

MEDICAL-LEGAL ISSUES INVOLVING DOCTOR/ATTORNEY RELATIONSHIPS

In the August issue I spoke about the doctor/patient relationship and some legal issues concerning that subject. This article will focus on the relationships between the doctor and the attorney. Each state has different laws concerning this type of relationship, so I will talk in general terms. As we are well aware, the medical and legal professions are drawn into steadily increasing association in the litigation process. It is appropriate to develop voluntary contract of good will between each profession to better serve the patient/client of each profession.

The justice system gives the courts and litigants the right to make mandatory attendance of witnesses and parties to the litigation process for the purpose of giving testimony. When the doctor agrees or is compelled to attend court proceedings, the attorney is employing the doctor's professional time. The entire process depends upon the witness to the facts or the expert, who furnishes an opinion.

MEDICAL EXAMINATIONS:

Most states have provisions that allow a party to a suit to be examined, either a physical or even a mental one. The examinations are requested by counsel or by the courts. This is different than an independent medical examination as this is a compulsory examination if ordered by the courts and it is up to the attorney to instruct the party as to the location and time of the examination. The attorney requesting the examination has the responsibility of paying the bill. In addition state laws provide insurance carriers providing PIP coverage the right to send a patient/insured for a physical or mental examination by a doctor of their choice, sometimes called an Independent Medical Examination. The cost of this is entirely the responsibility of the insurance company. If requested by the attorney and ordered by the court, the scope of the examination may be limited by what the parties agree to or by court order and should be in writing.

MEDICAL RECORDS:

Very often, the doctor will receive a request for medical records by an attorney representing the patient. Keep in mind this request is generally not for a prepared written report. Usually this request is to see the patient's records in preparation for possible litigation. Keep in mind that your records must be easy to read and include enough information in your records to recall care if you are later called to testify in trial.

Most states require confidentiality in the release of medical records and prohibits the release of these records. The release of medical records should only be release to the patient, legal representative or other healthcare provider involved in the patient's case. All other releases of medical records should be with the patient's written authorization, subpoena, or court order. States have statutory requirements regarding furnishing copies of medical records and authorizations by the patient. The attorney representing the patient should be as specific as possible about the medical records he or she is requesting. It should be distinguished if the request is general, or for all records in the chart. Be careful not to send records that are considered "SUPER CONFIDENTIAL" as these records may only be released by a court order and signed by the judge. The release of super confidential records also falls under the new federal HIPAA laws.

Doctors can also charge for the expense of copying the records requested. The fee is usually may not exceed what the county clerks office charges for copies and should not be contingent upon payment of a bill. Usually records request from and attorney should be sent within a reasonable time by the doctor. The time is set forth in each state statue, but usually falls between 10-20 days.

With respect to written prepared reports requested by the attorney, the attorney should provide the doctor with a signed authorization from the patient or a copy of a court order. No authorization is required when the doctor is retained by an attorney or insurance company to conduct an compulsory medical examination, as the normal doctor/patient relationship is not present.

SUBPOENAS AND DEPOSITIONS:

A deposition is an official proceeding, authorized by state statute requiring person's to give testimony, either in court or outside of the courts. The person may be required to produce medical records at the proceeding. The subpoena is a legal document issued under the power of the court and prepared by the attorney, requiring the doctor to comply with the subpoena. States recognize that relationships between the doctor and the patient are privileged. A doctor may discuss information about the patient if he or she waives the privilege or if the doctor is giving sworn testimony, through a subpoena regarding the injury of the patient.

The time and place for testimony should be set forth by the attorney and the doctor. Usually testimony is taken at the doctor's office as a courtesy to the doctor. A doctor may be required to appear under subpoena within a specific time and place within the county of the doctors residence or office. Some state laws can compel attendance up to 100 miles of your residence or office. If the subpoena is truly inconvenient the doctor may: (1) Call the attorney who issued the subpoena and discuss alternatives (2) Notify legal counsel for party to set an alternative time or have the subpoena nullified by the attorney. It is necessary to follow these procedures or you may not be excused.

A subpoena may require the doctor to supply records at the proceedings. As the doctor is the custodian of the records requested, he has the right to object to the production of the records prior to the proceedings such as depositions etc. A subpoena will specify "Duces Tecum" which is appearance with records. You must bring the originals to the proceedings, unless specified by the attorney that copies are sufficient. Many times the doctor will receive a intent to serve a subpoena. This is usually done sometime before the subpoena is actually issued (10-20) days is customary. Your records should not be released until a formal signed subpoena is received. View all requests carefully before you release records.

There is a difference in the type of testimony you can give in a deposition or trial. A doctor can be a witness to the facts. Any person who has knowledge of the facts or evidence may testify to facts. A doctor who has knowledge of the patient, examination or treatment, may be

called to testify to those facts. A doctor may also testify as an expert witness. This involves a doctor who is not party to the legal action and testifies as to their expert opinion, which they have special knowledge, and training, and is qualified as an expert. This type of testimony is entitled to reasonable compensation for their testimony. Keep in mind that attorneys want the doctor to testify in simple language a lay person can understand. You may also have your qualifications and other areas challenged by opposing counsel as to disqualify your testimony.

DOCTOR/ATTORNEY RELATIONSHIP PRIOR TO TRIAL:

If you have been retained by an attorney to testify, do not consult with the opposing attorney, unless authorized by the attorney who hired you. Any information obtained from the attorney is privileged under the lawyer-client privilege or as part of the attorney's work. Meet with the attorney who hired you to testify prior to trial or any legal proceeding to discuss any medical-legal issues about the case. The attorney and doctor should discuss all medical information involved in the case. If the attorney must cancel, the doctor should be given at least 24 hour notice. If proceeding is cancelled in a shorter time, the doctor is ethically entitled to charge a reasonable fee for the time.

DOCTOR'S AT TRIAL:

Many times due to the heavy schedules of trials, lawyers will not know the exact start date of the trial. Doctors will receive subpoenas for trial that often does not specify a certain time for appearance, but will give you the date. Most times under these circumstances the doctor is placed on stand-by. During this time the doctor may be called to testify. The attorney should keep the doctor informed as to the progress of the trial so the doctor can have some notice. If the doctor receives a subpoena and will be unavailable he should notify the attorney in an attempt to reschedule the trial. The attorney should notify the doctor in advance of the issuance of the subpoena and make arrangements as to the time and place the doctor will be called to testify. As with any other person, the doctor has an obligation to respond to a subpoena.

DOCTOR COMPENSATION:

Due to the possibility of anti-trust violations this code does not set a specific fee schedule for professional charges related to litigation. Most doctors charge for their time on an hourly basis. It is reasonable to charge in intervals, usually 15 minute time frames. Many times the attorney advances the doctor the fee or a portion of the fee for his testimony, but the doctor should keep in mind that the patient/client usually bears the burden of payment. Sometimes the attorney will be late or cancel the proceeding. This may also happen to the doctor, who should also give advance notice if possible. If the doctor charges by the hour in 15 minute intervals and is late, he should reduce his fee accordingly. If the attorney requests the appearance of the doctor, then the payment for such services should come from the attorney. If not then the attorney should notify the doctor prior to requesting the service of the doctor. Payment for the doctor to testify should be paid promptly by the attorney and payment should not be contingent upon the completion of the case. This payment may be requested by the doctor in advance of the service. This is different from treatment, where the patient is ultimately responsible for payment. The best way to make sure you get paid is to have a written agreement with the attorney in advance for any legal proceeding all the way through trial.

If a dispute arises you can seek dispute resolution through your local bar, which usually have a medical-legal committee. This type of resolution is not binding. Another way, if both parties agree is through arbitration, which is final and binding.