New York Law Journal

Thursday, December 30, 2004

HEADLINE: **Trial Advocacy, Medical Malpractice: Using Defendants' Evidence Against Them**

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BODY:

Medical malpractice cases pit the plaintiff's trial lawyer against formidable obstacles: A defendant that may take the litigation personally; an insurer that may prefer to pay its lawyers rather than your aggrieved client; and a jury pool that may have been exposed to propaganda criticizing the prosecution of medical malpractice claims.

To overcome these obstacles you have to be well-prepared to prove your case through hostile witnesses and through the defendants' own records.

Leading Defendants on Direct

The best way to try a medical malpractice case is to prove the case through the mouths of the defendants themselves. You have the right -- and obligation -- to call the defense doctors as adverse witnesses and cross-examine them through the use of leading questions.

This is a critical advantage. By proceeding in this manner, you have the ability to present the defense testimony in the light most favorable to your client. To maximize the effectiveness of this strategy, all of the defendants should be called prior to calling your experts to the witness stand.

This is important for two reasons: The defendants will not be able to tailor their testimony to circumvent what your expert has said; and your expert will have all of the information needed to support his opinions.

But what if you need to offer the crucial testimony of a nonparty treating physician on your direct case? As a general rule, that physician is not going to want to help your client at the expense of his colleagues -- the defendants in the case. On the contrary, he may have a motive to shield the defendant doctor from liability. Perhaps they trade referrals of patients; perhaps they know each other through medical conferences; perhaps they are even friends. If the hospital where he has privileges is a defendant in your case, it is a good bet that he will not want to help your client. Yet you need his testimony to prove portions of your case, and you cannot wait for cross-examination on the defense case. This creates a dilemma.

If this treating physician is not a defendant and you cannot prove hostility, there is a grave potential that this witness will hurt you, if you cannot control him through the use of leading questions on direct. We recommend you do not call him unless you can prove hostility.

How do you prove hostility? Short of the doctor showing outright hostility by his demeanor or admitting his hostility right from the witness stand, it may be a difficult thing to demonstrate.

Do not forget, unlike a defendant you call as an adverse witness, a nonparty witness -- even one with demonstrated hostility -- will be considered your witness by the court. This is so because of the archaic nature of our state's common-law rules of evidence, which hold that one cannot impeach a witness he calls with evidence showing bias or interest in favor of the opponent1. This notion, although behind the times and contrary to the Federal Rules of Evidence,2 which permit you to impeach the credibility of your own witness, is good law in New York. In state court, you can only impeach the witness you call with signed statements or sworn testimony pursuant to CPLR 4514.

'Catch 22' Situation

Thus, we have a true "catch 22" situation. For the court to allow leading questions on direct, you need to show the witness's hostility to your case. The easiest way to show hostility of the non-party physician is to show bias in favor of the defendants in the action. But state law forbids impeachment with bias of a witness you call.

In such a situation, ask for the court's discretion to allow this line of questioning. If the court denies this request, ask for a showing outside the presence of the jury, so that the court might allow leading questions when the jury returns.

Q: Sir, you know that Metropolis Hospital is a defendant in this case, true?

Q: And that Dr. White is a defendant as well?

Q: Metropolis is the only hospital that affords you admitting privileges, correct?

Q: In other words, there is no other hospital in the City that allows you to admit patients, true?

Q: As a matter of fact, no other hospital in the State allows you to admit patients to your service, right?

Q: Or in the country for that matter, correct?

Q: You obviously have a relationship with Metropolis Hospital, true?

Q: Not only is it the only hospital that allows you to admit patients, but it is a place that actually refers you patients, right?

Q: In other words, two days of every month you are "on call" there, true?

Q: Where you get to see patients exclusively on their behalf, right?

Q: You follow them in the hospital?

Q: You refer them for diagnostic testing when necessary?

Q: And you even follow them in your office at times after discharge, true?

Q: Correct me if I'm wrong, but you obviously charge the patient for that service, right?

Q: For each patient you see, true?

Q: Either in or out of the hospital, correct?

Q: And the relationship with that hospital is important to you isn't it?

Q: You wouldn't want to see that end, would you?

Take the same tact in showing bias in favor of the hospital's codefendant as well:

Q: Now, not only do you have a relationship with Metropolis, but you have an ongoing relationship with Dr. White as well, true?

Q: He has referred you patients in the past, hasn't he?

Q: You've referred him patients in the past, true?

Q: You have an ongoing business relationship, right?

Q: A relationship you enjoy, true?

Q: A relationship that is beneficial to you both?

Q: A relationship that is financially beneficial to you, correct?

Because of the nature of malpractice cases, defendants' lawyers sometimes find themselves having represented the nonparty witness in other actions. Bias or hostility can be established by that relationship as well. Do not forget, however, that although you can impeach this witness on cross, the court may not permit you to do so on direct.

Q: Are you familiar with Mr. Olsen, the attorney for Metropolis Hospital?

Q: How many times have you met him?

Q: You've had a relationship with him in the past?

Q: A privileged relationship, true?

Q: Mr. Olsen has been helpful to you, hasn't he?

Q: Tell the jury how you know him?

Q: He has been your lawyer in the past, right?

Q: And you have been his client, true?

Q: The two of you actually share an attorney-client privilege, correct?

Q: And that lawyer can do nothing to harm your legal position, you know that, right?

Q: And you wouldn't want to do anything to harm his case, true?

Obviously, this line of inquiry would be much easier on cross-examination than on direct examination. During cross, credibility and bias are always relevant and never collateral.3 You will have much greater latitude to explore these areas at that time.

Defendants' Documents

Proving the case through the defendants' own documents is extremely compelling. You can also prove your case through records they claim not to have, as well as records they do have.

Be careful, however, because hospitals do not always produce all the relevant records regarding a patient. They sometimes take the position that certain documents belong to the hospital rather than the patient.

In no area is this more true than with respect to cases regarding inter-hospital transfer delays. Many hospitals actually have a specific document sometimes called a "Patient Transfer Data Form." Unlike other transfer forms filled out by the transferring physician and the staff nurse, these forms are filled out by the nursing supervisor or social worker in charge of all transfers in and out of the individual hospital. And unlike the forms filled out by many physicians, the form filled out by the nursing supervisor includes the specific time the transfer was set in motion.

To insulate themselves from such suits some hospitals deny that the record belongs in the patient's chart and deliberately fail to produce it. Others claim the record does not exist at all. Therefore, it is important to know the

appropriate procedures involving transfers. This way, you can examine the appropriate witness on the information they do not produce at trial.

First, a physician must decide that a patient needs to be transferred to another hospital. He would then contact a physician at a receiving hospital to ensure that his patient could be treated there. He would then have someone contact the nursing supervisor or social worker on duty at his own hospital to actually arrange for the transfer. At that point the appropriate hospital personnel take over.

They contact a counterpart at the receiving hospital, make sure there is a bed and appropriate staffing for the patient. It is typically the transferring hospital that arranges for the ambulance, but those arrangements must be confirmed by the supervisors at each hospital.

Each of these steps should be documented, including the time of the initial call, who initiated that call, each person spoken to, the name of the ambulance company responding, the time they were initially contacted, the specific internal location of pickup and drop-off, as well as the anticipated time of transfer.

There is other relevant information that should be included on this type of form as well: actual consent to transfer; neurological status; infection control issues; intravenous drips and medications; pertinent lab data; and where specifically within the receiving institution the ambulance is to take the patient.

Another form not commonly supplied by hospitals or ambulance companies is the "Call Intake Form" completed by dispatchers when they receive either 911 calls or inter-hospital transfer requests. These documents are filled out by the dispatcher as opposed to the Prehospital Care Report that is filled out by the ambulance personnel.

If it is a call involving interhospital transfer, the Call Intake Form will include the specific person within the hospital who initiated the transfer, the actual time of the call, where within the hospital the patient should be picked up and likewise dropped off -- as well as relevant history, medications, intravenous lines and clinical information. Procuring these forms may be critical in certain cases involving transfer delays and negligent transport.

Death Cases

In death cases, make sure that you request the New York State Department of Health Certificate of Death, which is filled out by a certifying physician at the hospital where the decedent passed away. It should be included in the actual hospital record and can be very helpful to you on the issue of causation. It includes the following information:

Death was caused by:

a. immediate cause (cardiopulmonary arrest)

b. due to or as a consequence of (intracerebral hemorrhage)

c. due to or as a consequence of (anticoagulation therapy)

This is obviously a crucial document. It is completed at a time before any lawyers are retained or any suit is anticipated. It will be difficult for the hospital to escape its own determination of the cause of death. Do not be concerned about what the document describes as the immediate cause of death. That is typically cardiopulmonary arrest.

It is the conclusions that follow that are important:

Q: You testified that the patient succumbed to an infection, true?

Q: That is false testimony isn't it?

Q: You know he died from the drugs that you gave him during an angioplasty, true?

Q: And you know that those drugs caused a coagulapathy, true?

Q: Meaning his blood got too thin, right?

Q: And a known side effect of those drugs is major hemorrhage, true?

Q: Now, you are just saying he succumbed to an infection so the jury believes it wasn't your fault that my client died, correct?

Q: Sir, I take it you saw the official death certificate in the hospital record?

Q: It was completed and signed by a certifying physician at your hospital?

Q: Long before there were any lawyers involved, true?

Q: Long before there was a lawsuit?

Q: And it listed the immediate cause of death, which was cardiopulmonary arrest?

Q: But that was just when my client's heart finally stopped beating, right?

Q: That only occurred as a consequence of intracerebral hemorrhage, true?

Q: Which was due to anticoagulation therapy, right?

Q: Which you ordered for your angioplasty, true?

Conclusion

Medical malpractice cases must be proved through defense witnesses and defense documents. Your clients generally have very little knowledge of the medical issues or treatment involved in the case you are bringing. Even if they do, it is far better to demonstrate the righteousness of your case through the testimony of adverse witnesses.

It is important to lead these adverse parties when calling them on your direct case. It is just as important to demonstrate hostility of nonparty witnesses when necessity dictates you call them on your direct case. Be careful, however, in calling the nonparty physician, because if you fail to demonstrate hostility, that witness can walk all over you under the guise of being fair and independent.

Finally, know what documents to request pursuant to discovery or subpoena. Your advocacy can be compelling when the defendants' own documentation contradicts their defense, causing them to run, but not hide, from their own records.

1. Prince, Richardson on Evidence (11th Edition, Farrell), page 433.

2. Federal Rules of Evidence, Rule 607, states that the credibility of any witness may be attacked by any party, including the party calling the witness.

3. Prince, Richardson on Evidence (11th Edition, Farrell), page 420.