CONDUCTING MEDICAL DEPOSITIONS

ILLINOIS INSTITUTE OF CONTINUING EDUCATION

Francis J. Lynch
Wolter, Beeman & Lynch

KNOW THE RULES

The first step in getting ready for a medical deposition - or any deposition - is to know the applicable rules. Open up a copy of the Supreme Court Rules to Rule 201 and start there. Note in subparagraph (a) that depositions can proceed on oral examinations or written questions. If the witness is local, oral examination is preferred because it allows you to ask follow-up questions and to make sure that you get a satisfactory answer to a question that is posed.

Note that documents which are privileged from disclosure at trial are privileged from disclosure during discovery (Rule 201(b)(2)). In preparing for a medical deposition, one must be aware of the requirements of HIPAA. The best way to secure access to medical records is with appropriately executed HIPAA Qualified Medical Records Releases from the patient and with a HIPAA Qualified Protective Order. A copy of a medical records release and a HIPAA Qualified Protective Order are attached.

Discovery cannot begin until all Defendants are required to appear (Rule 201(d)). Discovery procedures may proceed in any sequence (Rule 201(e)). By rule, disclosure of any matter obtained in discovery is not conclusive and can be contradicted by other evidence. Remember this when it's time to respond to the Motions for Summary Judgment or upon a claim that discovery responses are judicial admissions (Rule 201(j)).

Any claim of privilege must be supported by a description of the nature of the documents, communications, or things not produced or disclosed. Ask for a privilege log (Supreme Court Rule 201(n)).

Under Rule 202, depositions and oral examinations can be for discovery or evidence. In contrast to the Federal Rules of Procedure, Illinois has different rules for evidence and discovery depositions. Unfortunately, Rule 202 often means parties must incur some additional expense with respect to depositions of doctors. According to the Rule, "If both

discovery and evidence depositions are desired of the same witness they shall be taken separately, unless the parties stipulate otherwise or the Court orders otherwise." This results in the need for two depositions if the case goes to trial.

Rule 203 requires a deposition to be taken in the County in which the deponent resides or transacts business. Presumably, that includes the business of practicing medicine.

There is a separate rule regarding compelling the appearance of a physician deponent. According to Rule 204(c):

> "The discovery deposition of non-party physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a Subpoena issued by Order of the Court. A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the Court, the fee shall be paid by the party at whose instance the deposition is taken. Note first that this Rule applies to depositions. There is nothing in the Rules or Statutes that prevent you from subpoenaing a physician witness to appear at trial. There also is no Rule or Statute compelling you to pay a physician any fee to appear at trial other than the normal witness and mileage fee required for any trial witness."

As a practical matter, usually physicians will provide you with a date. The problem is that the entire case can be governed by the pace at which physicians offer dates for their discovery depositions.

On those rare occasions where a physician does not agree to provide a discovery deposition or when their suggestion of a time and place is impractical, a party can ask the Court to enter an Order requiring the issuance of a Subpoena for the deposition of a doctor. It is the author's personal experience that a Court will willingly enter such an Order but only upon a showing that the movant and the parties to the litigation have made every effort to agree on and schedule the doctor's discovery deposition but have been unable to do so.

Rule 206 allows any party to conduct a deposition when another party has served notice of the deposition. Rule 206(c) allows

the deponent to be examined as if under cross-examination. This is an essential point to remember when considering obtaining depositions for the purpose of learning and disclosing opinions under Supreme Court Rule 213(g). Either party - the Plaintiff or the Defendant - can conduct the deposition as if cross-examining the doctor.

Evidence depositions can be videotaped. Although it is rare, discovery depositions can also be videotaped and can be used for impeachment just like a deposition transcript.

Rule 207 provides that at the end of a deposition the Court Reporter should advise the deponent that they have a right to examine and sign the transcript or waive that right. Rule 207 does not distinguish between discovery and evidence depositions.

Rule 208 provides that the party at whose instance the deposition was taken shall pay the fees of the witness. Note, however, that Rule 204(c) has specific provisions that apply to the payment of a reasonable physician's fee for the time spent in a deposition.

Rule 212 outlines the purpose for which discovery depositions and evidence depositions can be used. Rule 212(b) contains some specific rules applicable only to evidence depositions of physicians. For non-physician evidence depositions to be used at trial, the Court must make a finding that the deponent is unable to attend or testify, is out of the County, or cannot be compelled to appear at trial. Respecting physicians however:

> "The evidence deposition of a physician or a surgeon may be introduced into evidence at trial on the motion of either party regardless of the availability of the deponent, without prejudice to the right of either party to subpoena or otherwise call the physician or surgeon for attendance at trial."

As an aside, for purposes of recovering fees and costs at the end of the case, during the evidence deposition it may be wise to ask the physician if he was otherwise unavailable for trial, therefore requiring the party to incur the cost of the evidence deposition in order to present evidence to the jury. That testimony may provide a basis for recovery of some of the costs associated with taking the physician's deposition.

In cases where issues include questions of medical conditions, proximate causation, exacerbation or aggravation of pre-existing

conditions, future damages and future medical expenses, one of the most important rules to remember is Supreme Court Rule 213(g). Rule 213(f)(2) identifies an independent witness as a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. In most cases involving injury or illness, treating physicians will be independent expert witnesses. The same rule defines a controlled expert as a person giving expert testimony who is the party, the party's employee, or the party's retained expert. Any physician who is hired by a party to testify as to medical issues would be a controlled expert witness. Rule 213(g) outlines the scope of evidence that can be used at trial and must be considered by every attorney attending and conducting any deposition, particularly depositions of independent and controlled experts. Rule 213(g) provides in part,

> "The information disclosed…in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition.
>
> Without making disclosure under this Rule, however, a cross-examining party can elicit information, including opinions, from the witness."

One of the essential purposes for conducting a discovery deposition of a treating physician or retained medical expert is to fully examine the physician's opinions and the bases therefore. Rule 213(g), along with Rule 206(c)(1), allows an excellent opportunity for an attorney to obtain, guide, and disclose all of the opinions necessary for trial in a single proceeding. Consider taking your own client's doctor's discovery depositions. You can lead the testimony, you can guide the formulation and disclosure of opinions as you would on cross-examination, and answers by the physician in a discovery deposition need not be disclosed anywhere else in order to be used at trial.

KNOW THE SUBSTANTIVE LAW

It's essential to know the law applicable to your case at the very start of discovery. The best place to start often is with preparation of jury instructions. If you prepare a rough draft of jury instructions at the very beginning of a case, along with preparation of your Complaint, you should have a reasonable understanding of the elements of your case. In order to conduct effective depositions of a physician, it is essential that you know every element of the case and that you know the Plaintiff's burden of proof. For example, a Plaintiff needs to be fully aware of its burden of proof to establish injury and causal connection. The Plaintiff also has the burden of producing affirmative evidence of damages such as pain, suffering, disability, disfigurement, permanency, the reasonableness and necessity of expenses, and any future damages that may be incurred.

The Defendant also has to be aware of burden of proof issues. If the Defendant intends to rely on the defense of pre-existing conditions or to challenge proximate cause, "the burden of going forward with evidence may shift from party to party." (Caley v. Manicke, 29 Ill.App.2d 232, 327, 173 N.E.2d 209 (1961)). The burden may shift to the Defendant in establishing the relevancy or causal connection between a pre-existing condition and the injury at issue (Voykin v. Estate of deBoer, 192 Ill.2d 49, 56-58, 248 Ill.Dec. 277, 281-82, 733 N.E.2d 1275, 1279-80 (2000)).

HAVE A LITTLE MEDICAL KNOWLEDGE

Obviously, one of the reasons lawyers take discovery depositions of doctors is to learn something. You can't expect to go into a deposition with full knowledge of the treatment or condition at issue. It's essential, however, to have some basic knowledge about the injury at issue in order to conduct a meaningful examination of the doctor. Contrary to the assertion that "a little knowledge is dangerous", proceed with the assumption that "a little knowledge helps you seek more knowledge".

Before the deposition, look up the key medical words or phrases that are at issue. For example, if the medical records reference radiculopathy, parasthesia, or dermatomal symptoms, look those words up. They will help you formulate questions for the doctor. They will even help you disclose some of the basic elements of your burden of proof. Most importantly, they will help educate you so that you are more prepared for the next deposition you conduct. Take adequate time before the

deposition to read the records thoroughly and look up terms and conditions that you are not familiar with.

KNOW THE DEPONENT

You do not have to have in-depth personal knowledge of the deponent's educational and experiential background before obtaining their deposition but it helps to know enough about them to know their potential role in the case. An example may be helpful. In a case involving a herniated disc caused by an auto accident, treated conservatively for several months, and ultimately requiring removal by an orthopedic surgeon, the injured party's lawyer has several deposition options. The family practitioner may be able to give the best account of the spectrum of the client's pain, suffering, and disability from the accident through the final release from care. The orthopedic surgeon, however, will be the individual who can best explain the mechanics of a disc herniation and establish causal connection between the injury and the car accident. The post-operative pain management specialist may provide the best source of testimony regarding future pain, suffering, and disability and the need for additional medical care. A basic understanding of the deponent coupled with your knowledge of the elements of your case will help guide your examination of a treating physician or a retained expert.

KNOW THE PURPOSES FOR A DISCOVERY DEPOSITION

There are three essential purposes for a discovery deposition. Keep each one of these purposes in mind when you are deposing a doctor.

The first purpose is to size up the witness. In every trial, jurors are asked to assess the credibility and believability of every witness. Do the same thing with doctors. Determine whether they have any prejudices, philosophies, or ideologies that guide their testimony and opinions. Determine if they sound competent, reasonable, and intelligent. Figure out if they give good explanations that will be useful to you at trial or if their testimony is guarded or equivocal. The simple questions to answer are whether they will be a good witness and whether their testimony will help the jury decide the case.

The second purpose for a discovery deposition is to learn or disclose information. Use a medical deposition for both purposes. Also, as noted above, strongly consider taking the

discovery deposition of your client's own doctors for disclosure purposes under Rule 213(g).

In the deposition, ask as many questions as you can to educate yourself about the patient's condition. Use the deposition as an opportunity to educate yourself. Every time you take a subsequent deposition you will add to your knowledge base.

Additionally, use the deposition as the opportunity to disclose opinions. Find out if the doctor can say anything to help you and get that testimony committed to the record. Information disclosed in a deposition does not have to be disclosed anywhere else.

Finally, and most importantly, it's as essential to learn the good parts of your doctor's testimony as it is to learn bad parts - "better the devil you know than the devil you don't". Do not be afraid of the harmful answer in a discovery deposition. You would actually rather hear that answer in a discovery deposition than at trial or in an evidence deposition. For that reason, proceed with a deposition - your client's doctor or the opponent's doctor - with the understanding that you want to know all of the information, good, bad, or ugly.

The third purpose for a deposition is to commit a party to a specific version of events. It is essential to keep this purpose in mind. One of the things you are trying to accomplish in a discovery deposition is to get the witness to commit to a specific version of facts or events in a format that can be used at trial. Anyone who has tried a case with a soft cross-examination or bad transcript knows the difficulty that can be presented by trying to impeach a witness with a prior statement. If the witness has wiggle room or if opposing counsel can see your impeachment coming, you can expect all kinds of obfuscation, denial, and objection. A non-specific soft or vague answer to a question is practically useless at trial for purposes of cross-examination.

For that reason, during a deposition make sure that at the end of the deposition your transcript contains sound bites that you can use. If you ask a question and a witness gives a long elaborate answer, then ask the follow-up question to give you the sound bite. Here is an example:

Q So the Plaintiff had a pre-existing degenerative condition in her lower back, correct?

A Yes.

Q But that pre-existing condition was asymptomatic at the time of the accident, right?

A Yes.

Q Pre-existing asymptomatic conditions can be aggravated, exacerbated, or made symptomatic by intervening trauma, right?

A Yes.

Q This patient had trauma superimposed over an asymptomatic degenerative condition, correct?

A Yes.

Q So even though she had a pre-existing condition, it was the accident and aggravation or exacerbation of her injury that caused her current problems, right?

A Yes.

Remember that the testimony of a doctor may be informative and may help you disclose opinions but it won't be functionally usable at trial or for impeachment if you don't have direct questions and specific answers.

Do not let the witness avoid an answer. If the witness doesn't want to give you an answer, let them ramble on at length but come back to the question until you have a satisfactory answer. At the end of the deposition, you should be confident that the transcript is filled with specific questions and direct responses thereto. You may not like the responses or the answers but make sure you have direct ones. It's better to know if a witness is going to say something bad after a discovery deposition than to find out they are saying something bad in the middle of trial.

PLAN FOR FORKS IN THE ROAD

It's important when you go into a doctor's deposition, or any deposition, to have an idea of what you think the witness will say. If you are taking your own doctor's deposition or the deposition of your own witness, you also should have a plan of what you want to ask them. It's important, however, that you plan not only the questions that you want to ask and the answers that you expect them to give, but also that you plan for answers that you don't expect. If you ask a question that can be answered yes or no, plan for each fork in that road. You may expect the doctor to say "yes" but plan for the opposite answer.

This will help you revise or steer a deposition back on track if you get an answer that you don't expect. An example may help.

Assume that you are going to ask your doctor questions about a client with a pre-existing medical condition. You will have to ask him questions about proximate causation between an accident and his subsequent back condition. If you ask the doctor whether or not an accident "caused" your client's back condition, you might get a "yes", but you also might get a "no". If the doctor understands the question you are asking, or you have asked it clearly, the injured person's treating physician may say something like this: "Yes, this accident caused the current problem."

The doctor, however, may give you an answer that you don't want. The doctor may be thinking of the term "cause" differently than you, and so when you ask him if an accident "caused the condition" the doctor may say "No, he had a pre-existing degenerative condition in his back." If you are prepared for either answer, you can resuscitate that deposition. If your doctor says "No, the accident didn't cause this condition" be prepared for an appropriate follow-up. Follow-up with questions like these:

Q This patient had a pre-existing degenerative condition, right?

Q This accident clearly didn't cause that degenerative condition, right?

Q However, according to history and medical records, that pre-existing condition was asymptomatic, right?

Q Pre-existing asymptomatic conditions can be exacerbated by intervening trauma.

Q This patient had symptoms after the trauma, right?

Q Wouldn't you agree that this accident caused an exacerbation of a pre-existing condition so as to make that condition newly symptomatic.

CONCLUSION

Think of every deposition as an opportunity to (1) Size up the witness, (2) Learn some things and disclose others, and (3) Commit the witness to specific testimony and learn the exact nature of that testimony, good or bad. Finally, medical depositions are expensive but they are often worth the cost, in both the case you are working on and in all the future cases in which medical depositions may be required.

AUTHORIZATION TO DISCLOSE HEALTH INFORMATION

This entire authorization must be filled out completely. Please print or type. Read each section and enter all of the needed informatic If all areas are not filled out completely and accurately, the authorization will be returned to you requesting the additional needed information.

PATIENT NAME_____ADDRESS_____
PHONE:_____ SSN:_____ DOB:_____

1. I authorize the use or disclosure of the above named individual's health information as described below.
2. The following individual or organization is authorized to make the disclosure:

_____
Name of Individual or Organization Sending Information

Address:_____

3. The type and amount of information to be used or disclosed is as follows (check those that apply and include dates where appropriate):

[ ] Problem list
[ ] Medication list
[ ] List of allergies
[ ] Immunization record
[ ] Consultation reports
[ ] Most recent history, physical & discharge summary
[ ] X-ray and imaging reports (from _____ to present)
[ ] Laboratory results (from _____to present)
[ ] Entire record (from _____to present)
[ ] Itemized bills (from _____ to present)
[ ] Certificate of Authenticity
[ ] Other (specify):_____

4. I understand that the information in my health record may include information relating to sexually transmitted disease, acqui immunodeficiency syndrome (AIDS) or human immunodeficiency virus (HIV). It may also include information about behavioral mental services and treatment for alcohol and drug abuse. If contained in the health record this information may be disclosed unl indicated hereby initialing on this line _____and checking the information not to be disclosed. Do not release the follow information (check those that apply)

[ ] AIDS or HIV Info [ ] Sexually Transmitted Disease [ ] Behavioral or Mental Services [ ] Drug/Alcohol Abuse

5. This information may be disclosed to and used by the following individual or organization (give complete address includ street and number, city, state and zip code; if this information is not complete this request will be returned to you):
My attorneys, WOLTER, BEEMAN & LYNCH, 1001 South Sixth Street, P. O. Box 5276, Springfield, IL 62705-5276
6. This information is needed for the purpose of: **attorney request/investigation of claim**
7. I understand that I have the right to revoke this authorization at anytime. I understand that if I revoke this authorization I m do so in writing and present my written revocation to the medical records department. I understand that the revocation will not appl information that has already been released in response to this or any other previously received authorization. I understand that revocation will not apply to my insurance company when the law provides my insurer with the right to contest claim under my poli Unless otherwise revoked, this authorization will expire on the following date, event or condition:_____ (not to exceed 120 days from date signed). If I fail to specify an expiration date, event or condition, this authorization will expire in c year from the date signed.
8. I understand that authorizing the disclosure of this health information is voluntary. I can refuse to sign this authorization need not sign this form in order to ensure treatment. I understand that I may inspect or copy the information to be used or disclosed, provided in CRF 164.524. I understand that any disclosure of information carries with it the potential for an unauthorized re-disclos of the information and may not be protected by federal confidentiality rules. If I have questions about disclosure of my hea information I can contact the facility's release of information provider, or I can contact the facility's medical records department.

By signing I acknowledge that I have read, understand and agree with the above. By signing I further understand that I may be charg in accordance with state and federal statutes for the processing of the requested records.

_____ _____
Signature of Patient or Legal Representative Date Time

Note: If patient is a minor or is otherwise unable to sign this Authorization, obtain the following signatures:

_____ _____
Signature of Legal Guardian or Other Authorized Personal Rep. Signature of Witness

_____ _____
Relationship to Patient Date Time Date Time

IN THE CIRCUIT COURT OF THE * JUDICIAL CIRCUIT
*** COUNTY, ILLINOIS**

*,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: *
	)	
*,	)	
	)	
Defendant.	)	

HIPAA QUALIFIED PROTECTIVE ORDER

THIS CAUSE COMES ON TO BE HEARD on the Motion for HIPAA Qualified Protective Order of Defendants, *, the Court finds that good cause exists for the entry of an HIPAA Qualified Protective Order to prevent the unauthorized disclosure and direct the use of protected health information during the course of this litigation.

Accordingly, IT IS HEREBY ORDERED:

1) All records produced by the parties to this litigation are produced subject to the conditions of this Order.

2) This Order applies to any records produced by a covered entity as defined by 45 C.F.R. 160.103 which has received a request or subpoena for protected health information.

3) During the course of this litigation, it may be necessary for the parties or their attorneys to disclose protected health information of the Plaintiff, *, as that term is defined under the Health Insurance Portability and Accountability Act (HIPAA) and the Federal Regulations enacted pursuant to said Act.

> (a) All protected health information disclosed by any of Plaintiff, *, healthcare providers shall be used for the sole purpose of preparing for or conducting this litigation, including, but not limited to investigation, consultation, discovery, depositions, trial preparation, trial, appeal, resolution, mediation, or uses incidental to the proceeding in the case

and shall not be disclosed or revealed to anyone not authorized by this Protective Order.

(b) Protected health information may be disclosed without further notice by any covered entity or health care provider, party or parties' attorney, to:

(1) the parties themselves, parties' attorneys, experts, consultants, any witness or other person retained or called by the parties, treating physicians, other health care providers, insurance carriers or other entities from whom damages, compensation, or indemnity is sought and any entity performing monitoring or adjustment activities on behalf of such insurance carrier or other entity and/or their employees, agents, or third party administrators for any of the parties involved in litigation; in any proceeding for health oversight activities as permitted under 45 C.F.R. 164.512, court reporters, copy services, other similar vendors to the parties and their attorneys, as well as the professional and support staff of all of the above.

(2) The parties, and each entity governed by this Order shall either (a) destroy, or (b) return to the entity who originally produced it, all protected health information, including all copies made, provided, however, that said protected health information may be retained in the files of the entities listed in paragraph (1) above and may be destroyed pursuant to their regular file retention policies so long as the protected health information is maintained in a secure environment.

Entered this _____ day of _____, 2008

ENTER

_____

Judge of the * Judicial Circuit