician's opinions differ from diagnostic tests or opinions of other treating physicians, confront him with those discrepancies as well. Be careful, however, to keep control and do not to allow him to explain away the differences or expose your lesser knowledge of the medical issues.

Closing Thoughts

The testimony of the plaintiff's treating physician may be the seminal event in the trial. It is the plaintiff's opportunity to reconcile his complaints and claims with purportedly objective proof. A well prepared defense attorney with an organized and focused cross-examination can turn the physician's testimony to the advantage of the defense, using plaintiff's own treating physician to undermine some claims and neutralize others. Oftentimes this testimony, more than any other in the case, will determine who will prevail at trial.

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When First We Practice to Deceive: Misrepresentations, Mistakes and Omissions in the Insurance Application

By Reed Podell

Good faith and fair dealing are the bedrock of valid contracts, including insurance policies. As an inducement to issue a policy, the insurer relies upon the prospective insured's complete, accurate and truthful disclosure in its insurance application so that it can determine whether to accept the risk in consideration for a commensurate premium. In turn, the insured expects that the insurer will act in good faith when claims are presented. This is not to say that the respective parties will gladly undertake their contractually assumed duties when called upon to do so. When claims arise an insured may find that the insurer will scour not only the policy but also the insurance application in search of inaccuracies or omissions, whether intentional or not, to avoid coverage.

Insurance Law § 3105 permits insurers to void policies *ab initio* where there is a "material" misrepresentation in the insurance application.[1] The insurer's statutory right of rescission is based upon the contract law principle that a party who discovers that he has been induced to enter into a contract by fraud may elect to rescind the contract.[2]

An insured's misrepresentation in an insurance application is not to be confused with a breach of warranty. In contrast to a representation that an insured may make in an insurance application—a pre-contract event—a warranty is a condition precedent to coverage contained within the policy itself or is incorporated by reference into the policy.[3] Except for maritime policies which are held to a higher standard, a breach of warranty will only defeat coverage if it materially increases the risk of loss, damage or injury.[4]

Materiality of a different type is at issue when determining an insurer's right to void a policy *ab initio* under Insurance Law § 3105, i.e. whether the misstatements or omissions[5] in the insurance application are "material."[6] "A fact is material so as to avoid *ab initio* an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only issued it at a higher premium."[7]

Where there is some ambiguity as to whether a statement in an insurance application constitutes a misrepresentation, the insured is entitled to have its answers construed with the greatest liberality in its favor.[8] But even if there is no ambiguity and it is clear that the insured made a misrepresentation in the insurance application, this alone does not resolve whether the policy may be rescinded. Again, the misrepresentation must be "material."

Ordinarily, the materiality of a representation or omission is for the jury to determine. But where the evidence concerning the materiality is clear and substantially uncontradicted, the matter presents a question of law for the court.[9]

The insurer's burden of proof is not satisfied by conclusory self-serving affidavits of the insurer's employees that the policy would not have been issued.[10] "To establish materiality of misrepresentations as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application."[11] Additional evidence of materiality include: affidavits of underwriters stating that the carrier would not have issued a policy if the risk was accurately disclosed; copies of emails and correspondence declining coverage to similarly situated insurance applicants; and copies of disclaimer letters sent to similarly situated insureds making similar claims.[12]

The degree to which omissions rise to the level of a material misrepresentation sufficient to allow an insurer to void a policy varies depending upon the nature of the insurance and the reason for the omissions. For example, maritime insurance is subject to the doctrine of *uberrima fides* under which the parties to the insurance contract owe each other the highest degree of good faith. The doctrine requires the insured to disclose to the insurer all known circumstances materially affecting the risk to be insured. The standard for disclosure under this doctrine is an objective one. The relevant inquiry is whether a reasonable person in the insured's position would know that the particular fact is material, i.e. whether the fact is something that would have controlled the underwriter's decision to accept the risk.[13] Reinsurance is another area that has been held to require "utmost good faith" on the part of insurance applicants who must disclose all facts materially affecting the risk of which it is aware and the reinsurer has no reason to be aware.[14]

Generally, though, an applicant for insurance has no duty to voluntarily disclose information material to the risk about which the underwriters never asked.[15] The insurance applicant has the right to suppose that when an insurer inquires as to certain matters the insurer "considers all others to be immaterial, or that he assumes to know or waives information in regard to them."[16] Thus, if