A Discovery is Not a Marathon – Best Practices for Production and Discovery in Medical Malpractice Cases

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Cases are won and lost at the examinations for discovery. Examination for discovery has been described as the single most important contribution to the success of litigation. It is widely accepted that documentary production and discovery are particularly important in medical negligence cases. The facts must be well known and understood. These facts are not only contained in the clinical notes and records related to the patients care, but also are uncovered through careful oral examination for discovery of the plaintiff and defendant health care providers. As with any other case, the purpose of discovery must be borne in mind, namely:

a. to enable the examining party to know the case it has to meet:

b. to procure admissions to enable one to dispense with formal proof

c. to procure admissions that may undermine an opponent's case in whole or in part;

d. to facilitate settlement, pre-trial procedure and trials;

e. to eliminate or narrow issues; and

f. to avoid surprise at trial.

In medical negligence cases, it is important to approach production and discovery from a strategic point of view. This involves answering the following questions:

1. What information / documentation is out there?

2. Where will I find it?

3. Will the information / documentation likely advance my case?

4. Will the information / documentation hurt my case? And if so, how will I minimize its impact?

Discovery is not a marathon. Is it not necessary to uncover every possible document and to ask every possible question in order to undertake an effective discovery. The uncovering of the relevant and material facts and securing appropriate admissions from the opposing party is often critical to the outcome of the case. Experts retained by both sides will place significant reliance on the evidence obtained through production and discovery.

There are legitimate concerns that the cost of medical malpractice litigation is becoming unaffordable and there are serious access to justice issues. The rising costs of defending actions on behalf of hospitals and doctors adds a significant burden in a publicly funded health care system. It is important to apply proportionality principles in how we conduct production and discovery in medical malpractice cases. We should consider whether each step to be taken is proportional to whether the step would require an unreasonable amount of time, cause undue prejudice or interfere with the ordinary progress of the action, or result in an unjustified expense.

The Holland Group has outlined two specific best practices recommendations as it relates to production and discovery. These are as follows:

Discovery Plans

Parties should make use of discovery plans and confer early in the action about production issues and organization of documents. In particular, one party should assume responsibility for establishing a common numbering system, so that discoveries and all future steps proceed with common references. Defence counsel should

assist, where possible, with obtaining information or transcriptions of illegible documents.

Streamlining/Reducing Discoveries

Counsel should consider a two-step discovery process where the apparently critical defendants are examined first, with a view to avoiding additional discoveries. The parties must endeavor to ascertain the extent of the peripheral defendants' involvement to facilitate the two-step discovery process. Likewise, if plaintiff's counsel produces information about peripheral plaintiffs in advance (such as an FLA plaintiff with no evidence on liability who resides in another jurisdiction), oral examinations may be reduced or eliminated. Discoveries themselves should be conducted as efficiently as possible and, in particular, a discovery on liability should rarely take more than two hours for any witness on either side. While damages discoveries may take longer due to the amount of information required, counsel should endeavor to reduce these examinations as well, through the use of productions prior to discovery. Written discovery questions should be considered in relation to peripheral players and basic damages issues.

Our collective experience as counsel who have acted for plaintiffs and defendants in medical negligence actions, tells us that in many cases production and discovery is unnecessarily excessive. We have put forward a number of suggestions and recommendations that counsel should consider.

The Keys to Success.

There are two key elements in undertaking appropriate and cost effective production and discovery, namely preparation and cooperation. Preparation is the key to success in uncovering the strengths and weaknesses of one's case. This is especially important in medical negligence litigation. The best plaintiff and defence counsel are always prepared.

Preparation for effective production and discovery begins when the file is opened. Good counsel will give early attention to identifying the important and relevant documents and information they will require and will take steps to locate them and ensure they are retained and ultimately produced. This includes securing information in the possession of your own client, the opposing party and non parties.

Preparation involves understanding your own case and that of your opponent. In most cases, it will require consultation with an expert at an early stage. Once you know the issues, you are in

the best position to identify the scope of production and discovery that is truly required in the case. Without undertaking this analysis of your case, there is a danger that production and discovery will become unfocused and time and money will be wasted obtaining records and documents which are unnecessary if not irrelevant and which will add significant costs to all parties .

Cooperation between counsel is also an important element in ensuring effective production and discovery. Early consultation, discussion and agreement on the scope of documentary and oral discovery, utilizing many of the strategies used below will allow the action to move forward in a timely and cost-effective manner.

Discovery Plans:

- Use them cooperatively; mostly they should be uncontroversial and the product of realistic agreement.
- As suggested in the Best Practices document, agree on (and assign one party to implement) a common numbering system and agree on technology.
- Establish realistic timeframes including, if possible, deadlines for the exchange of experts' reports.
- Build in dates for primary and possible secondary discoveries (see below)

- Contemplate and encompass documents relevant to important medical aspects of claim (and work to agree on what is and is not important and relevant, which should also serve to limit disagreements about who pays for what).

Documentary discovery:

- Follow the agreement in the discovery plan about what categories of documents are relevant and important
- Anticipate and include documents referable to damages
- Where documents come from the hospital, obtain details about whether or not all categories of documents produced including linked documents
- Include medical history documents that are clearly relevant to the case as pled, including psychological or psychiatric records (including all counselling/therapy)
- As contemplated in the discovery plan, use a single agreed upon numbering plan
- Identify and arrange transcription of illegible documents (subject to relevancy)

- Make every effort to comply with discovery plan deadlines for production (to allow for identification of issues or concerns prior to discovery and to avoid need for reattendances)

- Identify the necessary documents in the possession of third parties and work cooperatively to obtain them in advance of discoveries.

- Where appropriate, plaintiffs should provide the appropriate consents and releases to allow the defence to directly obtain access to the documentation.

- All parties should deliver Affidavit of Documents well in advance of the discovery, pursuant to a timetable outlined in the discovery plan. Draft Affidavit of Documents are acceptable as long as sworn Affidavit of Documents are provided at the time of the oral discovery or soon there after. Supplemental Affidavit of Documents should be delivered post-discovery where appropriate, and at the very least, in advance of trial.

Oral Examinations:

- Bifurcate discoveries, examine key parties first and then consider the need for discovery of less critical players.

- Even if it is determined that there is a need to obtain some information from less critical players, consider written discovery questions for these parties.
- Limit length of discovery on liability through preparation and focus
- Avoid unnecessary objections, and in any event limit argument relative to objections to bare minimum.
- Produce CVs in advance and if possible deal with education/training/qualifications questions in writing.
- Answer candidly and comprehensively about “findings, opinions or conclusions” of experts (in virtually all cases each side should have expert advice going in to discoveries).
- Minimize the number of undertakings by obtaining relevant production and discovery in advance of oral discoveries.
- Where appropriate, consider providing signed statements, affidavits or will say statements from parties or from witnesses who are employed by a party in lieu of oral discovery.

- Request for undertakings on discoveries should be limited to what is truly necessary.
- The parties should agree to allow post-discovery requests for further production and documents. For example, a plaintiff should agree to provide updated medical records without the necessity of an undertaking on the discovery. These issues should be covered in the discovery plan.
- Agree to exchange lists of witnesses and will-say statements, and if appropriate produce these at or in advance of the discoveries.

Final Comments

With appropriate preparation and co-operation between counsel, production and discovery in medical malpractice actions can be completed in a timely and cost-effective manner.

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