



## FOUR DISCOVERY ISSUES IN MEDICAL NEGLIGENCE CASES

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Rather than trying to broadly cover the topic of discovery, I have selected four specific issues relating to discovery and/or admissibility of evidence which pertain to medical negligence cases. They are: (1) communications with potential defendant health care providers, and others within their group or employer's practice; (2) securing and presenting evidence with respect to prior misdeeds by health care providers relevant to corporate negligence claims; (3) inadequate disclosure in response to Court Rules and interrogatories relating to expert witnesses; and (4) use of contention interrogatories.

### *1. Health Care Providers: Who Can Speak with Whom*

It is often helpful to speak with health care providers before deciding whether or not to bring a lawsuit for medical negligence. Sometimes it is not clear whether or not the health care provider may have some responsibility for the client's injuries. It is also necessary to speak with other providers who have treated the client, but who are either members of the same medical group or employees of the potential defendant entity.

Restrictions and conditions relating to such contact are set forth in Title 4 of the Rules of Professional Conduct, and in applicable case law. If the contact

is prior to an appearance by an attorney representing the witness or the applicable business entity, plaintiff's counsel may speak with any such witness provided there is first disclosure of counsel's role, and of his or her client's interest in the matter. RPC 4.3.

If a defense attorney has appeared in the matter, then plaintiff's counsel must determine whether the witness either could have been responsible for the client's injuries, or is a speaking agent for a defendant. If the witness is neither, then communication is permissible subject to the above limitations under RPC 4.3. If the witness appears to have been a negligent actor or a speaking agent, then plaintiff's counsel is now limited to formal discovery with notice to defense counsel as provided under the civil rules.

A "speaking agent" is one who has the authority to bind the defendant entity with respect to the matter before the court. In *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), the plaintiff's attorney sought to have ex parte interviews about the case with non-defendant current and former employees of the corporate defendant. Defense counsel instructed the employees not to speak with the plaintiff's attorney. The Supreme Court held that the attorney-client privilege did not bar counsel from interviewing them where he was asking about facts, and not communications to counsel.

The court also held that for purposes of the ethical rule against speaking with represented parties (Now RPC 4.2), only those current employees with authority to bind the corporation were "represented parties." The fact that agents or employees of a defendant entity may be able to bind that entity with respect to other matters should not be determinative.

On the other hand, under *Loudon v. Mhyre*, 110 Wn2d 675, 756 P.2d 138 (1988), defendants do not have the right, through counsel or otherwise, to interview subsequent treating physicians on an ex parte basis.

The same rule should apply when the "not at fault" subsequent treating physicians are employees of a corporate defendant. *Loudon* was based in part on the physician-patient privilege. Even though the privilege is waived when the patient puts her physical condition in issue, waiver is limited to the medical information that is relevant to the action. Permitting ex parte interviews by the defense could compromise patient confidentiality to the extent it is not waived. Consequently, it is improper for defendant entities or their attorneys to interview plaintiff's "not at fault" and "not speaking agent" health care providers to try to uncover information with respect to negligence, causation or damages. See my article regarding attorney-client privilege asserted by



treating physicians in Vol. 34.4 of Trial News, dated 12/1/98, and the article by Ron Perey and Carla Tachau Lawrence entitled “Whatever I See or Hear...I Shall Not Divulge” which will soon be published in the Trial News.

Unfortunately, a number of health care organizations seem to have difficulty appreciating this limitation, including Group Health Cooperative and Wenatchee Valley Medical Center. This will try to insist that it is necessary for them to speak with their employees to be able to make sure that they are not “targets” and to properly evaluate their exposure. It is best to give written notice right away that such subsequent treating physicians are not “targets”, and of your client’s insistence upon confidentiality in this respect pursuant to Loudon, and then to seek a protective order in the event that the defendant and/or defendant’s counsel refuses to agree to that limitation.

**2. Discovery and Admissibility of Prior Misdeeds**

Although evidence of prior misdeeds is not admissible under ER 404(b) to show that a party was at fault in the matter in litigation, it is relevant and material to show that others, including hospitals granting privileges and hospital employers, knew or should have known of such misdeeds, and arguably should have done something different to protect their patients.

The hospital owes a direct duty to its patients which it can breach regardless of whether there is negligence on the part of its agent or employee. The leading Washington case is Douglas v. Freeman, 117 Wn.2d 242, 252-3, 814 P.2d 1160 (1991). In that

case, the Washington Supreme Court held that “It is well settled that under the doctrine of corporate negligence, a hospital can be held liable for its own negligence in the absence of any negligence on the part of the treating physician.” The Court pointed out that: “The corporate negligence theory is based on the proposition that a hospital owes an independent duty of care to its patients.” Id. at 252, citing Schoening v. Grays Harbor Comm’y Hosp., 40 Wash. App. 331, 698 P.2d 593, review denied, 104 Wn.2d 1008 (1985).

It is important to distinguish hospital negligence, a theory of direct liability, from claims of negligent supervision, which are premised on imputed liability. Ordinarily a principal is liable for the negligent acts of its agent only when that agent acts within the scope of her authority. Where, however, the principal is negligent in supervising the agent’s work, the principal may be held vicariously liable for the agent’s negligence which is outside the scope of the agent’s employment. Because the doctrine of negligent supervision is a method of imputing the agent’s negligence to the principal, any claim for negligent supervision is duplicative when it is agreed that the agent is acting within the scope of her employment, and that the principal is liable for her acts in any event. The result is that evidence of the principal’s failure to monitor the agent has no probative value, because the issue is not material to the case.

By contrast, hospital negligence, or corporate negligence, is not a form of imputed liability, but of direct liability. A hospital owes duties directly to its patients, duties which may be negligently breached. This is starkly different from negligent supervision cases,

in which plaintiffs are often third parties, and there is no independent duty running from the principal to the plaintiff. Thus a claim for hospital negligence is not duplicative of a claim against the hospital’s agent (physician) for medical malpractice. Instead it serves as an independent ground for liability.

DeWolf and Allen, 16 Wash. Prac., Tort Law and Prac., sec 7.15 (1993) take the same view of corporate negligence, contrasting it with theories of vicarious liability. The authors conclude:

*The doctrine of corporate negligence does not impose vicarious liability on a hospital for the acts of a medical staff member. The pertinent inquiry is whether the hospital exercised reasonable care in the granting, renewal, and delineation of staff privileges. . It is also possible for a hospital to be found negligent for inadequate supervision of one of its staff members, even where the staff member individually is found not to have been negligent. Id.*

In addition, it seems logical that information relating to prior misdeeds may be reasonably calculated to lead to discovery of admissible evidence to demonstrate that the health care provider is not reasonably skilled or knowledgeable in providing certain care.

Often such information is included in the physician’s personnel or credentialing file. The issues are: (1) whether, and if so under what circumstances, can plaintiffs’ counsel access that information through discovery; and (2) whether and under what circumstances is that information admissible at trial.

The threshold problem with obtaining discovery of a physician’s personnel file or her credentialing file is whether the information is discoverable under CR 26, that is, “relevant to the

subject matter” of the lawsuit, and, if not obviously admissible, “reasonably calculated to lead to the discovery of admissible evidence.” This should be a relatively low burden to meet; however, the best hook on which to hang discovery of this type is hospital negligence. Washington hospitals have express legal duties to exercise due care in granting staff privileges and to monitor the competence of physicians working at the hospital (whether employees or not). Any doubt about the validity of such claims is laid to rest by new Washington Pattern Instruction 105.02.02 on hospital negligence. (Historically this doctrine has been known as “corporate negligence,” but because it applies only to hospitals it is less confusing to call it simply “hospital negligence.”)

Other situations in which information in personnel files may be relevant are those in which the defendant physician’s misconduct that is at issue in the case would reasonably be expected to be recorded in her personnel file. In addition to “classic” medical malpractice, this could include information on physician drug use, unsafe working conditions for medical residents, or even so-called “systems errors,” in which hospital protocols themselves are inadequate to meet the standard of care. Each of these last three situations are of growing importance in medical malpractice litigation.

Hospitals are certain to resist such discovery. First, they can be expected to do so on the grounds of the Quality Improvement Committee statute, RCW 70.41.200. Subsection (3) of this section provides that certain information is exempt from discovery

for purposes of review and prevention of medical malpractice by hospitals. Specifically it protects “information and documents, including complaints and incident reports, created specifically for, and collected, and maintained by a quality improvement committee.” Thus to assert the privilege the hospital must show that the document at issue meets each test—(1) created specifically for the committee, (2) collected by it, and (3) maintained by it. Personnel documents kept in the ordinary course are unlikely to fall within these strict limitations.

The same rationale may be used to respond to the claim that the work product doctrine bars discovery. As codified in CR 26(b)(4) the work product doctrine protects only materials “prepared in anticipation of litigation.” In most cases personnel information is not gathered or kept in anticipation of litigation. To the extent that it is, that information together with any misplaced Quality Improvement documentation could be reviewed in camera and excluded by the court.

Finally, state run hospitals and clinics are likely to argue that certain provisions of the Public Disclosure Act, chapter 42.17 RCW, preclude discovery of a state employee’s personal information. An initiative approved by the people on November 7, 1972, the Act is designed to promote complete disclosure of information relating to campaign financing in particular, but also of public records in general. RCW 42.17.010(11). Although the Act is meant to be construed liberally in favor of disclosure, a number of records are specifically exempted from disclosure to protect the privacy of individuals and vital

government functions. RCW 42.17.310. Personnel files of public employees are exempt under RCW 42.17.310(1)(b) to the extent disclosure would violate an employee’s right to privacy as defined in RCW 42.17.255.

State defendants argue that the privacy exemption bars discovery in litigation. Essentially defendants argue that the Public Disclosure Act creates a statutory privilege in favor of public entities and their employees. There is no indication, however, that the Act was intended to be a comprehensive scheme governing all disclosures of documents in public custody, including those otherwise available through pre-trial discovery. After all, the ballot title of initiative measure #276 read “Disclosure – Campaign Finances – Lobbying – Records.” I have found only two cases in which the courts have entertained such arguments in discovery disputes.

The first case to consider section 310 (the privacy exemption) in the context of pre-trial discovery was Barfield v. City of Seattle, 100 Wn2d 878, 676 P.2d 438 (1984), two consolidated § 1983 civil rights actions. At issue was whether the plaintiff was entitled to discover Seattle Police Department Internal Investigation Files allegedly containing investigations of prior complaints against the defendant officers. The defendants asserted a privilege under section 310. The court permitted discovery because it found the privacy exemption of the Act to be conditional on a showing that the officers privacy would be violated, and that this condition had not been satisfied. The court also stated that the trial court’s power to conduct in camera review and to impose protective orders sufficiently guarded



against any invasion of privacy. Thus the court distinguished disclosure under Act, on which there are no constraints apart from the protections in the statute itself, and discovery, which is subject to court control. At the same time it is unclear what would have happened if the conditions for asserting the privacy exemption had been met.

The second case, *Ollie v. Highland School Dist. No. 203*, 50 Wash.App. 639, 749 P.2d 757 (1988), was a wrongful discharge case. The plaintiff sought disclosure of other employees' performance evaluations in order to show disparate treatment by the employer. The defendant asserted a privilege under section 310. The court of appeals held that as long as the other employees' names and social security numbers were deleted their right to privacy would not be violated. The court in this case seems to hold that only that information which could tend to violate the privacy rights of non-litigants would be considered privileged.

State defendants are not likely to emphasize these cases, but rather to look to the language of the Public Disclosure Act out of context. Under section 255 of the act one of the elements for showing a violation of a public employee's right to privacy is that the requested information "is not of legitimate concern to the public." This underscores the folly in applying the Act to pre-trial discovery. There are, of course, reams of materials that are discoverable by a private litigant which are not of legitimate concern to the public. It is obvious in the case of private defendants that their internal documents are not the public's business. Why would a different standard apply to a governmental agency

that is engaged in such businesses as running hospitals? It seems obvious that this sort of governmental secrecy is in conflict the purpose of the Public Disclosure Act.

In the background of this discussion is the principle that where a party's interest in privacy is sacrificed for the sake of trial, that sacrifice should be kept to a minimum. This was enunciated in *Rhinehart v. Seattle Times Co.*, 98 Wn2d 226, 654 P.2d 673 (1982). Although this may underscore a policy which favors in camera inspection and where appropriate a protective order under CR 26(c), this does not establish a basis for a blanket denial of otherwise discoverable information in a personnel file.

Whether information obtained in the personnel file will be admissible at trial is of course another matter. Assuming that the evidence is relevant and material, admissibility will likely depend upon whether the information qualifies as a business record, and whether it is violative of ER 403, or 404(b).

ER 403 provides for the exclusion of such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence".

ER 404(b) provides for the exclusion of evidence of a person's prior acts to show that defendant probably acted the same way in the particular case. Such evidence may be admissible, however, to show notice to the hospital, or potentially the lack of knowledge on the part of the provider.

### 3. Expert Witness Disclosure

King County Local Rule 26(d)(3) requires disclosure of a "summary of the expert's opinions and the basis therefor and a brief description of the expert's qualifications." King County Local Rule 26(e), entitled Exclusion of Testimony, provides: "Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." King County Local Rule 26(f), entitled Discovery Not Limited", provides: "This rule does not modify a party's responsibility to seasonably supplement responses to discovery requests or otherwise to comply with discovery before the deadlines set by this rule."

In practice, we often send out thorough interrogatories to the defendant early on with respect to their expert witnesses. We may ask, among other things, about:

- (1) *the precise statement of the subject matter about which each expert will be testifying;*
- (2) *the theories the expert will rely upon*
- (3) *the opinions that the expert will express*
- (4) *the reasons behind the opinion*
- (5) *all information that has been provided to the expert upon which he or she relies*
- (6) *all sources of research which have been consulted; and*
- (7) *any communications with colleagues or other experts, or witnesses.*

The response is commonly that discovery is continuing, the identity of experts have not yet been determined,

and that this answer will be supplemented as required under the rules.

In the absence of a court order to the contrary, the next response we receive to these interrogatories is often on the defendant's deadline for disclosure of expert witnesses. On that day, and not before, the defendant finally determines who their experts will be. Then, their disclosure often says something like: "name, c.v. is attached, expected to testify with respect to negligence, causation and damages. " No additional answers are provided to the original interrogatories.

The question is: Are the above Local Rules meaningful and enforceable, or not? If so, what must the plaintiff do to exclude defendant's experts who have not been properly disclosed under these rules?

The case law on this matter is not that helpful. In Fred Hutchinson Cancer Research Center v. Holman, 107 Wn.2d 693, 706-07 (1987) the Supreme Court held that the plaintiff did not violate any discovery rules where the witness was not disclosed until the Friday before trial. The court found that the nondisclosure was not intentional and that even if it was, it would have been error to exclude the testimony. Similarly, in Alpine Ind. Inc v. Gohl, 30 Wn. App 750, 760 (1981), the Court of Appeals found no bad faith even though the defendant failed to disclose the substance of the witness's testimony as required by a pretrial discovery order. Consequently, the appellate court upheld the trial court's ruling, refusing to exclude one of defendant's witnesses because "(the witness) was not an unexpected witness." Id.

The only cases found excluding expert witnesses were where the party

failed to file a pretrial witness list (Allied Financial Svcs v. Magnum, 72 Wn App. 164, 167-68 (1993)), failed to disclose the witness entirely (Lampard v. Roth, 38 Wn. App. 198, 200-01 (1984)), or failed to comply with court orders compelling discovery regarding witnesses (Taylor v. Cessna Aircraft Co. 39 Wn App. 828, 838 (1985)).

Despite this case law, it appears that the trial court has some very limited discretion in this regard, and some judges have been receptive to a motion for relief where witnesses have not been properly disclosed under the rules. Rarely, however, does the relief result in the exclusion of the expert witness.

Therefore, rather than waiting to seek to exclude expert witnesses for failure to disclose in accordance with the rules, the more prudent course seems to be to immediately respond to the cursory last minute disclosure with a request for a CR 37 conference. At that time, one may go through the specific interrogatories relating to the expert witness, ask that they be answered fully, set a reasonable deadline, and then confirm the request in writing. State in the letter that a failure to comply with this request will result in an objection to the use of the witness at trial. Defendants' counsel will often reply that you can get all the details when you depose the expert. Depositions, however, are expensive and not always warranted. Even where they are necessary, real answers to interrogatories can assist you in preparing for the deposition. If and when the defendant fails to comply in full, note a hearing for an order to compel discovery. This may improve your chances of getting answers the next time.

Even if defendant's expert is not disallowed, plaintiff may secure terms, a continuance if necessary, or other relief. The case of WSPIE v. Fisons Corp (cite) put some teeth into the sanctions provided in CR 26(g) for discovery abuse. The Court held that "Responses must, using an objective standard, be consistent with the letter, spirit, and purposes of the rules. The purpose of the sanctions should be to deter, to punish, to compensate, and to educate."

#### 4. *Contention Interrogatories*

Propounding "contention interrogatories" is a method of discovery practice used to narrow the issues before trial. A party may submit a series of interrogatories to another party asking if there is an intention to contend certain things at trial. Where the parties are not in dispute, that issue is laid to rest ahead of time.

CR 33(b) expressly provides that an interrogatory "is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." This is taken to permit "contention interrogatories." A party is still protected, in that the court may order that such interrogatories not be answered until ordinary discovery is completed, or after the pretrial conference. Furthermore, interrogatory answers are admissible in accordance with the Rules of Evidence, as any other evidence, and so are not binding as are CR 36 admissions. The 1993 amendment to CR 33 also states that an interrogatory is not improper because the propounding party has other access to the information or has the burden of proof on the particular issue.

A brief discussion of the use of contention interrogatories appears in 4 Orland and Tegland, Wash. Prac. Rules Prac. at 189-90 (1992).

There is no Washington case law on contention interrogatories. However, several California cases are illustrative.

The Supreme Court of California expressly recognized the use of “contention interrogatories” in Burke v. Superior Court of Sacramento County, 71 Cal.2d 276, 455 P.2d 409, 78 Cal. Rptr. 481 (1969). Plaintiff Burke sued for wrongful attachment of certain real property. One of the issues was whether plaintiff had defaulted on his claim by failing to move to dissolve the underlying levy of attachment. Plaintiff therefore first propounded requests for admissions to the effect that the levy of attachment was valid on its face, and that a motion to dissolve it would have been a futile effort. The defendant objected on the ground that the admissions called for legal conclusions, not admissions of fact. With the objection sustained, plaintiff propounded contention interrogatories, asking “Do you contend” that the levy of attachment was not valid, or that a motion to dissolve would not have been futile, and that if defendant did so contend, to state all the facts supporting such contentions. The plaintiff also asked the defendant to state all the facts upon which defendant based the denial of the allegations of the complaint.

The Supreme Court ordered the defendant to comply with the discovery requests, since the purpose of discovery is to “test the pleadings,” and determine what issues need to be litigated at trial. The court stated that a defendant

may be required to disclose “not only the evidentiary facts underlying his affirmative defenses... but also whether or not he makes a particular contention, either as to the facts or as to the possible issues in the case.” Burke, 71 Cal.2d at 281. The court also noted that plaintiffs are under similar obligations. The court rejected the claim that the interrogatories called for legal opinions. The simple contention questions simply called for a yes or a no. The questions relating to the factual bases of such contentions called for properly discoverable factual evidence.

The Burke court was careful to indicate, however, that a party’s “legal reasoning or theories” are not discoverable. *Id.*, 71 Cal.2d at 284-5. The discovery requests were thus held to be valid only insofar as they sought specific contentions, and the specific facts relating thereto. This rule is illustrated by Sav-On Drugs Inc. v. Superior Court of Los Angeles County, 15 Cal.3d 1, 5, 538 P.2d 739, 123 Cal.Rptr. 283 (1975). Plaintiffs filed a class action law suit against defendant. At issue was the propriety of the defendant’s sales tax deductions and exemptions for the years 1967-71. The plaintiff’s therefore sought to discover the defendant’s tax returns, and further asked if the defendant contended that the deductions taken were lawful, and to specify on which sections of the tax code defendant relied. The court held that it was not proper to ask for the defendant’s legal reasoning and theories as to why the deductions were proper. This was legal research for the plaintiffs to perform themselves.

In Rifkind v. Superior Court of Los Angeles County, 22 Cal.App.4th 1255, 27 Cal.Rptr.2d 822 (1994) the

court held that contention questions are not proper in a deposition even though they are permissible by written interrogatories. The reasoning is that contention questions involve mixed questions of law and fact, and lay people should not be expected to be able to answer them correctly. Instead they must be answered with aid of counsel. It is significant that the party-deponent in this case actually was a lawyer.

There is also support in the Seventh Circuit Court of Appeals that contention interrogatories were in fact contemplated by the original version of the Federal Rules of Civil Procedure adopted in 1938, and are a proper method by which to narrow the scope of the generalized pleadings permitted under the Rules. See Orthman v. Apple River Campground, Inc., 757 F.2d 909 (7th Cir. 1985); American Nurses Association v. Illinois, 783 F.2d 716 (7th Cir. 1986); Vidimos, Inc. v. Laser Lab Ltd., 99 F.3d 217 (7th Cir. 1996).