ON THE MARK
Physicians and Litigation: Emerging Trends

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As the son of a surgeon and a lawyer representing personal injury victims for over 25 years, I have witnessed first hand both sides of the delicate relationship between the two older (not oldest) professions. I have seen the spectrum of issues emanating from discovery rules, expert requirements, statutory fee structures, and damage caps enacted and struck down. Legal issues impact physicians and lawyers and these are two groups that need to work together amicably. Recent developments in Illinois law are again testing this relationship.

Physician Deposition Fees

Involving physicians in personal injury litigation in any capacity is expensive. The range of fees paid by my firm for the deposition or trial testimony of nonparty physicians is between $300 and $1,200 per hour. Retained experts are much higher.

Such fees can pose a hardship for the litigant. The Illinois Supreme Court provides only general direction to attorneys regarding the payment of nonparty physician fees in Rule 204(c). There is no such rule directed at expert fees. Rule 204(c) requires the party to pay a "reasonable fee" to a physician for the time he or she will spend testifying. Being lawyers, we can immediately glean two issues arising from this rule that are susceptible to litigation: (1) what constitutes a "reasonable fee"? and (2) who is a "physician"?

In *Montes v. Mai* the court answered these questions. When the defendant subpoenaed the plaintiff's chiropractor for deposition, his terms were $550 per hour and advance payment with a two-hour minimum. The defendant's counteroffer of $300 per hour and no minimum or prepayment was rejected. The defendant challenged the terms. When the court took the matter up it reviewed *in camera* the financial records of the doctor's clinic to determine whether the requested fee was reasonable. The court ruled that an hourly fee of $66.95 was reasonable based on the financials provided to the court.

On appeal, the First District voluntarily tackled the overriding question of whether a chiropractor is a physician. It concluded in the affirmative and held the chiropractor is entitled to reasonable fees under Rule 204(c). That's one for the physician. However, using the doctor's W-2 and calculating an hourly based on a 52-week year and 40-hour week, the court affirmed the $66.95 per hour fee with no minimum or advanced payment. That's a big one for the deposing party. In the final analysis, the court urged both physician and party to open a dialogue and come to an agreement on fees. In a perfect world this would be fabulous. However, busy professionals who are equally famous for charging high hourly fees are loathe to find time to negotiate a fee reduction. This recent case puts attorneys in a Catch-22 situation.

Under Rule 1.5 of the Rules of Professional Conduct, an attorney has an obligation to ensure that the expenses charged to a client are reasonable. *Montes* clearly demonstrates

that a nonparty physician's fee is not implicitly reasonable simply because the physician sets it. This fee can be challenged by the party seeking the deposition and is subject to significant reduction. Therefore, an attorney must balance a client's financial interests with the risk of alienating the testifying physician who might assist the client's case and ultimately snare a larger recovery. Thus the rub.

The most balanced solution would be to set a firm wide threshold amount for nonparty physician fees, i.e. $400 per hour. After all, for the most part the physician according to the definition is just deciphering his own hand written notes. If the requested fee exceeds that amount then a letter would go out to the physician from the firm politely indicating that the firm has an ethical obligation to negotiate nonparty physician fees on behalf of the client. Further, if an amount cannot be agreed to, under Illinois law the matter will be raised before the presiding judge who will probably seek supporting documentation. The physician would likely be more willing to negotiate if the letter mentions the calculation employed in *Montes* using the most recent W-2 earnings divided by 52 (weeks) divided by 40 (hours) to set the hourly deposition fee. If the tone of the letter strikes the right balance, i.e. the attorney is ethically compelled to negotiate the fee, but no one wants to see a respected physician's fee reduced to an artificially low hourly by the court, then perhaps the fee will be reduced to a reasonable rate without court intervention or hard feelings. Of course, each potential physician deponent should be evaluated on a case-by-case basis. There may be instances where it is more advantageous to simply pay whatever the physician asks, than to expose the case to a key witness who has suddenly become uncooperative and/or flat out hurtful

Practically speaking it would be much easier and relieve tension between these groups if the legislature or the courts would simply make a reasonable hourly rate for various specialists. Short of this, it makes sense that the ISBA or ITLA develop a web-based repository and index of fees charged by physicians categorized by their field of medicine and geographical location. This would make it much easier to define what is a reasonable fee within Rule 204 and increase transparency in the discovery process for all parties.

Illinois Supreme Court Strikes Down Med Mal Jury Instruction

In June, in *Studt v. Sherman Health Systems*, the Illinois Supreme Court determined that Illinois Pattern Jury Instruction (IPI) 105.01 contains a misstatement of the law. IPI 105.01 incorrectly instructs the jury that they may consider other evidentiary sources besides expert testimony when determining whether a physician committed professional negligence. Under this instruction the jury could use bylaws, rules, regulations, policies, procedures, community practice and other evidence to render its verdict regarding a physician's negligence. Such evidence is only available for consideration in institutional negligence claims, not claims for vicarious liability for professional negligence.

IPI 105.01 may be brought into compliance with Illinois law by deleting the first sentence of the last paragraph and adding the following so that the final paragraph reads:

The law does not say how a reasonably careful [specialist/doctor/nurse/therapist/

health care provider/accountant/lawyer/other] would act under the circumstances. That is for you to decide. In rendering your decision you must rely upon opinion testimony from qualified witnesses. You may not rely on any other sources and you must not attempt to determine this question from any personal knowledge you have.

This is a clear and concise statement of the law regarding the evidence to be relied on by a jury in physician professional negligence cases as dictated by the Illinois Supreme Court in *Studt.* It should satisfy any previous objections of defendant doctors. This instruction may be used until the Supreme Court Committee on Jury Instructions adopts a new pattern jury instruction.

Many of the issues that arise appeal to common sense. Neither party can ignore the fact that doctors and lawyers are inextricably involved in the litigation process. Working together in the spirit of cooperation is the best prescription for eliminating the pain in this process.