

Doctors and Depositions:

Florida's Supreme Court Defines Limits

by Jeffrey S. Badgley, Esquire



To the physician, depositions are an inconvenient encroachment on the demands of private practice. To the attorney, they are a necessary tool for obtaining vital information for the advancement of a client's interests. This is the first part of a two-part series on two recent decisions of the Florida Supreme Court that define the boundaries of proper practice for physicians and attorneys regarding the taking of depositions.

Problems with Physician/Patient Confidentiality

You have just been served with a subpoena for medical records and deposition testimony and you are concerned that you may now become embroiled in a claim by the patient. You notice that a close friend from medical school is named as a defendant in the lawsuit and that his attorney is the one who subpoenaed you for deposition. You wonder why that attorney didn't bother to call you when the patient's attorney has been so friendly and has even offered to meet with you before the deposition to "help" you understand what the lawsuit is about. Can you call your physician friend or his attorney to find out what

this is about? While it might seem like an obvious course of action, you will run the risk of violating the patient/physician confidentiality that has now become firmly cemented into Florida law as a result of a Florida Supreme Court decision rendered earlier this year, Acosta v. Richter, 21 Florida Law Weekly S29 (Fla. Jan. 18, 1996).

Before the Supreme Court decided the Acosta case, attorneys for patients and physicians were battling over the right of a physician's attorney to contact the patient's treating physicians to discuss matters relating to their care. The courts issued a variety of decisions, not all consistent, as to whether such contacts were prohibited by the physician/patient privilege of confidentiality. This privilege prohibits a physician from discussing his treatment with anyone other than physicians involved in the treatment of the patient unless compelled to do so by subpoena or authorized in writing by the patient. Some courts held that there was no patient-physician confidentiality as to any medical treatment whenever a patient sued a health care provider. Other courts held that the patient/

physician privilege was vitiated only as to the particular health care provider who was being sued and that physician/patient confidentiality remained intact as to all other providers.

Florida's Supreme Court Responds

The supreme court decided the Acosta v. Richter case to clarify the extent of the physician/patient confidentiality in the context of a medical malpractice lawsuit. In this recent decision, the court ruled that physician/patient confidentiality does not dissolve whenever a patient sues a health care provider. Rather, a physician can only disclose confidential information regarding his or her treatment of the patient to the extent necessary to defend allegations of malpractice. This means that information protected by the physician/patient relationship may only be shared with the physician's insurance company and the physician's attorney to assist in the defense of a claim or an anticipated claim. The privilege remains intact for any other treating physician of this patient and their treatment can not be discussed or disclosed unless

compelled by subpoena or authorized by a written release from the patient.

Who Wins?

In practical terms, the court's decision means that attorneys representing physicians in medical malpractice actions can only obtain information about the plaintiff's medical treatment by subpoenaing treating physicians for deposition. A vigorous defense for the physician increases the number of depositions required, since informal phone calls or meetings would violate patient/physician confidentiality. In contrast, the plaintiff's attorney is permitted to speak informally with the treating physicians that have not been named as defendants in the lawsuit. Thus, the treating physician who is subpoenaed for deposition testimony must rely solely on the information given to him by the patient's attorney to understand his role in the lawsuit. This may not be the best source of information because this lawyer may also be considering whether to add new physicians as defendants. The Acosta decision not only requires more depositions to be taken by attorneys representing physicians; it also restricts treating physicians from discussing the lawsuit with the defense lawyers to obtain a balanced understanding of their role in the lawsuit.

What Now?

So what do you do with your subpoena for deposition? Fortunately, there are actions that you can take to protect your interests while remaining faithful to the court's

ruling. If you are subpoenaed for deposition in a lawsuit and you are concerned about the potential of a claim, you should immediately contact your malpractice insurer. Most insurers provide defense attorneys for these situations. Your attorney can then take whatever action is necessary to protect your interests. If you have not done this and suddenly find yourself in a deposition, feel free to ask the attorneys what the lawsuit is about. When I depose a treating physician in a malpractice action, I will often provide them with a copy of the plaintiff's complaint and briefly inform them of the nature of the allegations of medical negligence so that they can understand their role in the issues of the case.

Finally, remember, that when a physician's attorney has scheduled your deposition in a medical malpractice action, it is because he has no other method of obtaining information about your treatment. That friendly plaintiff's attorney who has spent time with you before the deposition may not be so friendly after your deposition when he decides that your testimony has made you a new defendant in the suit. ■

Doctors and Depositions, Part II:

Florida Supreme Court Protects the Privacy of Physician Experts

by Jeffrey S. Badgley, Esquire



This article is the second feature on recent decisions from the Florida Supreme Court that define the boundaries of proper practice for physicians and attorneys in civil litigation. This article will discuss the role of the physician expert who performs an independent medical examination or who is retained by the patient or a defendant physician to testify in a medical malpractice lawsuit.

Bias and Privacy

Prior to this year's court decision of *Elkins v. Syken*, 21 FLW S159 (Fla. April 11, 1996), physicians retained as medical experts in civil lawsuits were faced with the potential for burdensome intrusions into their financial privacy. In nearly every case in which a physician participates as an expert witness, there is an opposing point of view which is often supported by the opinion of another physician, who may be a patient's treating physician or a specially retained expert. In either situation, the attorneys for both sides will attempt to prove that the opposing party's expert witness holds a conflicting opinion because of an undisclosed bias in favor of the party he testifies for. Thus, attorneys

representing patients will try to prove that the "independent" medical examiner makes a substantial income from performing examinations solely for insurance companies and the attorneys who represent their interests. Attorneys representing physicians in medical malpractice suits will try to prove that the plaintiff's expert witness earns more money from testifying than he does practicing medicine.

Aggressive attorneys on both sides of these cases often demand that physician experts produce personal income tax returns and other IRS filings. Others subpoena extensive office and business records relating to previous medical examinations and court cases for which the expert has received compensation. Some courts have permitted this type of extensive investigation into the physician's personal income and medical practice. Indeed, some courts had even gone so far as to require the physician to change procedures for billing and filing and to prepare documents solely for the purpose of litigation. Perhaps some readers of this publication have had such experiences and have vowed to never participate in a civil lawsuit again, either for a patient or a physician.

Supreme Court Sets Limits

The good news is that the Florida Supreme Court has now established definite limits on what can be demanded from the physician who participates in a civil lawsuit as an expert witness. In *Elkins v. Syken*, the court expressed its concern for the burdensome and intrusive measures that had been sanctioned by some courts:

To allow discovery that is overly burdensome and that harasses, embarrasses, and annoys one's adversary would lead to a lack of public confidence in the credibility of the civil court process. In essence, an overly burdensome, expensive discovery process will cause many qualified experts, including those who testify only on an occasional basis, to refrain from participating in the process, particularly if they have the perception that the process could invade their personal privacy.

The court concluded that some courts had simply gone too far in allowing attorneys to go on "fishing expeditions" to prove the bias of

medical witnesses. The court then approved bright line standards on what could be requested from expert witnesses. These guidelines for what the expert physician is expected to provide during a lawsuit are summarized below.

Permissible investigation:

1. The medical expert may be deposed.
2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
3. The expert may be asked what expert work he or she generally does.
4. The expert may be asked what percentage of work he or she does for patients or physicians.
5. The expert may be asked to give an approximation of the portion of his or her professional time that is devoted to service as an expert. This can be an estimate of hours expended, number of IME's performed in a year, the percentage of income earned from such activities, etc.
6. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial for a reasonable period of time. The court suggested that would be three years, although it indicated that a longer period of time may be inquired into under some circumstances.

Impermissible investigation:

1. The medical expert cannot be asked how much money he or she earns as an expert or how much the expert's total annual income is.
2. The medical expert need not compromise patient privacy in responding to questions or requests for documents.
3. The expert may not be compelled to compile or produce nonexistent documents.
4. The expert does not need to produce personal income tax returns, IRS 1099 forms or other IRS filings.

The court's decision seems to suggest that extensive requests for records from other patient examinations may not be appropriate, however, no specific guidelines were given on this issue. Based on the concerns expressed by the court in this opinion, any document request that required a physician or his staff to spend undue amounts of time to respond to would probably be rejected by a trial court judge. However, it should be noted that in cases where the physician is a defendant, the supreme court has recently approved of permitting the patient's attorney to obtain records of other patients, provided the privacy of the patient is protected and the information is relevant to the issues in the lawsuit. Amente v. Newman, 653 So.2d 1030 (Fla. 1995).

Finally, the court noted that there would be severe sanctions for any medical expert who failed to give honest and accurate responses to these requests. If it is disclosed or made apparent to the trial court that a medical witness has falsified, misrepresented, or obfuscated the required data, the aggrieved party

may ask the court to exclude the witness from testifying and request imposition of costs and attorney fees in gathering the information necessary to expose the miscreant expert.

Conclusion

For those physicians who remain actively involved with medical expert work, this decision is a welcome respite to intrusive and burdensome requests for information. For physicians who have been burned by such experiences, the court's opinion should be read as a repudiation of these practices and an affirmation of the crucial role played by the medical expert in the resolution of civil disputes. As stated by Justice Anstead in metaphorical language directed to the medical community:

[W]e must be very careful not to allow abuses of the system to endanger the life of the open system itself. It is for the protection of the continued health of our overall open system of justice that we act today to curb some of the perceived abuses of our liberal system of discovery.

Having taken the pulse of the justice system on this issue, the court has balanced competing interests in favor of the privacy of medical experts. It has done so to encourage participation in civil litigation by qualified medical experts. ■