

Wednesday, May 15, 2002

HEADLINE: Trial Advocacy, Focusing On The Negative In An Independent Medical Exam

BYLINE: Ben B. Rubinowitz and Evan Torgan

BODY:

In virtually every personal injury case, the defense is entitled to have the plaintiff examined by a doctor of its choosing. Indeed, most preliminary conference orders direct the attorneys to spell out the type of physician who will conduct this exam. They further order the defense to provide plaintiff's counsel with a copy of the report generated from that exam.

It is when this report is received that the plaintiff's lawyer should begin to scrutinize that report for what it says and just as importantly, for what it does not say. Obviously, inquiry must be made as to what the report says about the history of the accident, the nature of the treatment to date, the types of tests and examination conducted by the examining doctor and the examining doctor's opinion as to diagnosis and prognosis of plaintiff's condition.

Equally important, however, is to scrutinize that report for what it does not say but should say. Working with such negatives can add a powerful line of attack to your cross-examination. For example, imagine the scenario where the defendant's examining doctor was not provided with a complete set of medical reports, a complete hospital chart or the X-rays taken of the plaintiff in the past. Here, there is no question that the examining doctor is at a disadvantage. At the time he writes up the report he has only a limited number of choices. The doctor can either note the absence of such materials by stating that he would like to review them, thus, calling attention to the inadequacy of his review or omit any reference to the missing data entirely. Either way, the ability to work with the negatives - that which the doctor did not review - can form the basis of a powerful and compelling cross-examination.

Baseball Bat, Voice of Reason

Baseball Bat Approach v. Voice of Reason Approach. True, an attorney could, on cross-examination, confront the expert witness by immediately pointing out that he failed to review the missing medicals. The attorney could, in effect, take out a baseball bat and start swinging at the witness. In a loud, prosecutorial tone he could ask:

Q: You never reviewed the x-rays, true? or

Q: You never reviewed the complete hospital chart, true?

While this approach might seem to score points, it detracts from the ultimate goal of cross-examination: laying the foundation for a strong and compelling argument on summation. If we think through the conduct of the defendant's examining doctor, it is easy to see what he has really done. Take, for example, the doctor's failure to review the X-rays. Here, he conducted an examination of your client, never reviewed the films, and offered an opinion as to your client's medical condition knowing that he had not reviewed crucial information. The best he can do is make an excuse for his conduct.

Set Up, Knock Down

Unlike the baseball bat approach, the "voice of reason" approach to cross-examination allows you to first set up the witness and then knock him down much harder. This approach allows you, as the "voice of reason" to ask questions that are difficult to oppose or deny:

Q: Doctor, you conducted a thorough examination of my client, true?

Q: You conducted a complete examination of my client, correct?

Q: Certainly you'd agree that the opinions you've rendered are supported with a strong or meaningful factual basis?

Q: After all, if you didn't have factual support you'd agree that your opinion would be less than valid?

Q: Aside from a clinical examination, doctors also rely upon certain objective tests to help them reach a diagnosis?

Q: Radiographic studies provide doctors with a view that can't be seen with the naked eye, true?

Q: If you didn't take the time to review appropriate documents and records you'd agree that your opinion would be less than fair?

Q: But of course, you took the necessary time?

Q: And, we can agree, you reviewed the necessary documents?

Q: That's why you can state with certainty what your opinion is, correct?

Now, work with the negative, and point out what the witness did not review:

Q: Doctor, in conducting this full, fair and thorough exam you never once reviewed the X-rays, true?

Q: In your report you stated that you would like to review them, true?

Q: Did anyone prevent you from looking at them?

Q: Did anyone prevent you from holding off on your opinion until after you've had an opportunity to review them?

Q: Did my adversary say "you are not permitted to look at them"?

Q: We can agree, Doctor, you had two choices: Either render an opinion without looking at the X-rays or wait until you've reviewed them and then render your opinion, fair enough?

Q: The problem is, the second choice takes a little more time and a bit more effort, doesn't it?

Q: You sir, made the conscious decision, to render an opinion without ever reviewing the X-rays, true?

Here, the doctor will likely try to explain that it was not necessary to view the X rays (or other medicals) to render his opinion. If we think through this answer we know that this expert, who prides himself on teaching others, has opened up a new line of attack by denying that it was necessary to view the X-rays prior to rendering his opinion:

Set him up:

Q: Doctor, on direct examination you told us that you were an attending physician at a teaching hospital, true?

Q: That means that over the course of your career you've had the opportunity to teach younger, less experienced physicians, true?

Q: You've taught them how to make differential diagnoses?

Q: You've taught them how to gather appropriate information, true?

Q: You've taught them how to reach well-founded medical opinions, correct?

Now, knock the witness down by using his own words against him:

Q: Doctor, in teaching these residents, you tell them, at times, to make inquiry as to whether X-rays have been taken, true?

Here you can drive your point home by changing the tone of your voice and expressing both sarcasm and righteous indignation through the following questions:

Q: And certainly if X-rays have been taken you tell them it's not necessary to view them, true?

Q: Don't you say, in teaching them, "in our hospital we have a different approach. Here it's not necessary to look at the X-rays to reach a diagnosis"?

Q: Don't you teach them "reach your opinion without looking at the X-rays and if someone asks you, you can always say, "It wasn't necessary to look at them"?"

Other Negatives

There are other negatives to work with that are equally helpful. Assume the report states your client, the plaintiff, was cooperative; however, that same report makes no mention whether your client was honest, forthright or was exaggerating or even malingering. The fact that this report does not contain this information provides another fertile area for cross. Once again the "set up" in conjunction with the voice of reason becomes all important in making your point:

Q: Doctor, we can agree, can't we, that your report honestly reflects your findings during the exam?

Q: Obviously, you took the time to note those things that we need to know, true?

Q: In the event you found that (my client) was exaggerating you would have made that clear in your report, true?

Q: Or, if you found that (my client) was attempting to deceive you, that could have been included in your report?

Q: The same would be true, if you found (my client) to be malingering - this is something that you would have noted?

Q: We can agree, you found (my client) to be cooperative, correct?

Now work with the negatives to bolster your client's credibility and to support your argument on summation:

Q: Doctor, at no time did you find (my client) to be less than honest?

Q: Indeed, you found her to be honest?

Q: She answered your questions in a forthright manner?

Q: She never exaggerated?

Q: She told you what hurt, true?

Q: You had no reason to think that she was telling you anything but the truth?

Doctor's Written Report

Of course, there are those doctors who will not be so agreeable. Indeed, it is this type of doctor who might choose to fight with you about your client's honesty. If, however, you took the time to set up the doctor with regard to the importance and accuracy of his written report, he will have difficulty later explaining any discrepancy between his written words and his present testimony. You must lock in the witness or commit him to the fact that he spent a good deal of time and effort in preparing the report. Additionally, you must make it clear that he included all the necessary and relevant findings in that report:

Q: Doctor, when you examined my client we can agree there was no doctor-patient relationship, true?

Q: The exam was solely for the purpose of litigation?

Q: You were retained by the defense?

Q: To conduct an honest evaluation?

Q: To conduct a fair evaluation?

Q: To write down all appropriate findings?

Q: To include all relevant information?

Q: And certainly not leave out or omit things that could in any way be regarded as having an important bearing on the case?

With this set up the doctor can be made to look foolish stating for the first time, in court, that he found your client to be dishonest:

Q: Now, Doctor, you just stated that you found my client to be dishonest, true?

Q: Certainly we can agree that that is something relevant to the case?

Q: Certainly we can agree that this has an important bearing on the case?

Q: You, however, already told us that your report contains all relevant information?

Now confront the witness with his own report in one of two ways:

Q: Isn't it true that there is not one single word about that in your report? or

Q: Show us any place in your report, in which you included all relevant information, where it says one word about that.

Obviously, if the witness continues to fight with you, this would be a good time to start the collateral attack.

Conclusion

While your cross-examination will undoubtedly touch on the areas contained in a defense doctor's report which actively dispute the findings of your own doctors, the skillful advocate will score points by focusing on the negative, that which the report does not contain, to undermine the credibility of the defendant's expert. Working with the negatives can reveal the weakness of defendant's position and ultimately enhance your credibility and serve to strengthen your arguments on summation.