

## **“FACT” DEPOSITIONS OF TREATING PHYSICIANS – WHY AND HOW YOU SHOULD ACT TO PROTECT THE DOCTOR- AND YOUR CASE**

Your secretary buzzes you to let you know you have a call.

“Dr. Smith is on the phone regarding Sally Jones. He sounds really angry about something.” Dr. Smith is the physiatrist who treated your client, Sally Jones, for cervical and lumbar pain she suffered after she was rear-ended at a red light by a State Farm insured more than a year ago. After collecting all of the medical records of Sally’s nine months of physical therapy, you sent them to the State Farm adjuster, along with the police report of the crash and the declarations page of Sally’s auto policy showing her selection of full tort. You made a demand for settlement of \$18,500.00. The adjuster’s offer of \$500.00 didn’t interest Sally, though, so you filed suit, and the case was listed for arbitration.

State Farm’s counsel took no discovery and only provided answers to your interrogatories and requests for production of documents after you filed a motion to compel them and a judge ordered him to do so. The answers revealed that the defendant has minimum coverage of \$15,000.00. No defense medical examination was obtained. At the arbitration, the defendant did not even appear. The arbitrators awarded your client \$14,500.00, which award State Farm’s counsel of course appealed. You filed your Notice pursuant to Rule 1311.1 that you would proceed at trial on the medical records alone, and that your damages would be limited to \$25,000.00.

That was seven months ago and you haven’t heard from defense counsel since. Trial is scheduled in three months. The only thing you need to be ready for trial is the narrative report of Dr. Smith in which he uses the magic words that will give you causation.

“Dr. Smith, how are you?” you say cheerily into the phone. In addition to not having received the report yet, you also haven’t gotten Smith’s bill for a narrative report.

“Terrible,” he says in a tone which tells you that your secretary was right. He *does* sound angry. “I just got served with a subpoena to appear for a deposition regarding Sally Jones. It says I’m supposed to appear on Monday in the center city office of defense counsel at 10:00 A.M., and that I have to bring with me all of her original medical charts. What is this nonsense? I’ve got patients that day. And doesn’t he know I charge \$3,500.00 for deposition testimony? I’m not showing up for this. You deal with it.”

### **WHAT IS THIS ALL ABOUT?**

In a disturbing new trend, insurance company lawyers handling compulsory arbitration and Rule 1311.1 cases have adopted a strategy of taking the “fact” deposition of treating physicians and chiropractors. They rely on Pennsylvania Rule of Civil Procedure 4003.6 as the authority which permits them to do so. Rule 4003.6, entitled “Discovery of Treating Physician,” provides:

**Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter. This rule shall not prevent an attorney from**

**obtaining information from**

- (1) the attorney's client;**
- (2) an employee of the attorney's client, or**
- (3) an ostensible employee of the attorney's client.**

Depositions of non-party, *fact* witnesses are obviously “a method of discovery authorized by this chapter.” And that is what defense counsel argues a treating physician is, nothing more than a fact witness. Defense counsel agrees that he cannot ask the doctor what his opinions are, nor can he ask him to offer any. He is limited to asking the doctor what he did, what he saw, and what he heard. Defense counsel contends that these are all merely fact-based questions.

But this is all ridiculous, of course, because your treating doctor *is* your expert, or, even if he is not, he is still, nevertheless, *an* expert. (An expert is one who has any reasonable pretension to specialized knowledge on the subject under investigation. George v. Ellis, 820 A. 2d 815 (Pa. Super. 2003)). As such, the doctor has a right to expect that if he is to be deposed in civil litigation, he will be compensated for his time as an expert, no matter who is deposing him or why.

So how do you explain to the doctor why his deposition is necessary and why he must appear? And how do you break it to the doctor, whose help you need to make your case, that in addition to missing a morning or afternoon of seeing patients, the only compensation he is entitled to for his time is the statutory witness fee of \$20.00 (plus 7 cents a mile for travel)?

**WHY IS DEFENSE COUNSEL SEEKING THE DEPOSITION?**

It is vitally important for any plaintiff's attorney to understand exactly why defense counsel would seek to take a fact deposition of a treating physician in the first place. If you do not appreciate the insurance company's motives, your client's case will be damaged, as will your relationship with the doctor.

There really is no mystery as to why the deposition is being sought. The insurance company has performed a cost-benefit analysis and concluded that the cost of paying their counsel to depose the doctor (when it is not necessary to defend the case), is worth the following benefits which will be reaped:

1. It will increase litigation costs to plaintiff's attorneys and discourage them from representing plaintiff's in smaller matters;
2. It will intimidate and discourage the physician and colleagues from treating accident victims and/or cooperating with plaintiff's attorneys; and
3. It will encourage de minimis settlements in light of the increased costs.

As your client's advocate therefore, and as a member of the bar, it is incumbent upon you to take all necessary steps to ensure that the insurance company's tactic of deposing the treating physician fails.

**WHAT CAN YOU DO?**

**1. Identify All Treating Physicians as 4003.5 Experts**

In any case where a treating physician's testimony might conceivably be utilized at trial, you should make that fact clear in response to expert interrogatories. The below answer is one which my firm uses in every personal injury case:

All discoverable medical expert opinions to be testified to for Plaintiff will	be
rendered by Plaintiff's treating/consulting physicians and not by any	experts
retained for the purpose of reaching conclusions without first-	hand factual
information or otherwise involved in Plaintiff's care,	treatment and/
or management, and who are routinely discoverable under	Pennsylvania
Rule of Civil Procedure §4003.5. Such opinions, as may be	offered, will be
based upon factual information, as was developed in	and/or relied upon in
the total course of Plaintiff's care, treatment and/or	management.

The scope of the subject matter of the medical testimony, as well as the substance of facts and opinions, are found in several charts, studies or interventions made concurrently with the care rendered, as well as the reports connected therewith. Testimony will be offered regarding the residual effect of the injury and the healing process, and prognoses will be offered for the assessment of future damages. No other "expert" witness whose information has been acquired or developed in anticipation of litigation or in preparation for trial, and who is expected to testify at trial, has been "retained or specially employed" by Plaintiff's counsel. Plaintiff reserves the right to supplement this response.

With this answer, the defense is put on notice that all of plaintiff's treating physicians are potential "experts" in the case, and that the sum and substance of their testimony can be found in the medical records of plaintiff's treatment. This designation will necessarily afford them the protection of Pennsylvania Rule of Civil Procedure 4003.5, entitled "Discovery of Expert Testimony; Trial Preparation Material." Under this Rule, the defense is limited to discovering, through interrogatories, the identity of plaintiff's experts, and the subject matter to which they are expected to testify, including the substance of any facts and opinions. Most importantly, it is only upon good cause shown that defense counsel may depose a 4003.5 expert.

A word of caution. Be cognizant that in Miller v. Brass Rail Tavern, 664 A.2d 525 (Pa. 1995), the Supreme Court held that Rule 4003.5 only applies to opinions which are acquired or developed in anticipation of litigation or for trial. And in Scott v. Defeo, 46 D&C 4th 353 (2000), it was held that opinions of treating physicians are all matters within the scope of the medical care provided, rather than opinions acquired or developed in anticipation of litigation or trial. However, if you have identified your treating physicians as plaintiff's only potential experts at trial in the manner described above, you will be able to at least make the argument that having specifically identified the doctor as a 4003.5 expert, he is entitled the protections afforded thereunder.

**2. File a Motion for Protective Order**

If you have not identified the doctor as a 4003.5 expert, and defense counsel is insistent on a deposition, it will be necessary for you to file a Motion for Protective Order pursuant to Rule 4012(a), which protects witnesses from unreasonable oppression, burden or expense. In filing such a motion, however, it is critically important to understand what protection you are asking the Court to give the doctor, and concomitantly, your client.

#### **A. Quash the Subpoena**

In your Motion, you should first ask that the Court quash the subpoena altogether, especially if your case is an arbitration matter or a 1311.1 appeal.

“The overall objective of compulsory arbitration is the expeditious disposition of pending litigation. Compulsory arbitration provides the parties with a more expeditious and inexpensive alternative to trial. [Rule 1311.1](#), addressing introduction of evidence on appeal from the award of arbitrators, contributes to the overall goal of compulsory arbitration by reducing the time and costs associated with calling witnesses to authenticate documents that are introduced into evidence at the trial de novo. In exchange for this cost-saving benefit, plaintiff agrees to limit damages to [\$25,000.00], regardless of the jury's verdict in his or her favor. [LaRue v. McGuire](#), [885 A.2d 549](#) (Pa.Super. 2005).

Allowing the deposition of the treating doctor, without the showing of good cause required under Rule 4003.5, would defeat the very purpose of compulsory arbitration and Rule 1311.1. Such discovery should be precluded altogether as it imposes an unreasonable burden and expense on the witness and the plaintiff.

#### **B. The Expert Fee**

If the Court refuses to quash the subpoena altogether, you should demand that the doctor be paid his normal expert fee for testifying. After all, if it was you who had requested the deposition of your client's treating physician, you would be forced to pay anywhere from \$1,500.00 to \$7,500.00 for the privilege. So why should defense counsel be entitled to depose the same individual, for the same amount of time, in the same case, on all of the same issues (minus only the opinion testimony), for twenty bucks?

Defense counsel will argue that a treating physician should be treated no differently than any other fact witness. After all, he will inevitably say, if a doctor witnesses a car accident, should he be paid \$3,500.00 to come in and testify? In the absence of the correct counter-argument, most judges will be swayed by this comparison. It is your job to point it out as a silly, disrespectful argument.

The treating physician who is asked to testify about the medical care he provided to a patient is in no respect like any other 'fact' witness. The treating physician graduated college, passed his MCATS, went to medical school, did a residency and an internship, and otherwise spent years gaining the knowledge and experience necessary to be in a position to recognize and understand the 'facts' to which he is being asked to testify.

Think of the average person looking through an electron microscope at the nucleus of an atom. Now compare that person with a *nuclear physicist* looking through the same microscope

at the same atom. Each person is thereafter subpoenaed as a 'fact' witness to be deposed as to what they saw. The testimony of each, although certainly 'factual,' would obviously be vastly different. Whereas the average person would be able to say that he saw several blob-like shapes moving around each other, the physicist could describe proton and neutrons and their interaction. The lay person's testimony would be meaningless and irrelevant. It is only because of the expert's expertise that his testimony is meaningful and relevant, and he should therefore be compensated as an expert.

## **B. The Scope of the Deposition**

Of all the issues raised above, this is the one most important to your case.

As stated above, the insurance company is willing to pay the costs associated with deposing the treating physician because, in the long run, it will save them money. But more specific to your case, the insurance company and defense counsel may believe that deposing the doctor might expose some facts which identify your client as a malingerer, the doctor as incompetent, or show fraud.

"But that's not possible in my case," you're thinking. The client has no previous claims, the accident was a significant rear-end collision in which her car was totaled, and the doctor is Board Certified. It can't hurt your case to depose the doctor, right?

Wrong. Unfortunately, "truth" in a courtroom is whatever the fact-finder says it is, and the truth ultimately found will be determined by the evidence which is permitted to be heard. If the doctor uses a template report which just plugs individual patient information in, will he be able to adequately explain why this is perfectly acceptable record-keeping practice? If the doctor included in his reports specific numbers for your client's range of motion, but took no actual measurements, will he be prepared to explain that he estimated the figures based on his observations and many years of experience? Or will the doctor get defensive at questions which seem to attack his credibility and competence, and testify defensively, or worse, refuse to testify at all?

In any motion for protective order then, it is critical to obtain an Order which limits the scope of the deposition to the doctor's recollection and observations of the treatment of the patient. This is really all that is relevant to the case. Questions concerning who owns the facility, who does the billing, how patients are recommended to the facility, whether or not the facility uses sign-in sheets, and whether or not licensed medical assistants are permitted to perform physical therapy, are all irrelevant and designed to elicit information the insurance company wishes to use for purposes other than defending your client's claim. If defense counsel is permitted to ask these questions, he might be able to cast the facility or the doctor in a false light before the fact-finder. This will obviously hurt your chances of recovering damages for your client, and this is the reason you care.

By limiting the scope of the deposition to the doctor's observations and recollection of the client's care, you eliminate defense counsel's ability to use the deposition for his illegitimate purposes.

## **REPRESENTING THE DOCTOR**

In making sure that all of the above steps are taken to protect the treating physician, you must of course consider the possibility of a conflict of interest. If there is any possibility that your client's interests are not one hundred percent aligned with the doctor's, you should encourage the doctor to obtain outside counsel. However, if there is no possibility of a conflict, and the doctor agrees, you should take all of the above steps yourself, without demanding a fee from the doctor. By doing so you will be serving the best interests of not only the individual client, but also every other existing and potential client involved in a motor vehicle accident who needs treatment.

So when Doctor Smith says "You deal with it," you should not hesitate to do so freely, knowing that you are fulfilling your obligations to both your client, and your profession. If for some reason you cannot represent the doctor, however, you should recommend that he obtain counsel to protect his interests.