The Game Part 2

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Who can forget (Ok, you caught me, I did forget) the following quotes from the TV show "Perry Mason"?

Lt. Tragg: *I don't need an autopsy to tag this one. It screams murder.*
Perry Mason: *When it stops screaming and starts following the rules of evidence, I'll start listening.*
Lt. Tragg: *My, we're very legal this morning.*

Or this one:

Perry Mason: *When you pick someone to lie to Mrs. Granger, never choose your doctor or lawyer. In both cases they can be fatal.*

I used to love to watch Raymond Burr in "Perry Mason." He would get some poor witness on the stand and, in the middle of her testimony, look at the jury while he handed the witness an incriminating document and say very loudly, "What about this?" At which point the witness would dissolve into tears with her head in her hands and confess to basically everything including the crime for which she was on trial.

Unfortunately the days of "Perry Mason" are over. Today, our legal system does not allow such maneuvering and is purposely designed to prevent those kinds of surprises. Despite the fact that our judicial process remains adversarial, the courts require cooperation and disclosure of relevant information. The sharing of the relevant material is through a process called disclosure and discovery. Most states require that the parties disclose all relevant information to the opposing party even if that information is harmful or incriminating.

Disclosure statement

The disclosure statement is basically a recipe for your defense, thus it is important for you not to withhold any pertinent information from your attorney. If you fail to disclose information that turns out to be relevant, that information may not be allowed to be presented in court. In addition, if you fail to disclose facts that may be harmful or prejudicial to your case, the court can impose sanctions against you and your attorney. Moreover, the court can issue a default judgment against you. All cases have areas or issues that you would rather not disclose. Failure to disclose that information to your attorney, however, prevents him or her from preparing an adequate defense.
Generally speaking, the disclosure statement must contain the following:

1. The factual basis of the claim or defense.
2. Relevant legal theories upon which the defense or claim is based.
3. Contact information for any witness whom the disclosing party anticipates calling and the subject matter upon which they will be called to testify.
4. Names and addresses of all relevant parties, including those who will provide statements, those who your attorney believes has relevant information, and any expert witnesses expected to be called.
5. The calculation of the damages.
6. A list of all documents and the location of documents relevant to the case.

Interrogatories

Before any pretrial conference, the opposing parties go through an abbreviated discovery process. This discovery occurs through a set of written questions called uniform (developed by the courts) interrogatories. Interrogatories include some standard questions about your background training and experience (**Figure 1**).

The parties may also file non-uniform interrogatories, which are specifically drafted for that particular case. Non-uniform interrogatories are exchanged after the disclosure statement along with a request to produce documents, i.e. medical records, autopsy records, policies and procedures, medical bills, incident reports, malpractice insurance documents, lost wages information and any relevant imaging or testing (**Figure 2**).

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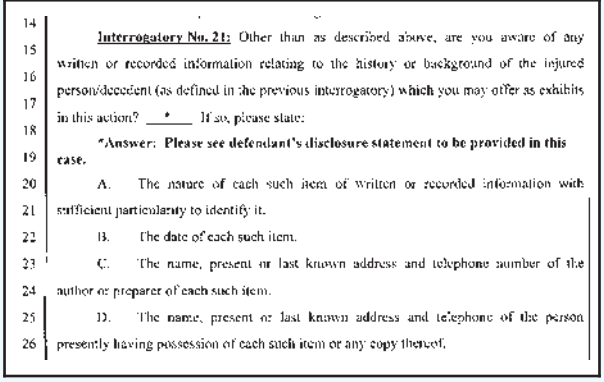
Figure 1.



Interrogatory No. 21: Other than as described above, are you aware of any written or recorded information relating to the history or background of the injured person/decedent (as defined in the previous interrogatory) which you may offer as exhibits in this action? ____ If so, please state:

Answer: Please see defendant's disclosure statement to be provided in this case.

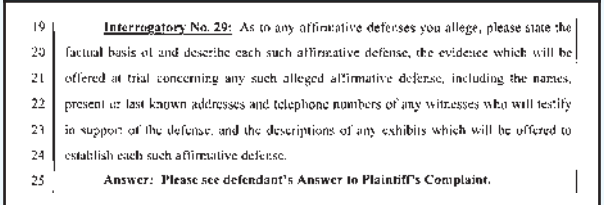
A. The nature of each such item of written or recorded information with sufficient particularity to identify it.

B. The date of each such item.

C. The name, present or last known address and telephone number of the author or preparer of each such item.

D. The name, present or last known address and telephone of the person presently having possession of each such item or any copy thereof.

Figure 2.



Interrogatory No. 29: As to any affirmative defenses you allege, please state the factual basis of and describe each such affirmative defense, the evidence which will be offered at trial concerning any such alleged affirmative defense, including the names, present or last known addresses and telephone numbers of any witnesses who will testify in support of the defense, and the descriptions of any exhibits which will be offered to establish each such affirmative defense.

Answer: Please see defendant's Answer to Plaintiff's Complaint.

Interrogatories are often very accusatory in tone and paint a picture that reflects negatively on you and upon the care delivered. Many times this is intentional inasmuch as the plaintiff's counsel attempts to posture in the belief that will give their side a tactical advantage. The best way to counteract that advantage is to remain as unemotional and factual as possible.

Your attorney will tell you that the best way to answer interrogatories is to be truthful and forthright even if it damages your case. It is best to address bad facts at the outset rather than to perpetuate a falsity that if discovered later that could ultimately destroy your case.

Comprehensive pretrial conference

Within days to a few weeks after the complaint has been received and answered the pretrial conference is scheduled. Generally the defendant does not need to participate in the comprehensive pretrial conference. Your attorney will represent your interests and report back to you.

At the pretrial conference your attorney, a member of the court and the opposing counsel will determine what further discovery is necessary and a timeframe or schedule for that discovery. In addition, a schedule will be developed and agreed upon for disclosure of plaintiff and defense experts both on standard of care and causation.

In many states the court limits each party to one standard-of-care expert as well as one expert per issue. Thus if there are multiple defendants of varying specialties or even in the same specialty, each defendant can retain one standard-of-care expert. However, typically only one expert for causation will be allowed.

Finally, the court will also set a date for a mandatory settlement conference as well as a potential trial date.

TABLE 1.

Q. Is it appropriate to continue to retake vitals if they are abnormal? **A.** It's not a yes/no answer. For example, if someone's vital signs were grossly abnormal, we would not say to waste time retaking them. We'd say to get the physician. At some point they probably will be retaken.
Q. And if they're grossly abnormal, you would take them immediately to the doctor? **A.** That's correct.
Q. So the triage technician in your role makes a decision about whether or not they're grossly abnormal or just merely abnormal? **A.** No. The electronic medical record basically makes the decision based upon normal parameters for the patient's weight, age, what have you.
Q. Are your triage technicians trained to accurately make that decision if the electronic medical record does not operate properly? **A.** I probably could not answer that across the spectrum of triage technicians.
Q. Would an LPN be qualified to make that decision? **A.** For grossly abnormal — they would be adequately qualified to determine grossly abnormal vital signs.

Depositions

The deposition is the one chance the opposing attorney has to meet you face-to-face and to question you about what you plan to say at trial. Generally, the questions start out very broad in scope, usually about your educational background and training. Next the attorney probes the actual event and finally he or she may question you about the clinic's policies and procedures regarding patients who present in similar fashion. Table 1 illustrates a typical exchange in a deposition.

The importance of the deposition cannot be overstated and how you perform during a deposition will have a far-reaching impact on the future of the case. To be clear, the attorney who takes a deposition will have learned a great deal about the medical issues involved. Prior to your deposition he or she will have consulted with experts, studied the relevant literature, studied textbooks and gone over the records with a fine-tooth comb. In other words, he or she will be extensively prepared to do battle.

As with most things in life, preparation and practice will help you tremendously during your deposition. First study the medical records and while doing so, do not make any notes in the records nor take any notes on a separate page.

Second, discuss with your attorney whether you should review the current literature. If you already know the current literature and simply need to refresh your knowledge base, that level of review should not be problematic. The challenge is if your care did not follow the guidelines or recommendations from recognized texts or the medical literature and you are now up to date on the current guidelines.

Third begin to prepare for the barrage of questions with which you'll be faced. Practice with your attorney and discuss how best to answer some of the more difficult or aggressive questions. In the end always be truthful and candid but only answer exactly what was asked. DO NOT EXPOUND!

On the day of the deposition dress professionally. Do not dress like it's your day off and do not come in scrubs. You are being judged. The opposing counsel will evaluate you the same way a jury will evaluate you. He or she will judge your empathy, your professionalism, your communication skills and finally, how you handle pressure. The attorney may even try to purposely push your buttons to see if you get upset or ill tempered. Obviously knowing the trap going in will help you prepare. I have been involved in cases where the only reason it was settled was because of a lack of confidence in the defendant physician's ability to take the stand in his or her own defense.

While being questioned, do not guess the answers. You can always refer back to the medical record. If you do not know something say, "I don't know." There is no prize for guessing right, and guessing wrong can have devastating future consequences. The challenge all physicians have is that we earn our living by answering questions and going out of our way to be helpful. In doing so we are used to becoming very conversational and sometimes overly conversant. Do not do the attorney's work for him or her. The deposition is the opposing side's opportunity to obtain statements that can then be shown to be incorrect or obtain admissions that will be used against you a trial. A deposition is not a conversation. Do not answer anything more than was asked and do not fall into the trap of saying, "Do you mean to ask me..."

Be very leery when the opposing counsel asks you to acknowledge a particular journal article or textbook chapter as authoritative. For the plaintiff to prevail, among other things, the opposing side must demonstrate that your care fell below the applicable standard of care. To do so, they will rely on authoritative journals, textbooks, and their experts. If you acknowledge a textbook as authoritative and your care does not follow the prescribed method of treatment in that textbook, you have essentially just endorsed the standard of care and that your care fell below it.

This is an incredibly uncomfortable position in which to find yourself. And the second it happens, you know you're sunk. Remember, no textbook can be absolutely authoritative in every particular instance or presentation of the patient. If you acknowledge the entire text as authoritative, anything contained in that book can be used against you to demonstrate the standard of care and how your care fell below.

"A deposition is not a conversation. Do not answer anything more than was asked and do not fall into the trap of saying, 'Do you mean to ask me...'"

In addition, avoid falling into the trap of hypotheticals. The way this occurs is that the opposing attorney paints a similar patient scenario and then asks you to respond and then uses your response and applies it back to the issue at hand, typically opening with the phrase, " Well then, Doctor, wouldn't you agree..." This is known as a leading question. Do not agree with those statements unless you agree with **every** word in the statement. These statements are designed to lead you down a path that only serves the opponent.

Take your time in answering the question. Go slow. Answer the question only after you have given it the appropriate amount of thought. Do not think out loud and do not interrupt the attorney while he or she is asking the question. Let counsel finish and then pause before answering to give your attorney the chance to object to the question if it is out of bounds.

At the end of your deposition your attorney may ask some additional clarifying questions. Alternatively, your attorney may offer nothing as opposed to taking the risk of exposing your defense. Do your best to not feel frustrated or angry during or after your deposition. The attorneys are simply doing the job they have taken an oath to do. Much like a provider, an attorney's role is to help his or her client.

Note that if there are additional defendants, their attorneys may question you as well and although they may have the same hope for a favorable outcome, they may be trying to shift blame to you. Thus do not let your guard down. Being on the same side of the suit does not mean you are on the same team!

If you can stomach it, your attorney may request that you attend the depositions of others. This will generally be used in a tactical nature so that your presence may help prevent an opposing expert from exaggeration.

In the final article in this series, I will discuss the settlement conference, the trial, and the appellate process. Or as they say on "Perry Mason," "Stay tuned, we will return after this word from our sponsor!" ■